



**Ethics and Anticorruption Commission v Omondi & 3 others (Anti-Corruption and Economic Crimes Civil Suit E016 of 2024) [2024] KEHC 16811 (KLR) (Anti-Corruption and Economic Crimes) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16811 (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 2024  
BM MUSYOKI, J  
NOVEMBER 29, 2024**

**BETWEEN**

**ETHICS AND ANTICORRUPTION COMMISSION ..... APPLICANT**

**AND**

**JAMES AMBUSO OMONDI ..... 1<sup>ST</sup> RESPONDENT**

**JANEROSE SANDE OMONDI ..... 2<sup>ND</sup> RESPONDENT**

**JAMES AMBUSO OMONDI & JANEROSE SANDE OMONDI T/A NGIMA  
MEDICARE AND LABORATORY SUPPLIES ..... 3<sup>RD</sup> RESPONDENT**

**JAMES AMBUSO OMONDI & JANEROSE SANDE OMONDI T/A ASKAVILLE  
MEADOWS ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to two applications. The first dated 10<sup>th</sup> June 2024 which is supported by affidavit of Evans Rono sworn on the same date sought is by the plaintiff and it seeks the following orders:
  1. Spent.
  2. Spent.
  3. That pending the hearing and determination of this suit, this honourable court be pleased to grant an order of injunction restraining the Respondents, their respective agents, servants or any other persons from transferring, disposing, wasting and/or in any other way dealing with the parcels of land known as;



1.Kisumu/Buoye/1523
2.Kisumu/Buoye/5295
3.Kisumu/Buoye/915
4.Kisumu/Buoye/5299
5.Kisumu/Korando/4054
6.Kajiado/Kaputei North/8889
7.Kajiado/Kitengela/19151
8.Kajiado/Kitengela/19155
9.Kajiado/Kitengela/19169
10.Kajiado/Kitengela/19197
11.Kisumu/Kochieng/4203
12.Kisumu/Kochieng/4202
13.Kisumu/Sidho East/2945
14.Kisumu/Sidho East/2206
15.Kisumu/Kochieng/4080
16.Kwale/Mahuruni/565
17.Kajiado/Loodariak/8268
18.Kajiado/Loodariak/8269
19.Kajiado/Loodariak/8270

4. That this Honourable Court be pleased to issue any other or further orders it deems fit and just so as to preserve the suit property pending the determination of this suit.
  5. That the costs of this Application be provided for.
2. On 11-06-2024, my brother Honourable Justice Professor Sifuna issued interim orders of injunction and later on 25-06-2024 the matter was mentioned before Honourable Justice Esther Maina on which date it was deferred to 2-07-2024. The respondents were duly served with the application but instead of responding to the same, they filed the 2<sup>nd</sup> application dated 2-07-2024 which sought court orders for;
- a. The application be heard on priority to the hearing of the main suit in ACEC E016 of 2024.



- b. Setting aside and vacating the ex-parte orders granted in this matter and extended on 1<sup>st</sup> July 2024.
  - c. Striking out these proceedings as sub judice James Ambuso Omondi v EACC & Others - HCEACPET/E001/2024.
3. When the parties appeared before Honourable Lady Justice Esther Maina on 10-07-2024, the Honourable Judge ordered that the two applications shall be heard together by way of written submissions and gave directions on filing and service of the submissions and reserved the matter for further mention on 31-07-2024. Come on 31-07-2024, the parties had filed their submissions but the advocate for the defendants asked that the matter be heard by a different Judge since the honourable Judge had heard an appeal touching on the same issues. The Judge granted the request and placed this file before me for disposal. The directions on the hearing and filing of submissions as given on 10-07-2024 remained the same.
  4. I have gone through the court record and it is clear to me that the defendants did not file a replying affidavit or other response to the notice of motion dated 10-06-2024 other than its notice of preliminary objection dated 29<sup>th</sup> June 2024 and submissions. Going by submissions filed by the defendants, their response to the plaintiff's notice of motion was the said preliminary objection. The plaintiff responded to the defendant's application through an affidavit sworn on 9<sup>th</sup> July 2024 by one Evans Rono.
  5. I think the best approach to take in disposal of these two applications is to determine the preliminary objection and application dated 2<sup>nd</sup> July 2024 first because the same are based on the same grounds and if this court were to find that they have merits, it will down its tools and the application by the plaintiff would fall on the way side.
  6. One of the grounds of the defendants' preliminary objection and application is that this matter is sub judice this court's constitutional petition number E001 of 2024; James Ambuso v State Law and Ethics and Anti-Corruption Commission & Others which was set for judgement on 18<sup>th</sup> July 2024. In its reply to this averment, the plaintiff has confirmed that the petition was then pending but argued that the parties in the petition were materially different from this suit and also that the substratum of the petition was different from the subject matter of this suit.
  7. The plaintiff averred that the remedies sought in the petition were in respect of violation of the 1<sup>st</sup> defendant's constitutional rights while this suit was for seizure and forfeiture of unexplained assets under Section 11(1) (j) of the *Ethics and Anti-Corruption Commission Act*. In my assessment, the two matters are distinct in terms of remedies sought and the cause of action although it may appear that the two had the landed properties as one of the items of litigation. For instance, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents could not have cause of action in the constitutional petition while the issue of violation of constitutional rights has no place in this suit. Faced with the same situation in *Kidero v Ethics & Anti-Corruption Commission & 13 Others (2023) KECA 62 (KLR)* the Court of Appeal held that;

‘The boundary between the constitutional petition and the civil suit is not blurred. The two suits stand on different thresholds. There is no danger or prejudice of conflicting decisions nor has it been demonstrated that the outcome of the civil suit will have a bearing on the petition. Civil proceedings, as distinguished from constitutional petition, are adjudicated and conducted by adopting different yardsticks. In a constitutional petition, the onus is to cite constitutional provisions alleged to have been violated and to prove the alleged infringement (See Anarita Karimi case). In the civil suit, the threshold is to prove the property sought to be recovered is public property and or proceeds of corruption. The two processes can exist concurrently and independent of each other. The outcome of one cannot



injure the other. It has not been claimed that the applicant will not be afforded a fair trial in the petition.’

8. I noted from the pleadings and submissions that judgement in petition was to come for judgement on 18-07-2024 which made me resort to the records of the same. I have since established through perusal of the said court record that the judgement was delivered on 26-07-2024 where the petition was dismissed but the court ordered that the plaintiff herein should complete investigations in six months which order seems to have been overtaken by events since the investigations seem to have been completed resulting to filing of this suit on 11-06-2024. That having been done, I think the issue of sub judice does not arise. That rule is applicable where there is a similar case pending and, in such cases, the remedy provided in law specifically Section 6 of the *Civil Procedure Act* is to stay the latter suit and not striking it out. After the latter suit is determined the principle of sub judice mutates to that of Res Judicata. So, even if I were to find that the suit herein is sub judice the said petition, the 3<sup>rd</sup> prayer of the defendants’ application would not be applicable.
9. In their submissions, the defendants have maintained that the suit is sub judice and the interim orders should be set aside for reasons that the plaintiff did not disclose material facts that the subject matter of the suit was the same subject matter in the petition. I do not see how even disclosure of the petition would have been material in this matter. The main complaint by the 1<sup>st</sup> defendant in the said petition was that the plaintiff herein had violated his constitutional rights by the way they were conducting investigations. The issue of accounting for the wealth and assets the 1<sup>st</sup> defendant had acquired which is the main issue in this suit was not subject of the petition. There were no subsisting orders in the petition which the plaintiff could be accused of withholding.
10. The other non-disclosure alleged by the defendants is in respect of existence of a criminal case and a pending appeal in the Court of Appeal. I do not think that I need to take time with this issue. The plaintiff had indeed stated at length the process and status of investigations in the supporting affidavit including conviction of the 1<sup>st</sup> defendant. This can be seen at paragraph 6 and 7 of the supporting affidavit dated 10-06-2024. I don’t think that there was in the circumstances material non-disclosure as alleged by the defendants.
11. Be that as it may, since the two applications are being heard together, I do not see any reasons to dwell on the prayer for vacating the interim orders. This is because, if I find no merit in the application dated 10-06-2024 the interim orders in place would automatically lapse. In that regard, this court finds that determination of the plaintiff’s application on merit would deal with the remaining issues raised in the preliminary objection and the defendants’ application dated 2-07-2024. In the circumstances, the defendants’ application dated 2-07-2024 and the preliminary objection sated 29<sup>th</sup> June 2024 are hereby disallowed with no orders as to costs.
12. I now turn to the plaintiff’s application for injunction. The defendants have not filed any affidavit in response to the plaintiff’s said application. In essence, the application has not been substantially answered but the plaintiff is still under obligation and has the burden to satisfy this court that it meets the threshold for granting of a temporary injunction. The conditions the plaintiff is required to meet in order to get the orders of injunction it is asking for are three-fold. First, it must establish that it has a prima facie case with a probability of success. Secondly, the plaintiff should also show that damages will not be adequate to compensate it for the injury it is likely to suffer in the event the application is not granted. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience. These are the established principles for an application for injunction and this case is no different.
13. It has been averred that the 1<sup>st</sup> respondent was working as a Finance and Administration Manager in Water Resources Management Authority which is a public body between 1<sup>st</sup> July 2011 and 31<sup>st</sup>



December 2016. The plaintiff states that it received information of corrupt practices perpetrated by the 1<sup>st</sup> defendant and embarked on investigations as part of its statutory functions. Upon investigations, the reports were found substantiated. The investigations led to the charging of the 1<sup>st</sup> defendant with corruption related offences in the Chief Magistrates Anti-Corruption Court vide anti-corruption case number 5 of 2019. The 1<sup>st</sup> defendant was found guilty on four counts and sentenced to a fine of Kshs 7.4 million which he paid.

14. The 1<sup>st</sup> respondent has not denied this claim. He has in fact in his application for setting aside interim orders herein stated that he appealed this decision which was upheld by this court subsequent to which he has filed an appeal which is pending in the Court of Appeal. Although it has not expressly been said so by the parties, the appeal referred to here must be that which the Honourable Justice Esther Maina was alerted of having handled culminating to her referring this matter to this court on 31-07-2024.
15. According to the plaintiff, the 1<sup>st</sup> respondent and his wife, the 2<sup>nd</sup> respondent have amassed wealth which is not commensurate with their known legitimate sources of income. The defendants were given requisite notices to explain their wealth which they have been unable to satisfactorily do. According to the plaintiff, after taking into account the defendants' known legitimate sources of income, there is an unexplained sum of Kshs 112,267,914.45. The plaintiff claims that the landed properties the plaintiff wants restrained were acquired using the unexplained money or money suspected to have been acquired corruptly. The proprieties are shown to have been acquired between 5-01-2012 and 8-04-2014 which period the 1<sup>st</sup> defendant was working with the Water Resources Management Authority.
16. When faced with such allegations, it is upon the defendants to explain their wealth failure two which the same becomes liable for forfeiture to the government. I have stated that the defendants have not filed a replying affidavit and there is no attempt to explain their wealth as required by law. The averment that the landed properties were acquired through corrupt practices have not been challenged in any way. In my judgment, the above establishes a prima facie case with a probability of success. Prima facie case was in *Mrao Ltd v First American Bank of Kenya & 2 Others (2003) KECA (KLR)* defined thus;

‘In civil cases, it is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.’
17. Having analysed the evidence before this court, I am convinced that the plaintiff has established an infringement of rights of the public which the plaintiff serves. The plaintiff has a statutory duty to recover the suspected proceeds of corruption from the defendants. In the circumstances, this court is therefore justified to find that the plaintiff has established a prima facie case with a probability of success.
18. The second limb is irreparable damages. The plaintiff is claiming a total of 19 properties whose cumulative value is given as Kshs 21,660,000.00. The 1<sup>st</sup> defendant has been convicted of charges said to be related to the acquisition of the said properties by corrupt ways. His appeal to this court has been dismissed. The defendants have failed to make any presentation of how they acquired the properties. The defendants have also not made any effort to show that they will be able to compensate the plaintiff on behalf of the government in the event the properties are alienated before the determination of the suit. The properties are sought to be preserved in the greater interest of the public.
19. In cases of this nature, if given a chance, culprits tend to make the subject matter go out of the reach of the public or the relevant authorities. There is likelihood that the respondents will be enticed to keep the properties away from forfeiture. If they are disposed of before the matter is concluded and this court finds in favour of the plaintiff, it would require use of more public funds and resources to



trace them which in my opinion would be against the constitutional dictate that public funds should be used prudently. It is my finding therefore, that these properties which are liable to forfeiture to the government should be preserved as the defendants may not be able to pay the value of the properties in the event they are disposed of before the conclusion of this suit.

20. In view the above, I hold that the plaintiff has satisfied the requisite first two conditions which entitles it to the orders sought. Even if I were to consider the application on a balance of conveniences, it is my considered position that the scale would still tilt to the advantage of the plaintiff. What is being sought is preservation of the properties in form of an injunction. The defendants are still free to use and occupy the properties. The scale therefore dictates that the status quo on the properties be maintained pending hearing and determination of the suit.
21. Consequently, I find merit in the application dated 10-06-2024 and the same is allowed in the following terms;
  1. The defendants, their respective agents, servants or any other person acting on their behalf are restrained from transferring, disposing, wasting and/or in any other way dealing with parcels of land known as Kisumu/Buoye/1523, Kisumu/Buoye/5295, Kisumu/Buoye/915, Kisumu/Buoye/5299, Kisumu/Korando/4054, Kajiado/Kaputiei North/8889, Kisumu/Kitengela/19151, Kajiado/Kitengela/19155, Kajiado/Kitengela/19169, Kajiado/Kitengela/19197, Kisumu/Kochieng/4203, Kisumu/Kochieng/4202, Kisumu/Sidho East/2945, Kisumu/Sidho East/2206, Kisumu/Kochieng/4080, Kwale/Mahuruni/565, Kajiado/Loodariak/8268, Kajiado/Loodariak/8269 and Kajiado/Loodariak/8270 until hearing and determination of this suit.
  2. For clarity, the above order does not restrain the defendants from using and occupying the named properties but they shall not interfere with the properties' status, conditions and title.
  3. The costs of the application shall be in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Miss Wairimu Kamau for the plaintiff and Mr. Ochiel Duddley for the defendants.

