



ORARO & COMPANY
ADVOCATES

LEGAL ALERT

**RECENT DECISION UNDERSCORES NEED FOR
COURT SANCTION IN THE CARRYING OUT OF
COMMISSION'S MANDATE**

The High Court (Jairus J) has quashed the decision of the Ethics and Anti-Corruption Commission (the Commission) that purported to compel Telkom Kenya Limited (Telkom) to suspend and recall the recent sale of its property pending investigations by the Commission. In a landmark [Judgment](#), Justice Jairus held that it is only through a Court Order that the Commission may seek to recover public assets and/or prevent their further dissipation.

The Dispute

Sometime in 2018, Telkom resolved to conclude a joint venture with Airtel Networks Kenya Limited (Airtel). Telkom then received a letter from the Commission demanding that it provides various documents to assist in investigations of alleged misappropriation of public funds during the process of privatization. The Commission, however, did not give specific details of the provisions upon which it had anchored its request for information nor of the matters it was investigating as required by law. Telkom only learnt from the press, later on, that the Commission was seeking to prevent an alleged dilution of Government's stake in Telkom.

Following the alleged investigations, the Commission directed the Communication Commission of Kenya (CCK) and the Competition Authority of Kenya (CAK) to withhold their approval of the merger, thus stalling completely the joint venture between Telkom and Airtel. Further, by letter dated 26th February 2020, the Commission wrote to Telkom informing it that it

was investigating allegations of misappropriation of assets owned and disposed by Telkom before and after its privatization.

In order to facilitate the investigations, the Commission demanded that Telkom provide a list of all its properties and their value. The Commission also demanded that Telkom should recall any recent sale of its property and suspend any further sale pending the conclusion of the investigations.

Aggrieved by these demands, Telkom, through the firm of Oraro & Company Advocates, wrote to the Commission and sought to be provided with the specific details of the allegations made against it. It also clarified that the suspension of the sale would not only hurt its financial operations but also expose it to loss arising from being in breach of its obligations to third parties.

The Commission did not cede to Telkom's demand, thereby necessitating Telkom, through Oraro & Company Advocates, to institute judicial review proceedings seeking to quash the Commission's decision directing it to provide the list of properties and recall and/or suspend any recent sale of property or further sale of property.

Decision

In his Judgment, Justice Jairus began by noting the lengthy dispute between Telkom and the Commission

and narrowed down to whether the Commission had powers under the Constitution as well as statute law to demand the suspension and/or recall the sale of Telkom's assets in the manner it purported to do. The Judge proceeded by considering the Commission's mandate in undertaking its constitutional and statutory functions in the context of investigation.

Justice Jairus held that the law does not only clothe the Commission with the power to investigate but also how the investigation should be conducted in certain instances. In this regard, the Judge held that the moment Telkom, through its Advocates, questioned the legal basis of its decision, it was the Commission's responsibility to point out which particular provision of the law it relied upon in executing its investigation mandate.

The Court noted that the Commission is not known to write in vain idle letters when the Constitution and statutes have armed it with necessary mechanism to gather whatever information it required to execute its mandate. Therefore, the Judge noted, Telkom's apprehension regarding the consequences of not complying with the terms of the unlawful letter, were justified.

Turning to the crux of the matter, that is, recovery and suspension of sale of public property, the Judge agreed with submissions by George Oraro SC on behalf of Telkom, that the only known means in law by which the Commission can protect and recover public

property, is through Court action. In particular, the Judge noted that "it is only by a Court Order that any of the assets disposed of by the applicant may be recovered and it is only through the same means that the applicant may be restrained from further disposing its property."

For the abovementioned reason, the Judge held that the Commission's purported decision to recover Telkom's assets or prohibit its sale was ultra vires, illegal, irrational and tainted by procedural impropriety.

Telkom Kenya Limited was represented in this judicial review by our team led by [George Oraro SC](#), Senior Partner, assisted by [Noella Lubano](#), Partner and [Erastus Rabut](#), Associate.



Disclaimer

This alert is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact Noella Lubano (noella@oraro.co.ke), Erastus Rabut (erastus@oraro.co.ke) or your usual contact at our firm.



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