



REPUBLIC OF KENYA



**Ethics & Anti Corruption Commission v Musyoka & 9 others (Anti-Corruption and Economic Crimes Civil Suit E016 of 2022) [2024] KEHC 13560 (KLR) (Anti-Corruption and Economic Crimes) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13560 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**ANTI-CORRUPTION AND ECONOMIC CRIMES**

**ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E016 OF 2022**

**PJO OTIENO, J**

**OCTOBER 28, 2024**

**BETWEEN**

**ETHICS & ANTI CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**URBANUS WAMBUA MUSYOKA ..... 1<sup>ST</sup> DEFENDANT**

**FIONA MUTHOKI MUTISYA ..... 2<sup>ND</sup> DEFENDANT**

**ANTONY MBINDYO MUSYOKA ..... 3<sup>RD</sup> DEFENDANT**

**JOHN KIIO MAUNDU ..... 4<sup>TH</sup> DEFENDANT**

**MAGDALENE WANZA KIIO ..... 5<sup>TH</sup> DEFENDANT**

**SHARON NGINA KIOKO ..... 6<sup>TH</sup> DEFENDANT**

**WISDOM HOLDINGS LIMITED ..... 7<sup>TH</sup> DEFENDANT**

**WAFIH INTERNATIONAL LIMITED ..... 8<sup>TH</sup> DEFENDANT**

**KIKOTO GENERAL MERCHANTS LIMITED ..... 9<sup>TH</sup> DEFENDANT**

**WEMMAR ENTERPRISES LIMITED ..... 10<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Overview of the Case**

1. Whereas the Plaintiff is a body corporate created and mandated under the Ethics & Anti-Corruption Act, among others mandates, to initiate and pursue proceedings in court for the purposes of recovery or protection of public property, for freezing or confiscation of proceeds of corruption or related to



corruption, or payment of compensation or other punitive and disciplinary measures, the 1<sup>st</sup> defendant is a former County Executive Committee Member and Chairman of the Standing Tender Committee of the County Government of Machakos . the other defendants are described as family members of the first respondent and close associates.

2. The plaintiff has alleged that the 1<sup>st</sup> defendant used his position and office to award high value tenders to companies associated with him thus acquiring assets whose sources he has failed to explained.

### **The Case as Pleaded**

3. As pleaded in the Originating Summons dated 12<sup>th</sup> May, 2022, the plaintiff's case is that it received information that the 1<sup>st</sup> defendant while being an employee of the County Government of Machakos, in the capacity of County Executive Committee Member for Agriculture, Food and Cooperative Development abused his position of trust and in conflict of interest engaged in an arrangement to award high value tenders to companies associated with him. Armed with this information, the plaintiff conducted investigations and established that between January 2014 and 2021, the plaintiff did indeed award high value tenders to the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendant herein, companies which are directly associated with his wife, brother and affiliates and which awards were in contravention of sections 33 and 66 of the Public Procurement and Disposal Act 2005 and section 42 of ACECA.
4. The applicant's claim is that the high value tenders were secured by the 1<sup>st</sup> defendant and his proxies through uncompetitive tender processes which circumvented procurement laws and in return they received a total of Kshs. 457,047,214.80 during the investigation period. Upon establishing that the 1<sup>st</sup> defendant's known legitimate sources of income during the investigation period amounted to Kshs. 16,266,532.95 (net salary), the plaintiff issued the 1<sup>st</sup> defendant with a statutory notice to explain the disproportion between the assets concerned and his known legitimate sources of income. They considered the response offered by the 1<sup>st</sup> defendant and of the total assets, the 1<sup>st</sup> defendant was able to satisfactorily explain a cumulative value of Kshs. 24, 677,870.95 leaving unexplained assets worth Kshs. 91,202,892.00.
5. The 1<sup>st</sup> defendant further avers that it issued statutory notices to the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants to give details of transfers and transactions from the County Government of Machakos to their accounts as enumerated in the respective notices. All of them indicated that they introduced the 1<sup>st</sup> defendant as a signatory to their respective accounts and he did all transactions and they were therefore not aware and could not explain the transactions in the sum of Kshs 98,283,020.00 for the 7<sup>th</sup> defendant, Kshs. 128,875,450.00 for the 8<sup>th</sup> defendant and Kshs. 33, 683, 671.25 for the 9<sup>th</sup> defendant.
6. The plaintiff therefore seeks forfeiture of the 1<sup>st</sup> defendant's unexplained assets amounting to Kshs. 91,202,892.00.
7. The originating summons is supported by the affidavit of Mr. Andrew Lekamparish sworn on 12<sup>th</sup> May, 2022 in which he introduces himself as an investigator with EACC and further echoes the averments in the originating summons.
8. He added that between the year 2013 and 2015, the 1<sup>st</sup> defendant was the chairman of the defunct Machakos County Government Tender Committee.
9. In addition, he stated that the plaintiff investigated the 1<sup>st</sup> defendant's Cooperative Bank Account No. 0111600577xxxx and out of the total sum of Kshs. 23,261, 619.96 held in the account, the 1<sup>st</sup> defendant explained a sum of Kshs. 22,620,927.95 with an unexplained credit of Kshs. 740,692.90. He also maintained an Equity Bank Account No. 067019177xxxx which held a sum of Kshs. 12, 267,



328.00 out of which he was able to explain a sum of Kshs. 2,056,943.00 with an unexplained credit of Kshs. 10, 210,385.00.

10. They also investigated the source of funds for the construction of a residential house erected on Land Reference Title No. Kibauni/Kamuthwa 168 valued in a cumulative construction cost of Kshs. 80,251,815.00 and established that it constituted unexplained assets.

### **Response to the Originating Summons**

11. The originating summons is resisted by the replying affidavit of Urbanus Wambua Musyoka sworn on 27<sup>th</sup> June, 2023 in his own capacity and with the authority of the other defendants in which he concedes that the 2<sup>nd</sup> defendant is his wife, the 3<sup>rd</sup> defendant is his brother, the 4<sup>th</sup> to 6<sup>th</sup> defendants are his associates while the 7<sup>th</sup> to 10<sup>th</sup> defendants are companies he owns and others that he has close association with.
12. The 1<sup>st</sup> defendant claims that he communicated to the interim county secretary declaring a conflict of interest with the companies', subject of this suit. He contends that any dealings with the said companies were well within the law as the tenders were awarded through a competitive tender process for which he was not a participant at the time of award having declared a conflict of interest.

### **Supplementary Replying Affidavit of the 1<sup>st</sup> Defendant**

13. Urbanus Wambua Musyoka in an affidavit sworn on 24/10/2023 asserts that the filing of the instant suit whereas a similar suit with the same parties and subject matters is pending is akin to double jeopardy as the same orders are sought in HCACEC E014 of 2022. He avers that he was not present at the tender committee meetings and adduces minutes in support thereto and mentions that he declared a conflict of interest. He further states that the plaintiff requested for a valuation of property known as LR No. Kibauni/kamuthiwa/168 which valuation report he supplied with a bill of quantities and a construction report and that he does not understand why the plaintiff is now claiming monies in his bank accounts.
14. Though directions were given to the effect that parties file their respective submissions, I can only see the plaintiff's submissions on record which are as below;

### **Plaintiff's Submissions**

15. The submissions identify eight issues for determination by this court namely;
  - a. whether the 1<sup>st</sup> defendant is in possession of unexplained assets pursuant to the provisions of the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003;
  - b. whether Kes. 10,951,077.00 transacted through Cooperative Bank Account No. 0111600577xxxx and Equity Bank Account No. 067019177xxxx all in the name of the 1<sup>st</sup> defendant constitute unexplained assets within the meaning of the provisions of section 55 of the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003;
  - c. whether the residential building constructed in Machakos county on Land Reference Title No. Kibauni/Kamuthwa 168 valued in cumulative construction cost of Kes. 80,251,815.00 constitutes unexplained assets within the meaning of the provisions of section 55 of the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003;
  - d. whether the 1<sup>st</sup> defendant should be ordered by this honourable court to pay the Government of Kenya a sum of Kes. 10,951,077.00 together with interest at court rates thereon from the



date of filing this suit until payment in full being the cumulative amount received in his bank accounts in the period of interest;

- e. whether preserved funds totaling Kes. 8, 555, 658. 67 in 1<sup>st</sup> defendant's Bank Account No. 067019177xxxx and Account No. 1490379947040 held in Equity Bank Kenya Limited (together with interest) should be forfeited and surrendered to the Government of the Republic of Kenya in part settlement of the forfeiture order;
  - f. whether the defendants should be ordered by this honourable court to pay the Government of the Republic of Kenya Kes. 80, 251,815.00 being the cumulative construction costs of the residential building constructed in Machakos County on Land Reference Title No. Kibauni/Kamuthwa 168 set out in paragraph 3 hereinabove together with the residential building constructed thereon; and
  - g. who is to meet the costs of the suit.
16. Though the plaintiff identified the said issues for determination by this court, it appears, in the submissions not to address the issues individually but generally. It submits that pursuant to the provisions of sections 2 and 55 of the ACECA, section 11(1)(j) of the EACC Act, 2011 and article 252 of *the Constitution* of Kenya, 2010, it is vested with the mandate to pursue recovery of unexplained assets and cites the case of Ethics And Anti-Corruption Commission v Patrick Ochieno Abachi & 6 others [2021] eKLR where the court observed as follows;

“There is no dispute that the ‘Commission’ vested with the mandate to pursue recovery of unexplained assets under section 55(2) of ACECA is the plaintiff. Section 11(1)(j) of the EACC Act provides that:

“In addition to the functions of the Commission under Article 252 and Chapter Six of *the Constitution*, the Commission shall... institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.”

The plaintiff is also empowered under Article 252 of *the Constitution* to “conduct investigations on its own initiative or on a complaint made by a member of the public.” It is also mandated, in accordance with the provisions of the Convention against Corruption (UNCAC) which is applicable to Kenya in accordance with Article 2(6) of *the Constitution*, to institute these proceedings as consistent with the United Nations Convention against Corruption which Kenya signed and ratified on 9th December 2003.

The Convention allows for the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with the Convention. “Confiscation”, which includes forfeiture where applicable, is taken to mean permanent deprivation of property by order of a court or other competent authority under Article 2(g).”

17. On whether the cash deposits and the residential house erected in the 1<sup>st</sup> defendant's rural home amounted to unexplained assets, the plaintiff submits that it has met the threshold and/or conditions for grant of orders of forfeiture as set out in the case of Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR where the court observed as follows;

“64. In our considered view, a reading of Section 2 and 55 (2) of the Act establishes the threshold for existence of unexplained assets to be:



- i. There must be set time period for the investigation of a person;
- ii. The person must be reasonably suspected of corruption or economic crime;
- iii. The person must have assets whose value is disproportionate to his known sources of income at or around the period of investigation and
- iv. There is no satisfactory explanation for the disproportionate asset.”

18. The plaintiff re-cites the court to the case of Ethics and Anti-Corruption Commission v Patrick Ochieno Abachi & 6 others [supra] on the incidence and standard of proof where the court observed as follows;

“Thus, the jurisprudence from our courts is that the plaintiff, in seeking to recover unexplained assets, is not required to prove corrupt acts on the part of the public servant concerned. All that is required is for the plaintiff to show, on a balance of probabilities, that the defendant in a matter has acquired assets which are not commensurate with his known legitimate source of income. Once that is done to the satisfaction of the court, the burden shifts to the defendant to explain the source of the assets at issue.”

19. The plaintiff submits that its basis of suspicion is that between January 2014 and July 2021 during which period the 1<sup>st</sup> defendant was serving as the chairman of the County Tender Committee, he awarded tenders to the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants in which he was the beneficial owner. The plaintiff further contends that the 1<sup>st</sup> defendant was introduced as the mandatory sole signatory of the 7<sup>th</sup> to 10<sup>th</sup> defendant companies’ bank accounts thereby making him the ultimate beneficiary of any proceeds accruing from the companies’ transactions. They claim that the 1<sup>st</sup> defendant signed notification of award/acceptance letters and other documents relating to the 7<sup>th</sup> to 10<sup>th</sup> defendants in his capacity as the Chairman, Machakos County Government Tender Committee.
20. The plaintiff goes ahead to point out that these proceedings are for the recovery of unexplained assets from the 1<sup>st</sup> defendant and they are therefore not required to prove that the 1<sup>st</sup> defendant, a public officer, committed an act of corruption. The plaintiff asserts that their investigations revealed that the 1<sup>st</sup> defendant had cumulative assets amounting to Kes. 128,430,762.95 acquired during the investigation period from salaries and allowances amounting to Kes. 22,620,927.05 and this prompted the plaintiff to issue a notice to the 1<sup>st</sup> defendant on 13/10/2021 under section 26 of the ACECA seeking an explanation on how the assets were accumulated.
21. On the bank deposits, it is asserted that the 1<sup>st</sup> defendant satisfactorily explained bank deposits of up to Kes. 37,227,871.90 but not Kes. 10,951,077.00 for lack of supporting documents. It is further asserted that the defendant did not attempt to explain the source of funds for the residential building but instead provided a valuation report that valued the property at Kes. 37,864, 599/-. The plaintiff adds that having served the 1<sup>st</sup> defendant with the notice; the burden of proof shifted to the 1<sup>st</sup> defendant to tender credible explanation on the source of Kes. 91,202,892, which they argue he failed to discharge.
22. On the existence of two suits involving the same parties and the same subject matter that is, this suit and ACEC Suit No. E014 of 2022, the plaintiff asserts that the latter suit is a civil recovery suit for proceeds of crime while the present suit is for forfeiture of unexplained assets. It is argued that forfeiture of unexplained assets is substantially different and a separate claim from a civil recovery of public funds.



The case of ACEC Suit No. E046 of 2022; EACC v David Kinyae Isika & another is cited for that distinction.

### Submissions by the respondent

23. By the submissions dated the 16.10.2024 the respondent admits having been a public officer, as defined by law, at the material time, as pleaded by the plaintiff. The findings by the plaintiff upon investigations were acknowledged together with the issuance of a statutory notice to which response was made. The response was partly accepted and partly rejected by the plaintiff. It was however contended that in his tenure as the Chairman of Machakos County Tender Committee, he not only declared conflict of interests but also excused himself from meeting as shown by minutes and the letter declaring conflict of interests.
24. He also admitted having constructed the building upon Kibauni/Kamuthwa/168 but asserted that the accurate value is the market price value of is 37 million and not the value of construction as assigned by the quantity surveyor appointed by the plaintiff. The value assigned by the plaintiff is termed as wildly overreaching and colossal.
25. The submissions identified two substantive issues for determination as; whether the defendant is in possession of unexplained assets and Whether the defendant gave a cogent explanation as to the source of the money and assets in issue.
26. It is submitted that the relevant law applicable is to be found the Constitution, article 79 and 248 and Statutes among them; *Anti-corruption and Economic Crimes Act* (ACECA), *Ethics and Anti-Corruption Commission Act* (EACCA) and judicial precedents from both within and outside our jurisdiction.
27. The definitions of unexplained asset and abuse of office under section 2 and 46 of ACECA are highlighted while sections 11 and 55 of the same Act were acknowledged to mandate the plaintiff to seek recovery of unexplained assets after affording to the subject a reasonable opportunity to offer an explanation.
28. In applying the law to the facts of the case, it is submitted that the plaintiff ought to have proved that the defendant committed a crime under ACECA which obligation it failed to discharge. To the contrary, when called upon to offer an explanation, the 1<sup>st</sup> defendant discharged that burden by exhibiting minutes and a letter of recusal thus leaving the plaintiffs assertions to fall in the realm of conjecture.
29. The decision in STANLEY MOMBO AMBUTI v KENYA ANTI-CORRUPTION COMMISSION [2019] eKLR was cited for the proposition that Kenyan concept of “unexplained assets” is akin to “Unexplained Wealth Order” (UWO) under the United Kingdom Proceeds of Crime Act 2002 (“POCA”) which defines an unexplained wealth order to be an order requiring the respondent to provide a statement explaining the nature and extent of interest in the property, how he obtained it and the costs thereof and generally setting out such information in connection with the property as may be specified in the order. A court decision National Crime Agency -v- Mrs. A [2018] EWHC 2534, was cited to show that an applicant must demonstrate reasonable grounds for suspecting that the known sources of an individual’s lawfully obtained income would have been insufficient for the purpose of enabling the individual to obtain the property. The court in that decision observed that one of the critical factors to be taken in account is the “income requirement” and an individual required to explain source of wealth should lead sufficient evidence to defeat any “reasonable grounds for suspicion”. Based on the applicable law, the defendant aver that the plaintiff has failed to prove that the targeted assets are either proceeds of crime or unexplained asset because the suspicion was displaced by the explanation offered.



30. For local jurisprudence, the decision of the Court of Appeal in Stanley Mombo Amuti v Kenya Anti-Corruption Commission (*supra*) was cited for the stand point that an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset and that the cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. The same decision was relied on the incidence of burden of proof.
31. On whether there had been a cogent explanation by the defendant on the sources of the income, the defendant reiterates that the explanation given was cogent leaving no reasonable suspicion to be entertained.
32. There was there the issue of parallel proceedings being this cause and HCACEC E014/2022, which the defendant contends does not auger well for the just and fair administration of justice. To score his point, the defendant cited to court the decision in Republic V Commission on The Administration of Justice & Another Ex Parte Samson Kegengo Ongeru [2015] Eklr where the court barred the 1st Respondent from investigating matters which are the subject of Court proceedings in order to avoid possibility of its findings running contrary to court decisions. The decision in Azzuri Ltd V George Kadenge Ziro & 5 Others [2017] Eklr was also cited in which the National Land Commission could not proceed to hear and determine a matter that was pending before the court as that would of necessity offend the sub-judice rule within the meaning of Section 6 of the Civil Procedure Rules with the court holding that the proceedings before the Commission would amount to nothing but affront on the powers granted to court under Article 162 of *the constitution*. The defendant thus took the position that to allow the two matters proceed at the same time would be untidy and unjust.
33. On costs, it was urged that the court applies section 27 of the *Civil Procedure Act*, and award to the defendant the costs after dismissing the suit.

### **Issues, Analysis and Determination**

34. The court has studied the Originating Summons, the response thereto and the written submissions by the parties as ably highlighted by counsel and it discerns the issues that arise for its determination to be whether the plaintiff has demonstrated on a balance of probabilities that the 1<sup>st</sup> defendant has unexplained assets, and if yes, whether such assets ought to be forfeited to the state.
35. The foundation of forfeiture proceedings of unexplained assets as defined in section 2 of ACEA is one, having assets which are disproportionate to a person's known source of income and failure by an individual to explain satisfactorily the source of the assets and two, acquisition of the assets at or around the time the person was reasonably suspected of corruption or economic crime.
36. The plaintiff's case was that it received information that the 1<sup>st</sup> defendant, a public officer having joined the County Government of Machakos on 17/4/2013 as an agricultural specialist and rising through the ranks to the position of a County Executive Committee Member for agriculture, food security and cooperative development had abused his position of trust and in conflict of interest engaged in an arrangement to award high value tenders to companies associated with him during his tenure as the chairman of the county tender committee, County Government of Machakos. The 1<sup>st</sup> defendant tendered minutes and a letter to the effect that he did not participate in meetings leading to the award of the tenders to companies associated with him and that he communicated a possible conflict of interest.
37. The decision to investigate unexplained assets is centered on reasonable suspicion of acquiring property through corrupt means.



38. Black's Law Dictionary 9<sup>th</sup> Edition at page 1585 defines reasonable suspicion as:
- “A particularized or objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity.”
39. The term reasonable suspicion was further explained in the case of Emmanuel Suipanu Siyanga v Republic Criminal Appeal 124 of 2009 [2013] eKLR where the court stated that;
- “...and it follows that the factual basis which would make any suspicion which is actually formed a reasonable one must also exist at the material time: a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation.”
40. Though the above definitions have been centered on criminal proceedings, the definition of what amounts to reasonable suspicion cuts across all manner of offences/charges and can therefore be applied in the subject instance.
41. I have looked at the Notification of Awards issued to the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants on diverse tenders and they have all been signed off by the 1<sup>st</sup> defendant in his capacity as the chairman, Machakos County Government Tender Committee. With the 1<sup>st</sup> defendant having admitted that the companies are ultimately owned by him and the fact that the 1<sup>st</sup> defendant's companies were awarded tenders only and specifically during his tenure in itself raises reasonable suspicion, that he had a hand, using his office, to have the tenders so awarded.
42. Following its suspicion that the 1<sup>st</sup> defendant acquired assets through corrupt means, the plaintiff wrote to the defendant to explain his wealth to which request the 1<sup>st</sup> defendant tendered explanation on how he acquired his wealth. The plaintiff further requested for an explanation on the cash at bank and the source of funds for the residential building constructed in Machakos County on Land Reference Title No. Kibauni/Kamuthwa 168. From the record, the court notes that the 1<sup>st</sup> defendant attempted an explanation on the cash at bank but wholly failed to explain the source of funds for the construction of the residential building.
43. Section 55(3) of ACECA provides that proceedings under the Act are of a civil nature where the standard of proof is on balance of probability. This provision was elucidated by the court of appeal in the case of Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR where it was held that;
- “78. The concept of “unexplained assets” and its forfeiture under Sections 26 and 55 (2) of ACECA is neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. Sections 26 and 55 of ACECA are non-conviction based civil forfeiture provisions. The Sections are activated as an action in rem against the property itself. The Sections require the Anti-Corruption Commission to prove on balance of probability that an individual has assets disproportionate to his/her legitimately known sources of income. Section 55 (2) of the Act make provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it. Section 55 (2) of ACECA is in sync with Section 112



of the Evidence Act, Cap 80 of the Laws of Kenya. Section 112 of the Evidence Act, (Cap 80 of the Laws of Kenya) provides:

“In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him.”

79. Under Section 55 (2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset.”
44. The evidentiary burden is therefore cast upon the 1<sup>st</sup> defendant to explain origin of his assets in every litigation for forfeiture under the Act.
45. It was the testimony of Mr. Andre Lekamparish that he wrote to the 1<sup>st</sup> defendant and companies associated with him to explain the source of the bank deposits in two bank accounts accumulating to a sum of Kshs. 48,178,947.95 and Kshs. 80,251,815/ and the construction costs of the residential building. He stated that the 1<sup>st</sup> defendant was only able to account for a sum of Kshs. 14, 606,943/. This witness took the stand on cross examination and the 1<sup>st</sup> defendant’s advocate, MS Wandugi, interrogated the witness but nothing was raised about the findings of the plaintiff on the wealth accumulated by the 1<sup>st</sup> defendant during the investigation period. The reasonable suspicion established by the plaintiff was not shaken.
46. The court has anxiously considered the explanation offered by the 1<sup>st</sup> defendant and noted that it was neither plausible nor satisfactory to court on the sources of funds and how the assets were acquired. The court is therefore satisfied on a balance of probabilities that from the bank deposits, the 1<sup>st</sup> defendant failed to explain the source of a sum of Kshs. 10,951,077.00.
47. Interestingly, the 1<sup>st</sup> defendant appears to not to address the unexplained cash at bank upon a close reading of his replying affidavit, supplementary replying affidavit as well as from the cross examination of Mr. Andrew Lekamparish.
48. On the issue of the residential building, the plaintiff asserts it to be constructed in Machakos county on Land Reference Title No. Kibauni/Kamuthwa 168. The 1<sup>st</sup> defendant disputes that fact and asserts that the building is erected on No. 167 but without any document to that effect. The court finds that the building is erected upon Plot No. 168 as demonstrated by the certificate of official search exhibited. To court, the acquisition of the land has not been questioned as no document has been exhibited to demonstrate that the land was acquired around the time material to this case. What is questioned and that which matters for this determination is the sources of funds used in the construction. It is noted that no explanation satisfactory explanation has been offered by the 1<sup>st</sup> defendant. The court thus holds that the construction was financed by unexplained funds.
49. The next question is what is the value of the unexplained funds. Whereas the 1<sup>st</sup> defendant exhibited a valuation report that assessed the market value of the property in the sum of Kshs. 37,864, 599/, the plaintiff on the other hand adduced a report valuing the property at cumulative construction cost of Kes. 80,251,815.00.
50. For one to be said to ‘return’ that which he illicitly took from the public, it is only logical that the use to which the illicit asset was put to be established. That ties well with the principle of asset recovery that nobody should be allowed to retain an illicitly acquired asset. To the court valuation to establish value is many a times abstract and based on comparable property recently sold in the vicinity while that



based on cost of construction is more objective for being based on the industry's established cost per relevant unit. From that appreciation, the court finds it fair and just that the value of the property be assessed based on the cost incurred in setting up the building up to its current state as proposed by the plaintiff in the sum of Kes. 80,251,815.00.

51. Moreover, in this matter, the land has not been pursued as tainted hence it is important to establish the cost of construction of the building away from the land itself.
52. The plaintiff makes a mention of two motor vehicles in the orders sought but a look at the investigations carried out itself presents no evidence that disclose the asset as unexplained. For that reason, the court has no material to find that the motor vehicles are unexplained assets.
53. On the issue of sub-judice, the parties have annexed the pleadings in ACEC Suit No. E014 of 2022 for interrogation by the court and the same reveal that the target is to recover was allegedly illegally received from public coffers and preserved property pursuant to ACEC MISC.E015 of 2021. The court discerns that the statute creates two distinct causes of action available to the plaintiff; civil recovery of proceeds of crime and forfeiture of unexplained asset. On that appreciation the court deems ACEC Suit No. E014 of 2022, as a civil recovery suit for proceeds of crime while the present suit is for forfeiture of unexplained assets. The two causes are distinct and targets distinct assets even when commingled. For this finding, I am persuaded by the decision by E Maina j, in ACEC Suit No. E046 of 2022; EACC v David Kinyae Isika & another (Unreported) that the two causes of action are substantially and distinctively different and the principle of res sub judice has not been infringed.
54. Accordingly, and flowing from the reasons and conclusion drwn as foregoing, the court orders that;
  - a. Kshs. 740,692.90 transacted through Cooperative Bank Account No. 0111600577xxxx and Kshs. 10,210,385.00 transacted through Equity Bank Account No. 067019177xxxx all in the name of the 1<sup>st</sup> defendant constitute unexplained assets within the meaning of the provisions of section 55 of the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003.
  - b. Being declared 'unexplained assets', within the meaning of sections 2 and 55 of the *Anti-Corruption and Economic Crimes Act*, it is ordered forfeited to the Government of the Republic of Kenya.
  - c. Residential building constructed and standing on parcel No. Kibauni/Kamuthwa 168, within Machakos County, valued to have been constructed at the cost of Kes. 80,251,815.00 constitutes unexplained assets.
  - d. However, because the land on which the building stands has not been proved to constitute unexplained asset, the court enter judgment for the plaintiff in the sum of Kshs 80,251,815.00, with interest thereon at court rates from the date of judgment till payment in full.
  - e. The plaintiff is awarded costs and interests of the suit as against the 1<sup>st</sup> defendant, as the only person whose property has been ordered forfeited.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2024**

**PATRICK J O OTIENO**

**JUDGE**

