THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. NO.129 of 2024

ENG. ANTONY TAWAYI WAMUKOTA.....1ST APPLICANT

CIVIL BUILD DEVELOPERS CO. LTD.....2ND APPLICANT

ALICESON INVESTMENTS CO. LTD.....3RD APPLICANT

-VERSUS-

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

JUDGMENT

1. The Application that forms the subject of this Application is the one dated 19th day of October, 2024 wherein the Applicants seek the following orders:

1) An Order of Certiorari to remove into this honourable court and quash the three notices to explain all dated the 15th day of January 2024 and the demand notices dated the 5th September 2024 as issued by the Respondent against the Applicants;

2) An Order of Prohibition prohibiting the Respondent by themselves, their agents, employees and or anybody deriving authority from the said Respondent from freezing, confiscating, implementing and/or taking any action or punitive disciplinary measures against the Applicants on account of the notices to

explain and demand notices dated 15th January 2024 and 5th September 2024 respectively issued against the Applicants.

3) An Order of Mandamus do issue compelling the Respondent to release and/or return to the Applicants all the landed property documents both original and copies and monies as particularized in the Respondent's inventory dated 23rd march 2023, 24th march 2023 and 6th June 2023 and further be compelled to remove any caution that they may have placed on any of the said inventorized properties.

4) A declaration do issue that the Applicants' fundamental right to fair administrative action, fair hearing, equal protection of the law, and legitimate expectation have been infringed and/or threatened by the Respondent on account of the notices to explain and demand notices dated 15th January 2024 and 5th September 2024 respectively as issued by the Respondent against the Applicants.

5) A declaration do and hereby issue that the Respondent is Constitutionally obligated to act lawfully, fairly and reasonably in the exercise of their Constitutional mandate, which principles have been threatened / violated by issuing / causing the issuance of the notices to explain and demand notices dated 15th January 2024 and 5th September 2024 respectively against the Applicants herein.

6) An order permanently restraining any attempt by the Respondent by themselves, their agents, employees and or

anybody deriving authority from the said Respondent from freezing, confiscating, implementing and/or taking any action or punitive disciplinary measures against the Applicants on account of the notices to explain and demand notices dated 15th January 2024 and 5th September 2024 respectively issued against the Applicants.

7) The Respondent be ordered to pay the Applicants the cost of this Application.

8) Such further and other reliefs that the honourable court may deem just and expedient to grant.

The Applicants' Case;

2. The 1st Applicant argues that he is duly authorized by the 2nd and 3rd Applicants to swear this affidavit on their behalf regarding the facts of their claim herein.

3. It is his case that on 7th February 2024, the Respondent issued to the Applicants, notices to explain their purported disproportion between their assets and known legitimate sources of income.

4. It is The 1st Applicant's case that these notices to explain basically targeted him to explain his sources of income between the period 2013 and 2023 herein referred to as the 'relevant period.'

5. The 1st Applicant is aggrieved that prior to the notices to explain, the Respondent commission had, out of malice and driven by ill motives, broken into his houses in Nairobi and Webuye taking away a pile of

landed property ownership documents including and cumulatively over 75 land title deeds, land sale agreements and cash amounting to over Kshs 1,675,000/= and confiscated his documents *per the inventory marked aw 4.*

6. He argues that the Respondent commission wants him to explain his sources of income but has taken all the documents including copies of the same and has declined to release even copies to him to enable him to effectively account for each of the property acquired lawfully within the relevant period.

7. The 1st Applicant further argues that The Respondent had even previously sought for his summary dismissal and/or suspension from employment which led to his illegal suspension for 12 months. He secured a judgment from the employment court.

8. The foregoing presentation depicts an unethical, malicious, corrupt and vindictive Respondent commission driven by ulterior motives and who is out to unnecessarily injure the reputation of the Applicants, and completely destroy an otherwise my illustrious career according to the 1st Applicant.

9. On 5th September 2024, the Respondent issued demand notices to him and his Co-Applicants requiring them to surrender all the property jointly and severally owned amounting to Kshs 418,286,554.16/= within 14 days from the date of issue of demand failure to which they institute recovery proceedings against them without any further reference to the Applicants.

10. In the notices dated 15th January 2024, the Respondent commission is seeking for The 1st Applicant to explain how he acquired property which the Respondent has purportedly valued at Kshs 434,844,839.80/= comprising of value of land - Kshs 294,200,000/=Bank deposits - Kshs 129,569,Motor vehicles - Kshs 9,400,000/= and Cash Kshs1,675,000/=.

11. The 1st Applicant argues that despite his comprehensive responses to the notices to explain and which responses are respectively dated 19th April 2024, 28th may 2024, 14th August 2024 and 22nd September 2024 among others, the Respondent only chose to look at the response of 19th April 2024 ignoring all the others consequently issuing demand Notices

12. He considers the impugned demand notices unfair, unreasonable, clouded with malice and ulterior motive, biased and overbearing on grounds that whereas the Respondent commission is clear that the period of interest or investigation i.e. the relevant period is between 2013 and 2023, the 1st Applicant's home where he resides with his family and which was bought and developed in 2009 at a cost of Kshs 8,255,000/= before even joining his current employer has been included in the Demand notices as part of the property to be surrendered to the Respondent commission and which they have overvalued at Kshs 28,200,000/=.

13. To demonstrate further abuse of power and bad faith on the part of the Respondent, for the salary account, the Respondent commission listed 79 entries of deposits of which they summed up to Kshs.

85,348,552.20. The commission also acknowledged that in the relevant period, the 1st Exparte Applicant's net salary was Kshs. 43,137,225.38 and therefore demanded an explanation on the difference.

14. But on the summation of the 79 entries, the correct sum is Kshs. 43,239,686.20. This figure includes Kshs 3,996,977.30 in entry no. 42 as provided in the notices to explain which was arbitrarily inserted and therefore the correct summation should be Kshs 39,242,707.20.

15. It The 1st Applicant case that the demand for explanation for a difference of Kshs. 46,105,843 arises from their own errors of commission and omission and is therefore unreasonable and unfair and must be stopped.

16. The 1st Applicant argues that since March 2023, the Respondent has been in custody of all his landed property documents being all original land title deeds and original sale agreements and copies thereof having confiscated them including even those acquired before the relevant period.

17. He is unable to access credit to even pay school fees for his children hence the continued retention of the said documents without any justifiable cause has adversely affected the schooling of his children.

18. He cannot dispose of any of his property because all the original documents are in custody of the Respondent illegally.

19. He is further concerned that the Respondent commission has wrongly included five landed properties in the impugned demand notices

valued at Kshs 36,000,000/= giving a wrong and malicious impression that the same were acquired within the relevant period.

20. According to the 1st Applicant,The Respondent has, without any basis of their valuation or any indication as to how they arrived at their valuation, overvalued the landed property acquired in the relevant period at Kshs 258,200,000/= yet from the land sale agreements and which agreements are in their possession clearly show that the same were acquired over a period of 10 years at Kshs 60,970,000/= hence an overvaluation of and/or by Kshs 197,230,000/=.

21. According to him the intention of the Respondent commission is just to dump figures and/or throw figures to create a perception or an impression that the 1st ex parte Applicant acquired the said properties corruptly yet the 1st Applicant has clearly demonstrated how he acquired the said properties from his savings, salary and business and most and/or almost all of them are in his rural Webuye Sub-county, but the commission doesn't won't to hear any of the above.

22. The Respondent has also ignored his professional valuers report.

23. He argues that he has been in employment for over 27 years as a civil engineer and consulting civil engineer rising the ranks to acting Managing Director, KETRACO and now the general manager, d & c and my direct income alone and as confirmed by the Respondent, for the relevant period of 10 years cumulatively amounts to Kshs 63,141,480.00/= comprising of salary of Kshs 53,668,372.40; bank loan of Kshs 4,321,800/=; interest of bank deposits Kshs

110,579.00/= and bank balance brought forward of Kshs 5,040,729.00/=.

24. The Respondent has ignored all his explanations and comprehensive responses and 18 months have since lapsed from the date when the Respondent confiscated his documents and demands to have them returned to me have gone in vain and as it stands the Respondent remains in total violation of Section 26(2) of the leadership and integrity regulations.

25. He argues that the Respondent's continued illegal possession of his land title documents contravenes his Constitutional right to property and has demobilized him, rendered him miserable and subjected him to economic distress.

26. The Fair Administrative Action Law demands that a party to whom a claim is raised against is accorded a fair process and supplied with documents relied upon by his adversary as is in the instant case of the Applicants and the Respondent but the Respondent has blatantly overlooked this.

27. A decision or action would be unconstitutional and an unconstitutional decision is not a law, it confers no rights, it imposes no duties, it affords no protection, creates no office and it is in legal contemplation as inoperative as though it had never been passed. That, is the only fate that must befall the decision and or intended decision of the Respondent in the instant case as the impugned demand notices remain void *ab initio*.

28. The Respondent commission has a predetermined decision, motivated by malice and choreographed to defeat the ends of justice and are so keen on locking the 1st Applicant out from the seat and wheel of justice.

29. The issuance of the notices, was done with an ulterior motive or purpose calculated to prejudice the legal rights of the exparte Applicants; failed to take into account relevant considerations and violates the legitimate expectations of the Exparte Applicants to whom they relate.

30. This honourable court is mandated to protect the national values and principles set out in article 10 of the Constitution which includes the observance of human rights, the rule of law, integrity, social justice, non-discrimination, and accountability.

31. In The Exparte Applicants' Replying Affidavit to the Respondent's Affidavit dated 25.11.2024,he argues that he declared his wealth as required by law for the years 2013 and 2023 in line with his wealth declarations forms and argues that his assets have never been a subject of doubt or investigations.

32. The Respondent sought and obtained court orders to investigate what they alleged as his involvement in procurement irregularities in the Lake Turkana wind power project and the associated Loiyangalani-Suswa transmission line.

33. He argues that, the statement by the Respondent that investigation was prompted by a report on accumulated assets that were

disproportionate to his known legitimate source(s) of income between January 2013 and December 2022, (the *period of interest)*, is an afterthought by the Respondent on realising that the first attempt to kick him out of KETRACO through false criminal accusation failed, thus resorting to attempted false civil accusations.

34. There was therefore according to The 1st Applicant no investigations pending and/or to be commenced as had already been completed and no iota of evidence whatsoever implicating him to any form of corruption in the said project.

35. It is the 1st Applicant's case that the Magistrate Court issued the search warrant with specific directions that required the Respondent to seize any material connected with the two projects.

36. Instead of complying with the said court order and/or search warrant, the Respondent operating irrationally and unreasonably confiscated 28 of his landed property documents which documents relate to properties he had acquired some way before his employer-KETRACO was established and some of which he had acquired way before the impugned projects were conceptualized and before the said period of investigation or relevant period of interest.

37. The 1st Applicant argues that on the purported completion of the said investigations, the Respondent without any evidence alleged that they had found that he was involved in misappropriation of **Kshs. 18.5 billion** by processing fraudulent payments to Isolux Ingeniera, a contractor on the Loiyangalani- Suswa transmission line.

38. They even went ahead to recommend his suspension for 12 months on the basis of their investigations which suspension the employment court termed as unlawful and unconstitutional thereby revoking the same and directing for his unconditional restoration to work

39. He was never involved in the Ketraco-Loiyangalani-Suswa transmission line project when payments were made to Isolux and the purported investigations into his wealth is a ploy to sanitise their failed bid to make him a scapegoat in the Lake Turkana wind power alleged scandal.

40. The Respondent acting so maliciously and desperately even went to the extent of engaging in falsifying his bank credits as explained in the paragraph below with an intention to just unfairly punish him, ruin his career and kick him out of employment, unlawfully taking all his properties.

41. He argues that in the course of their purported investigations, the Respondent employed fraudulent, unethical, irrational, unreasonable and unfair means to arrive at what they termed as *"unexplained assets disproportionate to his known legitimate sources of income within the period of interest valued at approximately Kshs 418,286,554.16 in his possession."*

42. In the three notices to explain, the Respondent purported to have valued my assets at **Kshs. 552,472,194.40** and by subtracting **Kshs. 137,182,680.24** which they termed as adequately explained, the balance was **Kshs 418,286,554.16.**

43. The Respondent for instance, in their notice to explain required him to explain source of income adding up to **Kshs 85,348,533/=** yet in their own analysis ***- their demand notice to the Applicant annexed and marked as aw 10)***, where they have clearly and correctly so admitted that his net salary was **Kshs 43,137,225.38**. Therefore, the Respondent's action to include fraudulent/fictious and/or fabricated credits and then demand him to explain including the fabricated difference of **Kshs 49,846,977.30** is in itself not only malicious and fraudulent but also irrational and unreasonable.

44. It is deplorable and shocking that such a high office constitutionally regarded as custodian of ethics and integrity can sink this low purely to drive malicious and unethical intent to unjustly ruin my career and deprive him of genuinely and lawfully acquired property. The exaggerated deposit to **KCB Account No. 1103087045** alone is even more than double the correct sums.

45. The **Kshs. 418,286, 554.16**partly comprised of bank credits amounting to **Kshs. Ksh224, 784,657.96** which the Respondent has wrongly interpreted as assets in his possession. An asset in a bank is a **credit balance** at any particular point in time, in this case December 31st 2022. Credit and debit entries represent day-to-day account transactions that may result from sales and purchases.

46. Therefore, counting all credit entries as assets in his possession violates the doctrine of double counting which is erroneous thus leading to wrong conclusions.

47. His closing credit balances for the respective bank accounts, which represented the correct assets in his possession are tabulated below in comparison to the Respondent's demand.

Table 2: exaggerated assets in bank balances

S/no.	Account name	Bank	Account Number	Balance as at December 31 2022	Respondent's Demand notices
1	Antony Tawayi Wamukota	KCB	1103087045	Ksh645,528.30	35,501,575.90
2	Antony Tawayi Wamukota	ABSA	2035352573	Ksh2.85	44,221,286.60
3	Aliceson Investment Company Ltd	ABSA	2028711231	Ksh824,557.96	68,937,897.90
4	Aliceson Investment	ABSA	2028711231	Us$214.70	111,620.48

	Company Ltd				
5	Civil Build Developers Company Ltd	DBK	11120151301	Ksh193,900.00	13,195,000.00
6	Equivalent total in Kshs (1USD=Kshs 117.20			**Ksh1,689,151.95**	**Ksh161,967,380.88**

48. This resulted in a wrong variation of over 160,000,000/= an erroneously arrived amount which the Respondent wants him to explain and despite his responses to them trying to clarify they did not bother to consider his response.

49. The 1st Applicant is concerned that the Respondent further alleged in their affidavit *"that upon conclusion of the investigations, the plaintiff established that the 1st Applicant was in possession of unexplained assets.....valued at approximately Kshs 418,286,554.16 in his possession and his associates, the 2nd and 3rd Applicants".*

50. The only assets that he possessed in banks, either directly or indirectly are bank balances tabulated above and which he annexed in his bank statements as proof.

51. Therefore, according to the 1st Applicant for the Respondent to demand that he surrender **ksh224,784,657.96** in cash without attaching bank statements to indicate where the monies are domiciled/kept is unreasonable and irrational**.**

52. The fabricated Kshs 418,286,554.16 which he is being asked to surrender partly comprised of **Kshs. 9,400,000** being valuation of a lorry truck Reg. KCW 151A that is not his asset**.**

53. Whereas the Respondent are very clear in their notices to explain that they investigated into assets acquired in the relevant period being January 2013 to December 2022, they seized ownership documents i.e. Title deeds and sale agreements for assets acquired before the said period even contrary to the search warrant and/or order of the court.

54. The Respondent went ahead to demand that him to explain how he acquired the same assets.

55. His advocate wrote to the Respondent requesting that they avail original and/or copies ownership of documents to assist in the explanation.

56. According to The 1st Applicant The Respondent, by refusing to hand over the documents even copies knowing they had not only picked original documents but also copies which indicates that the Respondent took all documents including original and copies and therefore leaving him with nothing he could use to explain as the purchase prices were on the sale agreements.

57. By concealing the requisite information from him, the Respondent conspired to ensure that he failed to give comprehensive responses to their notices so that they can issue demand notice. Whereas the Respondent has the original land sale agreements for all of his landed

properties, they valued the same assets at imagined prices which are very high.

58. Having obtained very high valuations, the Respondent, in the notices to explain, required him to explain the source of funds used in the acquisition of the assets at the imagined rates.

59. The Respondent declined to avail a valuation report and or any indication on how they arrived at the said figures which up to now remains as cooked figures fabricated to arrive at malicious and illegal end.

60. Despite visiting all land properties owned and possessed by him directly and indirectly through Aliceson Investment Company, a family enterprise where he owns 25% shareholding, the Respondent ignored the value of development on the land in terms of 40 acres of forests with mature trees mostly aged above 10 years and ready for harvesting.

61. The market price of unprocessed 10-meter wooden poles ranges from Kshs. 5,000 to 8,000. Sale of wooden poles is our main source of income which would have easily explained the question of *"possession of unexplained assets disproportionate to his known legitimate sources of income"* as put in the notices to explain, demand notice and in the Respondent's replying affidavit. There is no worse manifestation of malice than the Respondent's refusal to recognise sale of forest material in my responses but instead seek to criminalise such income as money laundering.

62. The Respondent in their own admission, secured the search warrant by swearing an affidavit submitted by the Respondent, stating that they were investigating procurement irregularities in the Lake Turkana Wind Power Project and the associated Loiyangalani- Suswa Transmission Line.

63. On this basis the court issued the search warrant with specific directions that required the Respondent to seize any material connected with the two projects. Both projects were commenced and completed between year 2013 and 2018.

64. While executing the search warrant the Respondent violated his right to a fair process in that the Respondent committed an illegality by seizing ownership documents of property acquired not only before the two projects were conceptualized but even before KETRACO was incorporated in 2008.

65. Whereas the Respondent, in paragraph 6 of the said affidavit, confirms that they were investigating income between January 2013 and December 2022 referred to as period of interest, most of the original title deeds seized were for properties acquired and developed before January 2013.

66. The Respondent seized 28 ownership documents in violation of court orders which had clearly restricted that they pick documents related to the two projects which commenced in 2013 and completed in 2022 i.e. the relevant period. Out of the 28 documents, he was never and has never been required by the Respondent to explain on 23

documents yet the Respondent still unlawfully holds them. These documents do not appear anywhere in the notices to explain.

67. It is therefore *illegal, unfair and unreasonable* to continue keeping the said original and copies of the said documents causing unnecessary inconvenience to myself.

68. He is not able to access any credit and/or even do meaningful transactions in the said property whose documents have been unlawfully confiscated.

69. The Respondent violated the court order by seizing original and copies of title deeds of land parcels acquired by the Applicant not only before the projects were conceptualized, but even before KETRACO was incorporated. The Respondent's act of seizing material that were acquired before the relevant period is irrational and unreasonable and the same contravenes the order of the court.

70. Whereas the Respondent, in paragraph 6 of their affidavit, confirms that they were investigating income between January 2013 and December 2022 (hereinafter the period of interest), most of the original title deeds seized were for the properties acquired before January 2013.

71. The Respondent acted outside the provision and directions of the order of the court in seizing documents not related with the impugned project and acting maliciously by cooking figures to paint the Applicant as corrupt.

72. According to him The 1st Applicant The Respondent acted with malice and ill motive as summarized and indeed demonstrated in fabrication and creation of fictitious bank credits, application of the doctrine of double counting, unlawfully compelling the 1st Applicant to account for an asset which does not belong to him and which he is not in possession, confiscation of landed property documents which fall outside the period of interest, refusal to accord the Applicants a fair hearing and fair administrative process by declining to avail documents to the Applicants to allow them fully respond to the Respondent's notices to explain, failure to disclose certain landed property documents to the Applicants.This property is not listed on the notices to explain, is not inventorized and was therefore not accounted for in court as required by law, failure to avail valuation report as request by the Applicants to allow them respond effectively to the valuation of the assets by the Respondent, very valuation of assets which assets the corresponding sale agreements are in the custody of the Respondent and which bear the actual purchase prices, refusal and/or failure to value assets which constitute part of the main sources of income- trees.

73. The very act of falsifying bank entries to achieve an exaggeration of Kshs. 49,846,977.30 as explained in paragraph 4 above and then issuing a *notice to explain* the difference followed with a *demand notice* to surrender the difference is in itself unethical, the highest form of extortion and corruption laced with malice and ill motive. It is unfortunate that such act can be perpetrated by an agency who are purportedly inquiring to alleged corruption. It is only this court that can protect him from these schemes and high handedness.

74. According to the 1st Applicant it would only be fair and just that this honourable court grant an order of certiorari to call into this honourable court and quash the three notices to explain all dated the 15th of January 2024 and the demand notices dated 5th September 2024 as issued by the Respondent against the ex-parte Applicants as the same were arrived at maliciously and wrongfully.

The Applicants' Written Submissions;

75. The Applicants rely on their Notice of Motion dated 19th October 2024, Statutory Statement, Verifying Affidavit, Applicants' Replying Affidavit dated 7 th January 2025 together with the list and bundle of documents filed therewith and the bundle of authorities filed herewith. He submits as follows.

76. The Applicants submit that vide a search warrant dated 20th March 2023, the Respondent was authorized to obtain and seize any documentary and electronic evidence connected with transactions touching on the Lake Turkana Wind Power Project or the associated Loiyangalani - Suswa Transmitter Interconnector Project.

77. The search warrant was specific as to the extent and scope of the search and seizure thus to obtain and seize any documentary and electronic evidence connected with transactions touching on Lake Turkana Wind Power Project or the associated Loiyangalani-Suswa Transmitter Interconnector Project.

78. The said projects commenced in 2013 and completed in 2018 and the period within which the Respondent was conducting investigations against the Applicants is between 2013 and 2022 otherwise known as the "relevant period".

79. On 23rd March 2023, in the most abhorrent, undignified, inhumane and humiliating manner, the Respondent raided the homes of the 1st Applicant making away with a pile of documents being the Applicants' original and copies of title deeds and sale agreements.The Respondent also seized Kshs 1,675,000/= from the 1st Applicant.

80. The Respondent contrary to the Search Warrant, seized including the Applicants' landed property ownership documents which fall outside the period of investigation and/or the relevant period and are not in any way connected to the projects mentioned in the search warrants.

81. They submit that the Respondent thereafter made an Inventory of documents seized from the Applicants deliberately excluding other land ownership documents which they had seized and have declined to return such documents to the Applicants despite several demands.

82. They further submit that the Respondent failed to return to the warrant-issuing court, some of the documents confiscated, together with the money obtained for accountability, as required by law.

83. On 7th February 2024, the Respondent then issued to the Applicants, Notices to Explain purportedly for them to explain what the Respondent allege as disproportion between their assets and known legitimate sources of income.

84. They submit that even after a thorough explanation by the Applicants in response to the Respondent's Notices to Explain, the Applicants clearly linking each of the asset and how acquired, the Respondent want to hear none of the above and seems like they have a predetermined mission driven by ulterior motives to realize an unjust end.

85. On 5th September 2024, the Respondent issued to the Applicants, Demand Notices demanding that the Applicants surrender to them Kshs 418,286,554/= purportedly being the value of unexplained assets.

86. They submit that there is no unexplained asset instead the Respondent has embarked on a desperate mission to fabricate and has created fictitious bank credits and over-valued properties of the Applicants including just dumping figures in order to paint the Applicants as corrupt.

87. The Applicants have ably and elaborately demonstrated the fabrication of figures and overvaluation of properties by the Respondent, in their Affidavits and statutory statement supported by the accompanying annexures.

88. They submit that the Respondent has fabricated and/or created fictitious bank credits in order to portray the Applicants as corrupt and has unlawfully confiscated their land ownership documents, placing caution on some property contrary to the Applicants' right to property as espoused under Article 40 of the Constitution of Kenya, 2010.

89. The Respondent, is a high office constitutionally considered to be the custodian of ethics, integrity and transparency can sink this low to the extent of purely being driven by ulterior motives and malicious intention to ruin the career of the 1st Applicant and deprive the Applicants of genuinely and lawfully acquired property. The Respondent has had to fabricate figures, overvalue properties, engage in double counting and lump on the Applicants non-existing figures in order to issue the impugned notices.

90. They submit that the procedure leading to the issuance of the impugned Notices to Explain and the resultant Demand Notices was marred with illegality, fraud and procedural impropriety and was unreasonable, irrational, unfair, irregular, malicious and driven by ill motives.

91. They submit that that following the foregoing and their failure to accord the Applicants their right to a fair administrative action, the Applicants vide a Notice of Motion dated 19th October 2024.

92. The Respondent then upon service filed a Preliminary Objection contesting the jurisdiction of this Court dated 25th November 2024 together with a Replying Affidavit of the same date to which objection the Applicants raised grounds of opposition and filed written submissions in opposition to the Preliminary Objection.

93. Judicial Review primarily refers to the authority of the Court both to review the constitutionality or validity of legislative Acts and to pass upon the constitutionality or validity of executive and administrative

acts and to disregard or direct the disregard of such acts as are held to be unconstitutional or as violative of applicable statutes.

94. They submit that it is the authority of the Courts to declare void the acts of the Legislature and the Executive if they are found in total violation of the provisions of the Constitution.

95. It is checking and cross checking the working of the other organs of the Government, while trying to uphold the ideal of the rule of law. It means not only that the Court may strike down a legislative action as unconstitutional but that it may also validate it as within constitutionally granted powers and as not violating constitutional limitations.

96. Judicial Review is a way for the superior Courts to supervise the lower Courts, tribunals and other administrative bodies to ensure that they make their decisions properly and in accordance with the law. It is also the power of a Court, to declare a governmental measure either contrary to, or in accordance with, the Constitution or other governing law with the effect of rendering the measure invalid and void or vindicating its validity and is used for seeking: a mandatory order (an order requiring a public body to do something, also known as an order of mandamus); or a prohibiting order (an order preventing the public body from doing something, also known as an order of prohibition); or a quashing order (an order quashing the public body's decision, also known as an order of certiorari); a declaration; or an order for damages.

97. Judicial Review in Kenya has it basis in the Constitution of Kenya under Articles 23(3), Article 47, Article 165(3)(b) & (d), (6) and (7) of the Constitution and the Fair Administrative Action Act which allows this Honourable Court, away from the rigid traditional Judicial Review mechanisms, to consider certain aspects of merit when considering an application for Judicial Review.

98. Reliance is placed in the Supreme Court of Kenya in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) where it is noted that the purpose of the remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which an application for Judicial Review is made, but the decision-making process itself.

99. Judicial Review orders are available against defective or faulty processes of an administrative bodies exercising a quasi-judicial function as was held in the case of **Mukinginyi Walter Trek vs Independent Electoral & Boundaries Commission (2017) eKLR.**

100. The grounds for Judicial Review already stated, other instances include situations of non-compliance with mandatory and material procedures and conditions precedent, procedural unfairness and errors of law.

101. Moreover, Judicial Review is available where an administrator acts on ulterior motives calculated to prejudice the rights of the Applicant,

fails to take all relevant considerations into account, acts on the basis of illegal delegation and also in bad faith.

102. In addition, an administrative decision is susceptible to Judicial Review where there is no rational connection between that decision and either the purpose for which it was taken.

103. Further grounds include abuse of discretion and unreasonable delay or failure to act in discharge of a duty imposed under any written law. Despite the Applicant's explanations, the Respondent has chosen the path of deceit, lawlessness and bad faith.

104. The Respondent issued demand notices demanding the Applicants to surrender Kshs 418,286,554/=without any basis as the amounts were arrived at through fraud, illegal means and in fact the Respondent has fabricated and/or created fictitious bank credits in order to portray the Applicants as corrupt and has unlawfully confiscated their land ownership documents, placing caution on some property contrary to the Applicants' right to property as espoused under Article 40 of the Constitution of Kenya, 2010.

105. What is deplorable is that the Respondent, such a high office constitutionally considered to be the custodian of ethics, integrity and transparency can sink this low to the extent of purely being driven by ulterior motives and malicious intention to ruin the career of the 1st Applicant and deprive the Applicants of genuinely and lawfully acquired property.

106. The Respondent has had to fabricate figures, overvalue properties, engage in double counting and lump on the Applicants non-existing figures in order to issue the impugned notices.

107. It is submitted that the procedure leading to the issuance of the impugned Notices to Explain and the resultant Demand Notices was marred with illegality, fraud and procedural impropriety and was unreasonable, irrational, unfair, irregular, malicious and driven by ill motives.

108. There is no pending and/or ongoing investigations against the Applicants just like there is no civil proceedings instituted against the Applicants and the Applicants are therefore in no way approaching this Honourable Court to interfere and/or stop any such proceedings and/or investigations instead the Applicants have approached this Honourable to review the procedure and or process involved in arriving at the impugned Notices to Explain and Demand and which process the Applicants have complained as being irrational, unfair, unreasonable, marred with procedural impropriety and driven by ulterior motives.

109. The Applicants submit that the Applicants have demonstrated this through their affidavits and supporting annexures where the Respondent has fabricated bank credits lumping huge non-existing sums of money on the Applicants which they are being called upon to explain and since no one can explain non-existing fictitious figures, the Respondent have issued demand notices against the Applicants.

110. This Honourable Court derives its jurisdiction from Articles 23(3), 47 and 165(3), (6) and (7) of the Constitution of Kenya, 2010 which provides that:

> Article 23. Authority of courts to uphold and enforce the Bill of Rights
>
> (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
>
> (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
>
> (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
>
> (a) a declaration of rights;
>
> (b) an injunction;
>
> (c) a conservatory order;
>
> (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and (f) an order of Judicial Review.

Article 47. Fair administrative action

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a)provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b)promote efficient administration.

Article 165(3), (6) and (7) of the Constitution provides that:

Article165(3) Subject to clause (5), the High Court shall have

a. unlimited original jurisdiction in criminal and civil matters;

b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

   i. the question whether any law is inconsistent with or in contravention of this Constitution;

   ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

   iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

   iv. a question relating to conflict of laws under Article 191; and

e. any other jurisdiction, original or appellate, conferred on it by legislation.

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person,

body or authority referred to in clause (6), and may make any order or give.

111. The Fair Administrative Action Act, Cap. 7L of the Laws of Kenya which provides that:

> Section 3. Application
>
> This Act applies to all state and non-state agencies, including any person–
>
> a. exercising administrative authority;
> b. performing a judicial or quasi-judicial function under the Constitution or any written law; or
> c. whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.
>
> 4. Administrative action to be taken expeditiously, efficiently, lawfully etc.
>
> (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
>
> (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard; (c)notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to–

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and (d)request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

Part III – JUDICIAL REVIEW

7. Institution of proceedings

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if–

(a) the person who made the decision–

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e)the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant;

(f)the administrator failed to take into account relevant considerations;

(g)the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h)the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to–

(i) the purpose for which it was taken;

(ii)the purpose of the empowering provision;

(iii)the information before the administrator; or

(iv)the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that–

(a)the administrator is under duty to act in relation to the matter in issue;

(b) the action is required to be undertaken within a period specified under such law;

(c) the administrator has refused, failed or neglected to take action within the prescribed period.

11. Orders in proceedings for Judicial Review

(1) In proceedings for Judicial Review under section 8(1), the court may grant any order that is just and equitable, including an order–

(a)declaring the rights of the parties in respect of any matter to which the administrative action relates;

(b)restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an Applicant;

(c)directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d)prohibiting the administrator from acting in a particular manner;

(e)setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f)compelling the performance by an administrator of a public duty owed in law and in respect of which the Applicant has a legally enforceable right;

(g)prohibiting the administrator from acting in a particular manner;

(h)setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i)granting a temporary interdict or other temporary relief; or

(j)for the award of costs or other pecuniary compensation in appropriate cases.(2)In proceedings for Judicial Review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order– (a)directing the taking of the decision;(b)declaring the rights of the parties in relation to the taking of the decision;(c)directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or(d)as to costs and other monetary compensation.

112. Reliance is placed on the case of Mukinginyi Walter Trek vs Independent Electoral & Boundaries Commission (2017)eKLR in which the Court held that Judicial Review orders are available against defective or faulty processes of an administrative bodies exercising a quasi-judicial function.

113. The case Supreme Court case in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) which even though the the Applicants herein are concerned with the procedure leading to the impugned notices, allows this Honourable Court, away from the rigid traditional Judicial Review mechanisms, to consider certain aspects of merit when considering an application for Judicial Review.

114. The Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR** noted as follows:

> *"Traditionally, Judicial Review is not concerned with the merits of the case. However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory Judicial Review…The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision…"*

115. They submit that the Supreme Court has clarified the conflicting approach to Judicial Review and in a Judgment dated 16th June 2023 in **Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR)**,the Supreme Court has set the scope of Judicial review and the circumstances

under which the scope may be expanded to include inquiry into the merits of administrative action.

116. In the case of **Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR),** the Supreme Court while disagreeing with the reasoning of the Court of Appeal and in complete shift from its previous decision in **SGS Kenya Limited v Energy Regulatory Commission & 2 others SC Petition No 2 of 2019 [2020] eKLR** held inter alia that:

> *"With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue Judicial Review orders under the Constitution if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to Judicial Review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal."*

117. The Applicants have approached this Court and are seeking that the court reviews the procedure used in arriving at the impugned notices which process is complained of as unreasonable, unfair, illegal and marred with procedural impropriety.

118. It is submitted that nothing bars this Honourable Court from undertaking a merit review since the Applicants have alleged their constitutional right to fair administrative action have been violated.

119. They submit that the Anti-corruption&EconomicCrimesActunder whichthe Respondent purports to operate and any other legislation implemented by the Respondent are subservient to the Constitution and must at all times be implemented in accordance with the Constitution as any derogation thereof renders resultant actions as unconstitutional and a nullity as is the in the present case.

120. They submit that the Respondent has acted beyond the requirements of the Orders of the Court that issued the search warrant by confiscating land title documents which are not within the relevant period, have created fictitious bank credits and overvalued properties of the Applicants deliberately to portray them as corrupt and have failed to account for some of the landed property documents and money seized as required by law.

121. Land Title Deed and Sale Agreement for Property LR No. Ndivisi/Muchi 9977 was never inventorized and was never accounted for in court as required under sections 118 and 121 of the Criminal Procedure Code. The money seized amounting to Kshs 1,675,000/=

was also never accounted for and was never produced in the court that issued the warrants as required by law.

122. The Applicants are apprehensive that they may lose their property and money acquired lawfully through people who have no regard for the law.

123. They submit that even where a search warrant is available, the documents and or goods seized must availed to the Court immediately for proper accountability and safety of the seized items.

124. In **Abubakar Shariff Abubakar v Attorney General & another [2014] eKLR**, the Court noted that:

> *"A warrant is not a licence for the police to seize property and then keep the same in their custody for as long as they wish. If the police needed to conduct further analysis on the seized items then they ought to have* ***first*** *returned the warrant and seized articles to court, and sought proper authority for further retention and/or disposal of such items. No doubt section 121(1) exists to ensure that items seized during a search are properly accounted for, properly (and safely) stored and preserved. The requirements that the same be presented to court exists in order to avoid any illegal tampering with seized articles. It was not upon the police to decide when it would be convenient for them to report back to the court. They had a legal duty to report back immediately. It was only the court that is mandated to give directions of further retention of the seized items for whatever purpose. The explanation offered by*

police for failing to comply is not persuasive. I find that the actions of the police in retaining the seized items until ordered by the court to produce them contravened the Criminal Procedure Code and was therefore unlawful. The petitioner is entitled to general damages for this violation. I therefore award to him general damages in the sum of Kshs. 400,000/= plus interest at court rates. I find that the special damages of Kshs. 270,000/= claimed by the petitioner (and proved by annexed receipts) as payment to a firm of advocates in respect of proceedings to compel the police to produce in court the items seized from his residence is merited. I therefore award to the petitioner special damages in the sum of Kshs. 270,000/= plus interest at court rates."

125. The court in the above case of **Abubakar Shariff Abubakar v Attorney General & another [2014] eKLR**, then held:

"I hereby declare that the failure by police to make and file a return in the Chief Magistrate's Mombasa, Misc. Appl. 168/2011 and their failure to produce the seized articles before the court was a contravention of section 121 of the Criminal Procedure Code and was therefore unlawful..."

126. The Respondent by failing to disclose where the items are, and having failed to avail the said items to court and are still holding them unlawfully, such illegal actions then brings them under the scrutiny of this Honourable Court.

127. They submit that the fabrication of the Applicants' bank credits, overvaluation of properties and failing by the Respondent to state how they arrived at the overvalued figures, the failing to account for some items in court as required by law and the confiscation of the Applicants' land title documents which lies outside the relevant period is the highest form of abuse of power and ulterior motive.

128. The abuse of power, unfairness, unreasonableness and blatant procedural impropriety, calls for this Court's intervention.

129. On costs the Applicants submit that this matter was occasioned by the fact that the Respondent decided to overlook the constitution and the law and are involved in the highest form of abuse of power.

130. It is to be noted that as a result of such actions by the Respondent, the 1st Applicant in particular has been subjected to untold emotional anguish and distress.

131. The Applicants have had to incur legal and incidental costs bringing the instant suit as a result of the Respondent's unreasonable, irrational, malicious, illegal and irregular actions for no offence committed by the Applicants.

132. It invokes Section 27 of the Civil Procedure Act codifies the law on costs.

133. In UAP Insurance Company v Toiyoi Investment Limited [2020] eKLR in which H.A. OMONDI J at paragraphs 23, 24 and 25 notes:

"Mr. Justice (Retired) Kuloba while writing on the same issue stated that: Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise..."

134. In the **Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others,** where the court citing two leading decisions on the subject held inter alia that: -

"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion. .....But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at."

135. In the Supreme Court of Uganda in **Impressa ing Fortunato Federice vs Nabwire** where the court stated: -

"The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case.

If there were mathematical formula, it would no longer be discretion…while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are-

i. *Under Section 27 (1) of the Civil Procedure Act, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially.*

ii. *A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought…It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability…*

In the UAP case above notes: *"The history of this matter speaks for itself, it has a life that evolved and devolved with a multiplicity of applications, many apparent sideshows, that at times had a hue of vexation. Taking into account all these. I am persuaded that the Applicant in this matter is entitled to be awarded costs of the suit not only because the Applicant was the successful party; the 'event' in this matter being in the favour but also one who has had to undergo expenses whether monetary or in terms of time and energy in defending the suit, and accompanying applications over the years. I have no hesitation in awarding costs to the defendant/Applicant."*

136. The Applicants have committed no wrong and have proved as such. It is only the Respondent who deliberately failed to observe the law, driven by malice and what appears sinister motive, thereby subjecting the Applicants to emotional anguish and huge litigation costs.

137. The in the Supplementary Submissions the 1st Applicant submits that he has demonstrated that he does not own the impugned property LR NO. Webuye Municipality Block 111/51 valued by Respondent at Kshs 178,200,000/= in Webuye, Bungoma and has annexed the official search results from the Ministry of Lands, Bungoma Registry, on his further affidavit.

138. The demand by the Respondent to the 1st Applicant to explain and failure, to forfeit a property he does not own and one that is unregistered and non-existent is unreasonable and of extreme irrationality.

139. He submits that there was no proper investigations such as a reasonable man would conduct because if the Respondent would have bothered to conduct a search on the said property, it would have noted that there is nothing for the 1st Applicant to explain since all other assets have been adequately explained for save for those whose accounts/bank credits were again fictitiously created by the Respondent as submitted in our main submissions.

140. The Applicants submit that the Respondent failed to take into account relevant considerations such as conducting a basic search at

the Land Registry to determine or know whether the subject property is registered and is owned by the 1st Applicant.

141. Such failure could only be interpreted as deliberate, malicious and the land reference number just fabricated to injure the 1st Applicant and falls squarely within the confines of extreme irrationality hence the notices to explain and resultant demands from the Respondent becomes nothing but nullity and void ab initio.

142. In **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR** while addressing the concept of relevant considerations from paragraph 61 of his Judgment notes that:

> *"Reaching at a decision on the basis of irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality. So, as stated in the case* ***R v Secretary of State for Social Services, Exparte Wellcome Foundation Ltd,*** *it is a reviewable error either to take account of irrelevant considerations or to ignore relevant ones, provided that if the relevant matter has been considered or the irrelevant one is ignored, a different decision or rule might (but not necessarily would) have been made. Many errors of law and fact involve ignoring relevant matters or taking in to account of irrelevant ones. Ignoring relevant considerations or taking account of irrelevant ones may make a decision, or rule unreasonable."*

143. As Cooke J pointed out in the case **Ash by v. Minister of Immigration**

> *"[30] Considerations may be obligatory i.e. those which the Act expressly or impliedly requires the Tribunal to take into account and permissible considerations i.e. those which can properly be taken into account, but do not have to be.[31] Where the decision-maker fails to consider those obligatory considerations expressed or implied in the Act, the decision has to be invalidated. Whereas, in the case of permissive considerations, the decision-maker is not required to strictly abide to such considerations. Rather, the decision-maker is left at discretion to take the relevant considerations having regard to the particular circumstances of the case by ignoring those irrelevant ones from consideration. The number and scope of the considerations relevant to any particular decision or rule will depend very much on the nature of the decision or rule. All that the courts do is to decide whether the particular consideration(s) specified by the complainant ought or ought not to have been taken into account.[32]In effect, under this head the courts only require the decision-maker to show that specified considerations were or were not adverted to. In technical terms, the burden of proof is on the Applicant, but the Respondent will have to provide a greater or less amount of evidence as to what factors were or were not considered and how they affected the decision. A mere catalogue of factors ignored or considered may not be enough.[33] It is suffice to say that where the decision-maker fails to take relevant*

considerations into account but takes those irrelevant ones, there is high probability that the outcome of the decision may be affected by defects than not. So, the interference of the court to review such kind of decisions seems justifiable."

The good Judge further as from paragraph 78 of the judgment on irrationality and unreasonableness of a decision notes that:

The Exparte Applicant's counsel submitted that the decision is irrational and unreasonable[46] because it is not connected to the purpose of Article 227 of the Constitution, nor, was it within the purview of section 176 of the act. He argued that under section 7 (2) (i) (iii) (iv) of the Fair Administrative Action Act, [47] a decision is amenable to Judicial Review on grounds of unreasonableness and irrationality. He cited Republic vs Inspector General of Police & Another Exparte Patrick Macharia Nderitu [48] where it was held that to succeed in an application for Judicial Review, an Applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety.

79. The first Interested Party's counsel's submission was that that the Applicant has failed to establish that the Respondent acted unreasonably or irrationally within the Wednesbury Principle.

80. Addressing a similar issue in Republic v Public Procurement Administrative Review Board Exparte Trippex Construction Company Limited & another[49] I observed that Rationality, as

a ground for the Review of an administrative action is dealt with in Section 7(2) (i) of Fair Administrative Action[50] which provides that:-

> *"A court or tribunal under subsection (1) may review an administrative action or decision, if-*
>
> > *The administrative action or decision is not rationally connected to-*
> >
> > *a) the purpose for which it was taken;*
> >
> > *b) the purpose of the empowering provision;*
> >
> > *c)the information before the administrator; or*
> >
> > *d)the reasons given for it by the administrator."*

81. *Chaskalson P, in Pharmaceutical Manufacturers Association of SA and Another: In re Exparte President of the Republic of South Africa and Others stated that:*

"The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

82. *In applying the test of rationality, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the materials made available and the conclusion arrived at.*

83. *Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7(2) (k) of the Fair Administrative Action Act. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others, O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd:*

"The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock... as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. ... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief

constable has struck a balance fairly and reasonably open to him."

84. *The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it" and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated. In Prasad v Minister for Immigration, the Federal Court of Australia held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when "looked at objectively… so devoid of any plausible justification that no reasonable body of persons could have reached them."*

85. *A decision which fails to give proper weight to relevant factors may also be challenged as being unreasonable. It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision — even if there are other good reasons for it — is vitiated.*

86. *In my above cited decision, I observed that review by a court of the reasonableness of a decision made by another repository of power is concerned mostly with the existence of justification,*

transparency and intelligibility within the decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:

i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;

ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;

iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision-maker" could have made it.

144. It is submitted that the decision by the Respondent to order the 1st Applicant to account and explain over a property that is not his and one that is not even registered and unknown and the fact that the Respondent did not bother to confirm the ownership of the property through a simple search at the lands registry, is nothing but an irrational and unreasonable decision amenable to Judicial Review and whose only fate is that of quashing hence our humble plea that

the Notices to explain and the resultant notices be quashed and the Honourable Court grant the orders as prayed by the Applicants.

145. On the question of jurisdiction, that has now been overtaken by events since this Honourable Court dismissed the P.O directing that the matter be heard on merit.

146. They submit that even if investigation were ongoing which is not the case, this Honourable Court is properly placed to intervene where such investigations constitute abuse of the process as investigations must be carried out independently, in good faith without malice or for purpose of achieving some collateral goal divorced from the purpose for which investigatory powers are conferred.

147. The oppressive or vexatious use of powers conferred by law contravenes public policy and that the Respondent in conducting investigations are bound by the law and the decision to investigate 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 as is in the present case.

148. This Court has, as such inherent power to interfere with such investigations or administrative process because like in the instant case, if not malice and/or ulterior motive and bad faith, why would the Respondent fabricate the 1st Applicant's bank credits and compel him to account for certain properties which do not belong to him as demonstrated elsewhere herein.

149. They submit that whereas the Respondent Commission has the powers to investigate and recommend for prosecution against any corruptible and/or unethical conduct or institute forfeiture proceedings, such powers must be exercised within the confines of the Constitution and the laws under which such powers are granted, as any derogation from the Constitution and the law as is in the present case, renders the entire process unconstitutional, unlawful hence null and void ab initio.

150. In **Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016]eKLR** and in **Commissioner of Police & Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] KECA 182 (KLR)** it was respectively held that:

> *"Investigations must be carried out independently and must be carried out in good faith without malice or for the purpose of achieving some collateral goal divorced from the purpose for which the investigatory powers are conferred. 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."*

151. They submit that they have demonstrated so, that the purported investigations by the Respondent and which investigations are completed were devoid of any merit, was malicious and intended to achieve an ulterior motive. This is due to the fraudulent fabrication of bank credits by the Respondent and forceful demand to the 1st Applicant to account and explain what is not his.

152. They submit that even where a search warrant is in available, the documents and or goods seized must availed to the Court immediately for proper accountability and safety of the seized items something which the Respondent did selectively by leaving others out particularly the Cash amount of money being Kshs 1,075,000/= whose whereabouts remains unknown and the Applicants run the risk of losing it to a well-coordinated fraudulent scheme in the name of fight against corruption.

153. In **Abubakar Shariff Abubakar v Attorney General & another [2014] eKLR,** the Court noted that:

> *"A warrant is not a licence for the police to seize property and then keep the same in their custody for as long as they wish. If the police needed to conduct further analysis on the seized items then they ought to have first returned the warrant and seized articles to court, and sought proper authority for further retention and/or disposal of such items. No doubt section 121(1) exists to ensure that items seized during a search are properly accounted for, properly (and safely) stored and preserved. The requirements that the same be presented to*

court exists in order to avoid any illegal tampering with seized articles. It was not upon the police to decide when it would be convenient for them to report back to the court. They had a legal duty to report back immediately. It was only the court that is mandated to give directions of further retention of the seized items for whatever purpose. The explanation offered by police for failing to comply is not persuasive. I find that the actions of the police in retaining the seized items until ordered by the court to produce them contravened the Criminal Procedure Code and was therefore unlawful. The petitioner is entitled to general damages for this violation. I therefore award to him general damages in the sum of Kshs. 400,000/= plus interest at court rates. I find that the special damages of Kshs. 270,000/= claimed by the petitioner (and proved by annexed receipts) as payment to a firm of advocates in respect of proceedings to compel the police to produce in court the items seized from his residence is merited. I therefore award to the petitioner special damages in the sum of Kshs. 270,000/= plus interest at court rates. The court further held: "I hereby declare that the failure by police to make and file a return in the Chief Magistrate's Mombasa, Misc. Appl. 168/2011 and their failure to produce the seized articles before the court was a contravention of section 121 of the Criminal Procedure Code and was therefore unlawful."

154. The continued unlawful holding of the 1st Applicant's land title deeds for no offence committed is a violation of the Applicant's right

to property and enjoyment of the same and has subjected the Applicants to untold suffering and emotional anguish.

155. They submit that they have ably demonstrated how the process leading to the issuance of the impugned notices was marred with illegality, procedural impropriety, unreasonableness, irrationality and the abuse of power by the Respondents.

156. It is their submission that the Applicants have met the threshold for the grant of all the Judicial Review orders sought in their application.

The Respondents Case;

157. In opposing the Application, it is The commission is empowered by law to investigate the conduct of any person which in its opinion constitutes corruption or economic crime, and unethical conduct pursuant to the provisions of the anti-corruption & economic crimes act, 2003 (the ACECA) and the ethics & anti-corruption commission act, no. 22 of 2011 (the EACC Act).

158. The commission is mandated under Article 252 of the Constitution of Kenya to conduct investigations on its own initiative or on a complaint made by a member of the public against a State or Public Officer.

159. The commission received a report on an allegation that the General Manager, Design And Construction Kenya Electricity Transmission Company Limited (KETRACO), the 1st Applicant herein, has amassed

huge wealth that is not commensurate with his known sources of income.

160. The commission commenced investigations seeking to establish whether there were reasonable grounds to suspect that the 1st Applicant was engaged in corrupt conduct as alleged and also to establish whether he had acquired and/or accumulated assets that were disproportionate to his known legitimate source(s) of income between January 2013 and December 2022 (hereinafter the period of interest).

161. In the course of its investigation, the commission obtained a search warrant vide Misc. Criminal Application no. E829 of 2023 allowing the commission to search the Applicants' premises.

162. The seriousness of 1st Applicant's allegation of malice demands proof of a high order and credibility, which has not been demonstrated.

163. Criminal Law requires the commission to return to court all the items obtained vide a search warrants, which was duly undertaken as depicted in the document marked as "ds 2".

164. The commission's investigations revealed that the 1st Applicant used his office to knowingly and unlawfully acquire an indirect private interest in the contract between KETRACO and the consortium of Nari Group Corporation And Powerchina Guizhou Engineering Co. Ltd for the completion of the 428 km of 400kv transmission line between Loiyangalani and Suswa Substations.

165. On 7th February 2022, the commission issued the ex parte Applicants with notices to explain the disproportion between their assets listed and the known legitimate sources of income amounting to Kshs 498,803,821.86 pursuant to section 26 of the ACECA as set out in annexures aw 1, 2 and 3 of the 1st Applicant verifying affidavit.

166. The Exparte Applicants, through their advocate forwarded a response to the said notices issued by the commission on 14th August 2024 in line with annexure aw 14.

167. The Exparte Applicants have been given an opportunity to explain the disproportion of their assets to the commission as required by law and a full and comprehensive investigation of the allegations against the Applicants has been undertaken within the Commission's Constitutional and Statutory mandates.

168. The investigations further established that:

a. On 1st February 2010, the 1st Applicant was appointed as a civil engineer by KETRACO a probationary term of service and rose through the ranks to an acting position as Ag. Managing Director.

b. On 18th March 2020, the 2nd Applicant was registered by the Registrar of Companies with the 1st Applicant being the sole director.

c. On 3rd July 2013, the 3rd Applicant was registered by the Registrar of Companies vide CPR/ 2013/107787 having the 1st Applicant and Alice Nafula George his mother as directors.

d. That the 1st Applicant used the 2nd and 3rd Exparte Applicants as conduits to receive, hold or otherwise conceal funds acquired in the course of or as a result of corrupt conduct.

e. That the 1st Applicant's net salary at KETRACO for the period of interest was Kshs 43,137,225.38.

f. After analysis and verification of the information provided by the ex parte Applicants, the commission arrived at a disproportion of Kshs. 418,286,554.16 which remains unexplained to date.

169. It is its case that having established a reasonable suspicion of corrupt conduct on the part of the 1st Applicant as per section 55(a) of ACECA, and the failure of the ex parte Applicants to explain the sources of their assets valued at Kshs 418,286,554.16, the commission issued them with a demand notice.

170. The commission had the liberty to proceed with Section 55 ACECA, the commission's next step is to institute a forfeiture suit. The Applicants have not placed anything before this honourable court to show that the investigations were for a purpose other than the public interest.

171. The Exparte Applicants have not demonstrated that the investigations conducted by the commission are contrary to public policy; that it is in bad faith or intended to achieve an ulterior motive.

172. The Exparte Applicants to merely state that their fundamental rights to fair hearing, administrative action, fair hearing and equal

protection of the law were violated without specifically stating the nature of violation or infringement of such rights.

173. The Application is speculative and premature in arguing that their rights will be infringed if the commission institutes a suit against them, a fairly predictable procedure, that the Applicants have not yet been subjected to and where they will have an opportunity to defend themselves.

174. The Applicants will have the opportunity to defend and poke the admissibility of the commission's evidence against them at trial.

175. They shall be given an opportunity to provide any further explanations as to the assets in their possession before the trial court, whose duty it is to hear the evidence, weigh it, and reach a conclusion on the guilt or otherwise of the parties before it.

176. The Applicants shall be afforded an opportunity to defend themselves during trial. If the Exparte Applicants are allowed at this stage to challenge the evidence in the possession of the commission, this amounts to preempting the commission's case by setting out the Applicants' defence and accepting it as true.

177. In the search warrant, the court allowed the commission to retain documents and material subject of the search until conclusion of the investigations against the Applicants and thereafter, produce the same as evidence in court, either in criminal and/or civil forfeiture proceedings.

178. Under section 59 of ACECA is allowed to conduct valuations of properties subject of corruption or economic crime investigations and prosecutions.

179. It is therefore untrue that the commission "just dump figures and/or throw figures" as alleged by the ex parte Applicants who are put to strict proof thereof.

180. In the instant case there is no evidence of malice, no evidence of unlawful actions by the commission, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the Applicants might not get a fair trial as provided under article 50 of the Constitution.

181. Just as a forfeiture order cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the defendants to have a fair trial.

182. Judicial Review proceedings are concerned with the process rather than merits of the challenged decision to institute forfeiture proceedings against the Applicants.

183. This honourable court is not entitled to make definitive findings on matters which go to the merit of the impugned investigations and/or intended civil proceedings.

184. In determining the issues raised in the Application, this honorable court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the trial court.

185. This honourable court ought not to usurp the Constitutional and statutory mandate of the commission to investigate and institute forfeiture proceedings in the exercise of the discretion conferred to it.

186. The mere fact that the intended forfeiture proceedings are in all likelihood bound to inconvenience the Applicants is not a ground for halting them by way of Judicial Review since Judicial Review proceedings are not concerned with the merits but with the decision making process.

187. The Applicants have advanced their defence in the guise of a Judicial Review Application, which defence the Applicants can produce before the trial Court.

188. This instant Applicant sets out to have a determination on contested matters of facts presented by the parties and this honourable court would not have jurisdiction in a Judicial Review proceeding to determine such issues. Parties are better left to resort to the trial court where such matters ought to be resolved on their merits.

189. Judicial Review proceedings are not the proper legal regime in which the innocence or otherwise of the Applicant ought to be determined as to do so amounts to abuse of the judicial process.

190. An investigation, not being an administrative action, cannot be the subject matter of Judicial Review. A Judicial Review Application

cannot be used to stop the institution of civil proceedings. This court, sitting as a Judicial Review court, is being asked to anticipate and determine questions that will be determined by the Anti-Corruption Court once forfeiture proceedings are instituted, a jurisdiction which it does not have.

191. Pre-emptive action to stop the institution of civil proceedings is unheard of in our justice system. As such, this court, sitting as a Judicial Review court lacks the jurisdiction to hear and determine this matter. The Application, if allowed, would usurp the function of the anticorruption court.

192. The Anti-Corruption Court will be able to determine each and every issue being raised by the ex parte Applicant once the forfeiture proceedings are instituted. The Application is intended to derail recovery of an unexplained assets and thereby defeat public interest.

193. The precedent, which this court is being asked to set, would deal a significant blow to the country's determination to combat illicit enrichment and to recover unexplained assets.

194. The instant Applicant sets out to have a determination on contested matters of facts presented by the Applicants and this honourable court does not have jurisdiction to determine such issues which ought to be resolved on their merits by the trial Applicants submissions.

The Respondents submissions;

195. It submits that The Commission is empowered by law to investigate the conduct of any person which in its opinion constitutes corruption

or economic crime, and unethical conduct pursuant to the provisions of the Anti-Corruption & Economic Crimes Act, 2003 (the ACECA) and the Ethics & Anti-Corruption Commission Act, No. 22 of 2011 (the EACC Act).

196. Under Article 252 of the Constitution of Kenya, the Commission is mandated to conduct investigations on its own initiative or on a complaint made by a member of the public against a state or public officer.

197. Section 55 of the Anti-corruption and Economic Crimes Act (ACECA) allows the Commission to commence proceedings at the High Court if after investigations; the Commission is satisfied that the person has unexplained assets. The person must have, in the course of investigations, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that proportion has been given.

198. Section 23(4) of the ACECA allows the Commission to apply the provisions of the Evidence Act, Criminal Procedure Code, the Police Act and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crimes. Further, section 23(3) of ACECA gives the Secretary and an investigator powers, privileges and immunities of a police officer.

199. A reasonable opportunity was afforded to the Applicants vide the notices to Explain dated 15th January 2024 as enshrined under section 26 of the ACECA.

200. According to the said Notices, the Applicants were required to explain the sources of funds of acquisition of their properties with supporting documents of each property as well as their development costs where applicable.

201. They were also to explain the sources of their specific credits in their bank and Mpesa accounts, which they failed to do. The Commission therefore duly met the threshold as set out in **Dr. Christopher Ndarathi Murungaru vs Kenya Anticorruption Commission & another [2006] eKLR.**

202. The Commission received a report on an allegation that the General Manager, Design and Construction Kenya Electricity Transmission Company Limited (KETRACO), the 1st Applicant herein, has amassed huge wealth that is not commensurate with his known sources of income.

203. Upon receipt of the said allegations, the Commission commenced investigations seeking to establish whether there were reasonable grounds to suspect that the 1st Applicant was engaged in corrupt conduct as alleged and also to establish whether he had acquired and/or accumulated assets that were disproportionate to his known legitimate source(s) of income between January 2013 and December 2022 (hereinafter the period of interest).

204. The Commission obtained a search warrant under sections 118 and 120 of the Criminal Procedure Code, which investigation tool is available to the Commission, allowing the Commission to search the Applicants' premises. The Commission submits that the search warrants were not defective and were obtained and executed lawfully. Further, a return was duly made to the issuing court as required under the law. Every inventory in possession of the Commission has been duly verified and signed by the Applicants confirming that they are a true record of the items collected by the Commission in enforcement of the court orders. The Applicants have not challenged the said order.

205. The Court allowed the Commission to retain documents and material subject of the search until conclusion of the investigations against the Applicants and thereafter, produce the same as evidence in Court, either in criminal and/or civil forfeiture proceedings.

206. Additionally, as stated hereinabove, the Commission duly issued the Applicants with Notices to Explain under section 26 ACECA to afford them an opportunity to explain the disproportion between their assets and their known legitimate sources of income.

207. Upon receipt of the Applicants' responses vide their Advocate, the Commission was not satisfied that an adequate explanation of a disproportion of Kshs418, 286,555.16 had been given.

208. After conclusion of the investigations, the Commission established that:

a) The 2nd Applicant is a private Limited Company registered on 18th March 2020, with the 1st Applicant being the sole director of the company.

b) The 3rd Applicant is a private Limited Company registered on 3rd July 2013 with two directors; the 1st Applicant and Alice Nafula George his mother with 250 and 750 ordinary shares respectively.

c) The 1st Applicant is reasonably suspected to have used his office while serving as the Senior Manager, and later, Acting General Manager, Design and Construction at the (KETRACO) to have knowingly and unlawfully acquired an indirect private interest in the contract between KETRACO and the consortium of Nari Group Corporation and Powerchina Guizhou Engineering Co. Ltd for the completion of Procurement, Construction, Testing and Commissioning of approximately 428 KM of 400kV transmission line between Loiyangalaniand Suswa substations through his associate companies the 2nd and 3rd Applicants.

d) The Applicants were in possession of unexplained assets disproportionate to their known legitimate sources of income within the period of interest valued at approximately Kshs 418,286,554.16 in their possession.

e) The Commission issued a Demand Notice dated 5th September 2024 jointly to them. See Annexed and marked "AW 11".

209. It is the Commission's humble submission that the issues raised in the Application are issues that can only be determined by the trial court, the Anti-Corruption and Economic Crimes Division of the High Court upon weighing the evidence tabled before it by all parties.

210. The very issues raised by the Applicants ought to form part of their defence in the said trial court.

211. In **Sofia Mohammed vs Ethics and Anti-Corruption Commission (EACC) & 3 others [2018] eKLR** the Court rightly stated:

> "The Petitioner will have the opportunity to object to the admissibility of that evidence in the criminal case against her at the appropriate time. The trial court will therefore address that issue and make a determination... ... What has clearly come out is that the Petitioner wants this court to weigh and consider the sufficiency of the evidence in respect of the criminal case she is facing. She wants this court to declare that what she did does not amount to abuse of office. How can this court arrive at that without weighing the evidence? That is not the reserve of this court which cannot also prohibit the respondents from carrying out their mandate of investigating cases of corruption unless it has been clearly shown that by so doing the 1st Respondent is violating an individual's rights. The Petitioner has failed to demonstrate so. For this court to make the declaration the Petitioner seeks in prayer (c) of her petition the court will have

to evaluate the evidence in the criminal case. That again is a reserve of the court hearing the criminal case."

212. In **Lydia Lubanga vs Inspector General of Police & 4 others [20161 eKLR** the Court rightly observed:

"The Petitioner will have the opportunity to raise the issue of the admissibility of the evidence against her and provide explanations as to the money received before the trial Court, whose duty it is to hear the evidence, weigh it, and reach a conclusion on the guilt or otherwise of the accused person before it. As Warsame J (as he then was) held in the case of Michael Monari & Another vs Commissioner of Police & 3 Others, Miscellaneous Application No.68 of 2011:

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is

to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

213. The Applicants have not demonstrated that there was illegality, irrationality or unreasonableness in executing the Search Warrant issued in accordance with the law as provided in section 118 of the Criminal Procedure Code, the Notices to Explain and the Demand Notice. They have also not shown that the Commission acted outside its statutory powers in executing its mandate under the Constitution and the law.

214. The Commission submits that each allegation is unsupported by any evidence. Further, neither express nor implied malice nor ill motive can be inferred or assumed.

215. In **KSM CA No.1 of 2013; DPP vs Crossly Holdings and 2 others** where the Court of Appeal held that in the absence of dishonesty, bad faith or some exceptional circumstances, the decision of the Commission and the AG to investigate, recommend for prosecution, arrest, charge and prosecute respectively should not be amendable to judicial review in court.

216. The Honourable Court in **Eric Wambua Muli & another vs Prime Bank Limited & 3 others [2017] eKLR**, observed as much and stated as follows with regard to abuse of the court process;

"It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused.

The black law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. "An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules…

217. The Commission's investigations revealed that the 1st Applicant used his office to knowingly and unlawfully acquire an indirect private interest in the contract between KETRACO and the consortium of Nari Group Corporation and Powerchina Guizhou Engineering Co. Ltd for the completion of the 428 KM of 400kV transmission line between Loiyangalani and Suswa Substations. This Honourable Court to protect itself from abuse of its own processes.

218. In an attempt to subvert the laid out procedure in the ACECA and specifically sections 26 and 55, the Applicants are using this Honourable Court to prohibit the Commission from carrying out its mandate of prosecuting cases of corruption.

219. The Applicants have not clearly demonstrated any violation of their individual rights. Having established a reasonable suspicion of corrupt conduct on the part of the 1st Applicant as per section 55(a) of ACECA, and the failure of the Ex Parte Applicants to explain the sources of their assets valued at Kshs 418,286,554.16, the Commission is then mandated to institute civil forfeiture proceedings as per section 11 as read with section 3 of the Ethics and Anti-Corruption Commission Act.

220. The Commission issued the impugned Notices to Explain with annexures which clearly set out bank and M-pesa credits which sources the Applicants were required to explain. According to the impugned Notices, the Applicants were also required to explain the sources of funds of acquisition of their properties with supporting documents of each property as well as their development costs where applicable

221. The said Notices under section 26 ACECA issued to the Applicants were very specific as to the person reasonably suspected of corruption; they were specific to the time of investigations (the period of interest) and specific as to what properties and/ or assets were under inquiry.

222. The Applicants duly responded to the same Notices without raising any issues regarding impropriety.

223. Therefore, the allegations of violation of rights under the Constitution and/or illegality of the Notices issued to the Applicants are an afterthought and must fall.

224. The Applicants have failed to demonstrate how their rights have been or are likely to be adversely affected by issuance of the said Notices.

225. Further, the Applicants have not demonstrated that the Commission acted in excess of its constitutional and statutory mandate or that the Notices were used for any other purpose other than the enforcement of the law and therefore their Application must fail.

226. The Application is speculative and premature in arguing that the Applicants' rights will be infringed if the Commission institutes a suit against them.

227. The civil process in the Anti-Corruption Court is a fairly predictable one.

228. The Applicants, once they have been subjected to it, will have an opportunity to defend themselves and their rights to fair hearing have already been safeguarded under the Constitution.

229. This Application is therefore without merit, an abuse of Court's process and an attempt to have this Honourable Court weigh evidence, which is within the purview of a Trial Court.

230. An order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the Applicants to have a fair trial.

231. In determining the issues raised in the Application, this Honorable Court will entertain the temptation to unnecessarily stray into the arena exclusively reserved for the Trial Court therefore abusing the Court process.

232. The proceedings contemplated pursuant to the impugned Notices to Explain are civil in nature and will be tried by a court of concurrent jurisdiction, namely the Anti-Corruption and Economic Crimes Division of the High Court.

233. This Court, sitting as a Judicial Review Court, has no jurisdiction to stop contemplated civil actions before a court of concurrent jurisdiction.

234. The Applicants allege that the Commission in the course of its investigations has breached sections of the Fair Administrative Actions Act and some Articles of the Constitution.

235. The Commission submits that corruption investigations are not administrative actions in nature, and therefore cannot be subjected to the said Act.

236. Pursuant to the doctrine of abstention, this Honourable Court should not be prematurely rushed to intrude into matters that generally fall within the area of responsibility of institutions or agencies of Government created to deal with specific issues under statute such as the Commission.

237. In **Royal Media Services Limited vs The Attorney General Civil Appeal No. 45 of 2012** the Court held that:

> *"...In our view the judge cannot be faulted for holding that a constitutional petition procedure adopted by the appellant in ventilating its claim was ill suited for the kind of claim it had laid before the trial court namely debt collection. We had occasion in the past to bemoan the current trend of filing constitutional petitions and references on matters or claims that have no iota or scintilla of any constitutional bearing. This trend of constitutionalizing virtually everything, which is*

actually, in our view an abuse of the court process, needs to nibbed in the bud and frowned upon. "

238. On 7th February 2022, the Commission issued the Ex Parte Applicants with Notices to explain the disproportion between their assets listed and the known legitimate sources of income amounting to Kshs498,803,821.86 pursuant to section 26 of the ACECA.

239. Subsequently, the Exparte Applicants, through their Advocate forwarded a response to the said Notices issued by the Commission on 14th August 2024.

240. The Ex Parte Applicants have been given an opportunity to explain the disproportion of their assets to the Commission as required by law and the Commission submits that a full and comprehensive investigation of the allegations against the Applicants has been undertaken within the Commission's Constitutional and statutory mandates contrary to the allegations that the Commission has acted in bad faith, is biased and with malice.

241. Articles 40 and 47 of the Constitution can be limited and qualified in the circumstances set out under Article 24(1) to safeguard the public interest in combating corruption and economic crime and ensuring the prudent management of public bodies and resources.

242. Article 40(6) does not extend the right to property to any property that has been found to have been unlawfully acquired as is the allegation against the subject properties registered in the names of the Applicants.

243. In **Benson Muteti Masila & 5 others vs Chief Magistrate Milimani Law Courts & 4 others [2020] eKLR** the Honourable Court rightly observed;

> *"The law has given investigative agencies the mandate to carry out investigations, and prosecutorial power has been vested in the DPP. The jurisprudence that has emerged from our courts is that these bodies must be allowed to carry out their constitutional and legislative mandates. Only in the clearest of cases, where a party has established a violation of his rights under the Constitution, will the court intervene."*

244. Mere assertions in the Application of double accounting, overvaluation, and fabricating and/or creation of bank credits by the Commission without an iota of evidence tendered by the Ex Parte Applicants is in bad faith, vexatious and ought to be dismissed with costs.

245. The Commission submits that Section 59 of ACECA allows a licenced valuer employed by the Commission to undertake valuations of the assets subject of investigations.

246. According to the said section 59(1) of ACECA, the Applicants have not produced any evidence to the contrary to challenge the certificates of valuation in respect to the properties subject of the forfeiture suit.

247. It is in the public interest that cases investigated by the Commission, particularly those touching on misappropriation of public funds, be prosecuted expeditiously.

248. The Commission submits that this Application is a tactic by the Applicants to derail the expeditious institution and prosecution of the intended civil proceedings.

249. In **Wilfred Karuga Koinange vs Commission of Inquiry into Goldenberg Commission (Misc. Appl. 372 of 2006).**

> *'The State represents a community of individuals, who all contribute to the welfare of the state. In the wider context therefore, it is in the interest of the state, the community of Kenyans and all persons living within the territorial boundaries of Kenya, and perhaps beyond, that lawsuits including criminal prosecutions which particularly impinge upon the welfare of the state and therefore the community within the state be prosecuted in a sequence and within a reasonable time and not by way of a multiplicity of suits, motions over other motions and sometimes cross motions.*
>
> *The multiplicity of such motions is but gerry-mandering through the court corridors contributing nothing but delays in the dispensation of justice to the individual accused or the applicant and also the community of Kenyans because the issues raised, like in this case, and the previous applications, whether or not the disbursement of Kshs. 5.8 billions was legal or illegal should be determined in a proper trial, and should not be stayed by the court merely because they relate to issues raised 4, 8, 12 or more years ago.' Emphasis Mine.*

250. Once corruption and economic crimes are conclusively investigated and a forfeiture suit filed in Court, it is in the public interest that the said matters are expeditiously prosecuted, and the perpetrators punished and assets recovered.

251. The granting of orders sought in the Application will amount to interference with the Commission's investigative and recovery mandate which would be detrimental to public interest and this Honourable Court ought not to interfere since no impropriety has been demonstrated.

252. The Judicial Review proceedings are concerned with the process rather than merits of the challenged decision to institute forfeiture proceedings against the Applicants.

253. The Applicants have failed to strictly plead and prove how their rights have been violated by the Commission.

254. In it's Supplementary Submissions The Commission is empowered by law to investigate the conduct of any person which in its opinion constitutes corruption or economic crime, and unethical conduct pursuant to the provisions of the Anti-Corruption & Economic Crimes Act, 2003 (the ACECA) and the Ethics & Anti-Corruption Commission Act, No. 22 of 2011 (the EACC Act).

255. Section 55 of the Anti-corruption and Economic Crimes Act (ACECA) allows the Commission to commence proceedings at the High Court if after investigations; the Commission is satisfied that the person has

unexplained assets. The person must have, in the course of investigations, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that proportion has been given.

256. A reasonable opportunity was afforded to the Applicants vide the Notices to Explain dated 15th January 2024 as enshrined under section 26 of the ACECA.

257. According to the said Notices, the Applicants were required to explain the sources of funds of acquisition of their properties with supporting documents of each property as well as their development costs where applicable.

258. They were also to explain the sources of their specific credits in their bank and Mpesa accounts, which they failed to do.

259. The Commission's investigations revealed that the said property, L.R. No. Webuye Municipality Block 111/51, is adjacent to L.R. No. Webuye Municipality Block 111/40, which property is registered in the name of the 1st Applicant. Further, it was established that both properties are jointly fenced and that the 1st Applicant has developments on both properties, i.e. L.R. No. Webuye Municipality Block 111/40 and L.R No. Webuye Municipality Block 111/51. The location of both properties was identified in the map Webuye Block III Sheet 1.

260. The Commission therefore had reasonable grounds to suspect that the 1st Applicant and/or the 2nd and 3rd Applicants are the owner(s) of L.R. No. Webuye Municipality Block 111/51 being developed within the period of investigation.

261. When given the opportunity to explain the source of funds used to purchase both properties, as well as the development they have undertaken thereon, the Applicants only explained that they used their savings to purchase L.R. No. Webuye Municipality Block 111/40 without any documentary evidence to support the assertion.

262. It was therefore clear from investigation of the Applicants that they are engaged in corrupt conduct and the 1 st Applicant had acquired and/or accumulated assets that were disproportionate to his known legitimate source(s) of income between January 2013 and December 2022 (hereinafter the period of interest).

263. The conclusion is that including L.R. No. Webuye Municipality Block 111/51 as part of the assets owned or in possession of the Applicants was not unreasonable.

264. This Honourable Court cannot thus conclude that the inclusion of the said property by the Commission was irrational, malicious and fabricated as alleged.

265. In **JR No. 30 of 2017 Republic v DPP & others Ex-parte Eng. Peter O. Mangiti,** the court at paragraph 38 held:

> *What the Ex-parte Applicant is inviting this court to do is to go through the documents produced as annexures, together with*

his averments and evaluate them and find that he should not be charged.

266. The Applicants herein are attempting to do the same thing before this Honourable Court.

267. Evaluation of evidence is not in the purview of a judicial review court. Although this Honourable Court's directions were that parties only limit themselves to submit on L.R. No. Webuye Municipality Block 111/51, the Applicants at paragraph 5 of their Further Affidavit have alleged that the Commission never returned documents in respect to L.R. No. Ndivisi/Muchi/9977 and Kshs 1,075,000/ to the Court issuing the warrant after conducting a search in their premises.

268. The search warrant, having been obtained and executed legally, the Commission returned all the documents and items obtained pursuant to the said search to the Court issuing the said warrant as set out in the inventory filed in Court by the Commission.

269. As part of the inventorized items is the original title deed in respect to L.R. No. Ndivisi/Muchi/9977 in the name of the 1st Applicant and a locked safe.

270. It is after the Commission accessed the contents of the safe that Kshs 1,075,000/- was obtained and placed in a safe at the Commission pending the conclusion of its investigations against the Applicants and thereafter, be produced as evidence in Court, either in criminal and/or civil forfeiture proceedings.

271. The Commission reiterates that it duly issued the Applicants with Notices to Explain under section 26 ACECA to afford them an opportunity to explain the disproportion between all their assets listed therein and their known legitimate sources of income.

272. Upon receipt of the Applicants' responses vide their Advocate, the Commission was not satisfied that an adequate explanation of a disproportion of Kshs 418,286,555.16 had been given.

273. The Applicants have not demonstrated that there was illegality, irrationality or unreasonableness in executing the Search Warrant issued in accordance with the law as provided in section 118 of the Criminal Procedure Code, the Notices to Explain and the Demand Notice.

274. They have also not shown that the Commission acted outside its statutory powers in executing its mandate under the Constitution and the law.

275. The Ex-Parte Applicants have not placed facts or evidence before this Court to demonstrate that the Commission has acted without or in excess of its jurisdiction or abused or exercised its powers in a manner contrary to the law or that the inquiry is actuated by ulterior motive, or malice, or is otherwise that the commission acted in contravention of the Constitution.

276. The Commission's investigations revealed that the 1st Applicant used his office to knowingly and unlawfully acquire an indirect private interest in the contract between KETRACO and the consortium of

Nari Group Corporation and Powerchina Guizhou Engineering Co. Ltd for the completion of the 428 KM of 400kV transmission line between Loiyangalani and Suswa substations. We therefore urge this Honourable Court to protect itself from abuse of its own processes.

277. The Applicants are using this Honourable Court to prohibit the Commission from carrying out its mandate of prosecuting cases of corruption. The Applicants have not clearly demonstrated any violation of their individual rights.

278. The Commission issued the impugned Notices to Explain with annexures which clearly set out bank and M-pesa credits which sources the Applicants were required to explain. The said Notices under section 26 ACECA issued to the Applicants were very specific as to the person reasonably suspected of corruption; they were specific to the time of investigations (the period of interest) and specific as to what properties and/or assets were under inquiry.

279. All the Applicants duly responded to the same Notices without raising any issues regarding impropriety. Therefore, the allegations that the Commission fabricated the 1 st Applicant's bank credits are untrue, an afterthought and must fall. In fact, the 1 st Applicant has not specified which bank credits the Commission is alleged to have fabricated. Mere aspersions cannot be a basis of issuing judicial review reliefs against the constitutional and statutory mandate of the Commission.

280. Just as a forfeiture order cannot be secured without any basis of evidence, the respondent submits that an order of prohibition cannot also be given without any evidence that there is manipulation, abuse

or misuse of court process or that there is a danger to the right of the Applicants to have a fair trial.

Analysis and determination;

The issues for determination;

1) Whether the Applicant has made out a case for the grant of the orders pray for.

2) Who shall be the cost of the Application?

The First Issue;

281. Order 53(2) of the civil procedure rules provides:

> *"Time for applying for certiorari in certain cases [order 53, rule 2] leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the Application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the Application for leave until the appeal is determined or the time for appealing has expired."*

282. The above provisions prohibit the filing of Judicial Review Applications for an order of certiorari after expiry of six months from the date of the impugned decision where such decision is a judgment, decree, conviction, order or other proceeding.

283. In **Republic v National Transport And Safety Authority & Another [2016] eKLR,** G.V. Odunga J (as he then was) had this to say concerning the prayer for prohibition, where certiorari was not available to the Applicant:

> *"as was held in municipal council of Mombasa Vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 Of 2001:"where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of certiorari to have it moved into the high court and be quashed, it is not open for them to seek to have the appellant prohibited from implementing the decision as 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."*

284. On 15th January 2024 the Respondent issues demand notices upon each of the Applicants. The Applicants moved the court on 8th October 2024. That is 9 months after the cause of action arose in so far as the notice dated 15th January 2023.This is the date that the cause of action arose.

285. The Applicants cannot argue that they did not know of the existence of the dispute because after receiving the impugned notice, they engaged the Respondent severally on many fronts. The time as provided for under Order 53 rule 2 cannot be enlarged.

286. The Applicants also prays that an order of mandamus do issue compelling the Respondent to release and/or return to the Applicants all the landed property documents both original and copies and monies as particularized in the Respondent's inventory dated 23rd March 2023, 24th March 2023 and 6th June 2023 and further be compelled to remove any caution that they may have placed on any of the said inventorized properties.

287. In the case of **Republic v County Secretary Migori County & Another Exparte Linet Magambo[2020] eKLR**, in determining whether the writ of mandamus can lie, the court stated that;

> "The scope of an order of mandamus was discussed in the decision of **Republic =vs= Kenya National Examination Counsel Ex Parte Gathenji & Others, (1997) eKLR** where it was held,
>
> *"The next issue we must deal is this; what is the scope and efficacy of an order of mandamus?*
>
> *The order of mandamus is of a most extensive remedial nature and is, in form, a command issuing from high court of justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in*

cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

288. The Respondent demonstrated that it confiscated the documents as set out in the inventory in the strength of a legal court order.The Applicants have not challenged the said order.

289. The Respondent has the power to retain the said documents and hand them over to the trial court.

290. If this court issues an order of mandamus as sought, then it will usurp the Respondents' statutory power without justification.

291. The Applicant has in any event invited the court to carry out a merit analysis which the court declines to undertake since the Applicants have not demonstrated the reasons as to why the court should conduct a merit analysis as a Judicial Review Court. The Applicants will have their day in the trial court where they can apply for the release of the state documents should the trial court deem it fit to do that.

292. The Applicants also seek for an order prohibiting the Respondent by themselves, their agents, employees and or anybody deriving authority from the said Respondent from freezing, confiscating, implementing and/or taking any action or punitive disciplinary measures against the Applicants on account of the notices to explain and demand notices dated 15th January 2024 and 5th September 2024 respectively issued against the Applicants.

293. The Applicants have not demonstrated nor given sound reason as to why the resident should be prohibited from pursuing a legal action against the Applicant.

294. In the case of **Kenya National Examination Council Versus Republic Exparte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**, the court stated the grounds upon which such an order of prohibition may issue as follows;

> *"What does an order of prohibition do and when will it issue" it is an order from the high court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – see halsbury&39; s law of England, 4th edition, and vol.1 at pg. 37 paragraphs 128"*

295. The Applicant have not demonstrated how the Respondent acted illegally or lawfully or in an unfair form. The Applicants have failed to demonstrate that the resident acted maliciously.

296. Without looking at the merits of the decisions by the Respondent the court is satisfied that the Respondent accorded the Applicants the requisite due process right when it sent to them the demand and the Respondent sent an explanation justifying what they were doing coupled with the Applicants responses.

297. This court cannot issue an order of prohibition at this level given that the Respondent is acting within the law and the court cannot stop a legal process unless there is a reason to do so, which the Applicants have not brought out.

298. The Applicants also asked the court to issue a declaration that the Applicants' fundamental right to fair administrative action, fair hearing, equal protection of the law, and legitimate expectation have been infringed and/or threatened by the Respondent on account of the notices to explain and demand notices dated 15th January 2024 and 5th September 2024 respectively as issued by the Respondent against the Applicants.

299. This court has looked at the fact that the Respondent entered into the 1st Applicant's premises on the strength of a court order. It seized the documents through an inventory. The Respondent further carried out a valuation. It notified the Applicants and issued the impugned notices.

300. The Applicants have not demonstrated how their rights to fair hearing, legitimate expectation was offended so as to warrant the issuance of a declaration.

301. The Supreme Court in the case of **Githiga & 5 Others V Kiru Tea Factory Company Ltd (Petition 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023) (Judgment)** held that under article 50(2) of the Constitution procedural fairness in the administration of justice involved the fair hearing rule that required a decision maker to inter

alia afford a person an opportunity to be heard before making any decision affecting his/her interests.

302. In the case of **Pastoli Vs Kabale District Local Government Council & Others, (2008) 2 EA 300**, where it was held that:

> *"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: see council of civil service union v minister for the civil service [1985] ac 2; and also, Francis Bahikirwe Muntu And Others V Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).*
>
> *Illegality is when the decision-making authority commits an error of law in the process of taking the decision 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 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 usually in defiance of logic and acceptable moral standards: re an Application by Bukoba gymkhana club [1963] EA 478 at page 479 paragraph "e".*

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 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 exercises jurisdiction to make a decision. (Al-Mehdawi V Secretary Of State For The Home Department [1990] ac 876)."

Costs;

303. In **Party of Independent Candidates of Kenya Versus Mutula Kilonzo A 2 Others HC EP No. 6 Of 2013**, the court stated as follows on the issue of costs:

"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion but this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so. "

304. The Applicants shall bear the cost of the suit.

Determination:

305. The court is of the view that the Applicants have not proven how the Respondent acted illegally, irregularly and in a way that would amount to a procedural impropriety.

306. The suit offends order 53(2) of the Civil Procedure Rules and the Order of Certiorari cannot issue on the basis of the letter dated 15.1.24.

307. The Applicants have not made out a case that can support the other reliefs

Order:

The suit is hereby, dismissed with costs

Dated, signed and delivered at Nairobi this 5th day of March, 2026.

.....

J. CHIGITI (SC)

JUDGE