



Ethics & Anti-Corruption Commission v Danstar Holdings Limited & another (Miscellaneous Civil Application E012 of 2022) [2023] KEELC 16524 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16524 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
MISCELLANEOUS CIVIL APPLICATION E012 OF 2022**

AK BOR, J

MARCH 22, 2023

**IN THE MATTER OF: THE ANTI-CORRUPTION
AND ECONOMIC CRIMES ACT NO. 3 OF 2003;**

AND

**IN THE MATTER OF: AN APPLICATION BY THE ETHICS AND ANTI-CORRUPTION
COMMISSION FOR AN ORDER UNDER SECTION 56(1) OF THE ANTI-CORRUPTION
AND ECONOMIC CRIMES ACT NO. 3 OF 2003 TO PROHIBIT DEALINGS WITH THE
PARCELS OF LAND KNOWN AS NANYUKI MUNICIPALITY BLOCK 12/129, 130 & 183**

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION APPLICANT

AND

DANSTAR HOLDINGS LIMITED 1ST RESPONDENT

DUNCAN MWENDA JACKSON 2ND RESPONDENT

RULING

1. This court issued a prohibitory order on December 19, 2022 restraining dealings with the parcels of land known as Nanyuki Municipality/ Block 12/129, 130 and 183 for six months pending conclusion of the investigations which the Ethics and Anti-Corruption Commission (EACC) was carrying out into the propriety of the acquisition of those parcels of land. The court granted the orders based on the Originating Motion dated December 16, 2022 which EACC filed in court on the same day.
2. The Respondents brought the application dated January 16, 2023 seeking to strike out or dismiss the suit and to have all the orders emanating from the suit discharged for want of jurisdiction. The application was primarily premised on the ground that Section 56 of the *Anti-Corruption and Economic Crimes Act* (ACECA) solely empowered the High Court to consider applications by the Applicant and issue the appropriate preservative orders. The Respondents contended that the



- Environment and Land Court (ELC) lacked the jurisdiction to grant the orders it gave because the dispute did not relate to the use and occupation of, or title to land but rather it related to investigations and implementation of powers of EACC under ACECA. They urged that the failure by the Applicant to institute the suit in the correct forum was fatal to the suit and that it ought to be struck out.
3. The application was supported by the affidavit sworn by the 2nd Respondent who deponed that the power to issue a prohibitory order under Section 56 of ACECA vested in the High Court and not the ELC. He urged that he would continue to suffer prejudice if the orders this court issued were not discharged.
 4. Simeon Lei, an employee of EACC, swore the Replying Affidavit in opposition to that application. He averred that the orders sought to be vacated related to the right to use, occupy and or title to land. Further, that Section 56 of ACECA should be construed with the necessary alterations in order to conform with the Constitution in light of Article 262 of the Constitution. He added that the investigations which EACC was undertaking were not an end in itself but that the ultimate intention was for EACC to recover the suit land if it established that the land constitutes grabbed public land. He contended that the Respondents had failed to discharge the duty imposed by Section 56 (4) of ACECA in relation to variation or setting aside of the impugned order.
 5. The 2nd Respondent swore the Supplementary affidavit in support of the application in which he reiterated the contention that this court lacked jurisdiction to hear this matter because it did neither related to the environment nor the use or occupation of and title to land.
 6. The court directed parties to file and exchange written submissions on that application. The Respondents submitted that a court's jurisdiction flowed from the Constitution and statute or both and that where a court is without jurisdiction, it should down its tools. They argued that Section 56 of ACECA clothed the High Court with the jurisdiction to issue the orders contemplated by that Section whether it was for moveable or immoveable property. They relied on Beryl Akinyi Muganda v Ethics & Anti-Corruption Commission [2012] eKLR where Fred Oching J (as he then was) clarified that if EACC wished to have the contents of the account preserved it should have sought orders from the High court.
 7. The Respondents argued that ELC's jurisdiction was limited by Article 162 (2) (b) of the Constitution and Section 13 of the ELC Act to determining disputes relating to the environment and the use and occupation of and title to land. They contended that preservation of property pending investigations by EACC did not fall within the ambit of the ELC since it does not have jurisdiction similar to that of the High Court despite being of equal status. They relied on Republic v Karisa Chengo & 2 Others [2017] eKLR where the Supreme Court stated that the three superior courts are different and autonomous courts and exercise different and distinct jurisdictions. Further, that as Article 165(5) precluded the High Court from entertaining matters reserved to the ELC and ELRC, it was to be inferred that the ELC and ELRC too could not hear matters reserved to the jurisdiction of the High Court.
 8. The Respondents maintained that despite the properties which are the subject of the investigations being land, the cause of action was the investigations by EACC and that that was what would determine the court to hear the dispute. They referred to the decision in Kenya Universities Staff Union v University Council of Masinde Muliro University of Science and Technology & 2 Others [2018] eKLR in which Odunga J(as he then was) observed that not every case in which parties were in an employer and employee relationship were to be determined by the ELRC, but that it was the cause of action which determined the court to hear the dispute. Judge Odunga gave an example of an employer lodging a complaint for theft by servant and the employee challenging his intended prosecution. That



case would fall under the jurisdiction of the High Court to determine whether the Director of Public Prosecutions was exercising his powers lawfully and fairly and not the ELRC.

9. The Respondents cautioned this court against being tempted to transfer the matter to the High Court based on the decision in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel [2016]* eKLR in which the court stated that it would be illegal for the court to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction because no competent suit existed that was capable of being transferred.
10. The Applicant submitted that by dint of Article 262(7) of the *Constitution*, reference to the High Court in Section 56 (1) of *ACECA* should be construed with the necessary alterations in order to conform with Article 162(2) (b) of the *Constitution*.
11. The Applicant relied on subsections 1(d) and (e) of Section 13 of the *ELC* Act on the jurisdiction of the ELC to determine all disputes relating to public, private and community land as well as any other dispute relating to the environment and land. The Applicant argued that from the time it was established, the ELC had issued innumerate orders for the preservation of land brought under Section 56 (1) of *ACECA* and that it could not find any decision where any preservation order issued by the ELC was vacated, varied or set aside on the ground that the court lacked jurisdiction to grant those orders.
12. The Applicant submitted that none of the cases which the Respondents relied on supported their contention that the ELC did not have power to hear and determine applications for preservation of land pending investigation, which are not an end in itself. That if the investigations were to establish that the land in question constituted public land that was wrongfully, irregularly, illegally or unlawfully alienated to the Respondents, then a suit for the recovery of the land would be instituted before the ELC and not the High Court.
13. The Applicant contended that the jurisdiction of this court cannot be limited to hearing the recovery suit only and that if this court had power to hear the impending suit for recovery by virtue of the subject matter being land, then it must also have power to hear applications related to or incidental to the suit for the recovery of land. The Applicant surmised that the issues in the authorities cited by the Respondents were general jurisdictional issues and were not specific to the issues they raise in their application.
14. The Applicant submitted that an application for the preservation of land pending investigations was a matter touching on land and that it fell squarely within the mandate of the ELC. It contended that ELC's mandate could not be taken away by the splitting of hairs or typology of cases as the Respondents were attempting to do. Further, that where the rights affected or likely to be affected touched on land, the court to hear and determine such claims was the ELC. It relied on *Kipsiwo Community Self Help Group v AG & 6 Others [2013]* eKLR where the court stated that it was the ELC which had jurisdiction to hear matters touching on the environment and land and that the manner in which such suits were commenced was immaterial because matters of land and the environment fell within the domain of the ELC.
15. The Applicant went further to submit that depending on the nature of the assets to be preserved pending conclusion of investigations, an application for preservation could be filed in the High Court if the assets sought to be preserved were movable property such as cash or shares. It thus agreed that either the ELC or the High Court had jurisdiction to grant preservation orders depending on the nature of the property sought to be preserved.



16. On the issue of the Practice Directions issued by the Honourable Chief Justice for the handling of corruption and economic crimes cases, the Applicant argued that the practice directions could not override a court's jurisdictional and statutory mandate.
17. The issue for consideration is whether the ELC has jurisdiction to hear and determine applications for preservation of land which is being investigated by EACC pursuant to Section 56 of [ACECA](#). The Applicant brought the ex parte Originating Motion dated December 16, 2022 pursuant to Section 56 of [ACECA](#) seeking an order to prohibit the Respondents from dealing with by way of sale, transfer, mortgage, development or in any other manner with the parcels of land known as Nanyuki Municipality/Block 12/129, 130 and 183 for six months pending conclusion of the investigations which the Applicant is carrying out.
18. Section 56(1) of [ACECA](#) provides that on an ex parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct. The order is to have effect for six months and may be extended by the court on application by the Commission pursuant to Section 56 (3). The court is empowered by subsection 4 to discharge or vary the order after hearing the parties if it is satisfied on a balance of probabilities that the property was not acquired through corrupt conduct.
19. [ACECA](#) does not define property. Article 260 of the [Constitution](#) offers some assistance on the meaning to be ascribed to property, as it defines property to include land or permanent fixtures on or improvements to land; goods or personal property; intellectual property; or money, choses in action or negotiable instruments.
20. [Black's Law Dictionary](#), 10th Edition defines property collectively as the rights in a valued resource such as land, chattel or an intangible. Further, that it is common to describe property as a bundle of rights which include the right to possess and use, the right to exclude, and the right to transfer. The other definition given in the dictionary is any external thing over which the rights of possession, use and enjoyment are exercised. Different categorisations of property are given in the Dictionary.
21. Property may loosely be described as any item that a person has legal title over; and can be tangible in form of houses, cash, cars or it may carry the promise of future worth such as stock and bonds. Property is seen from the aspect of the exclusive right to possess, use, enjoy and dispose of the property owned. In legal terms, property may be classified as either personal or real with personal property mainly referring to objects that can be moved while real property encompasses land and anything connected to the land.
22. Article 162(2) of the [Constitution](#) which deals with the system of courts enjoined Parliament to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of and title to land. Parliament was to determine the jurisdiction and functions of the two courts.
23. Pursuant to Article 162 (2) Parliament enacted the [ELC Act](#). The recital of the ELC Act states that it is an Act of Parliament to give effect to Article 162(2)(b) of the [Constitution](#); to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction, functions and powers, and for connected purposes. Section 4 of that Act established the ELC as a superior court of record with the status of the High Court. The court is to have and exercise jurisdiction throughout Kenya.
24. Under Section 13(1), the ELC has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) of the [Constitution](#) and with the provisions of the ELC Act or any



- other law applicable in Kenya relating to the environment and land. That is where the ELC draws its mandate from.
25. In the exercise of its jurisdiction under Article 162 (2)(b) of the Constitution, the ELC has power to hear and determine disputes relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land under Section 13(2) (d) of the ELC Act; as well as any other dispute relating to the environment and land.
 26. The ELC is empowered by Section 13(7) to make any order and grant any relief the court deems fit and just including interim or permanent preservation orders that include injunctions.
 27. From Article 162 of the Constitution it is apparent that the ELC is clothed with jurisdiction to hear and determine disputes relating to the use and occupation of land and title to land. This mandate is expanded by Section 13 of the ELC Act to incorporate disputes relating to the three categories of land and contracts, choses in action or other instruments granting enforceable interests in land. Section 13 (2) (e) extends the jurisdiction to any other dispute relating to environment and land in very broad terms.
 28. Black's Law Dictionary defines a chose in action firstly, as a proprietary right in personam such as a debt owed by another person, a share in a joint stock company or a claim for damages in tort; secondly, as the right to bring an action to recover a debt, money or thing; or thirdly, personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit. The dictionary goes further to define the term as a known legal expression used to describe all personal rights of property which can only be enforced by action and not by taking physical possession.
 29. The choses in action and other instruments granting enforceable interests in land contemplated by Section 13 of the ELC Act would therefore include claims for adverse possession of land, suits to enforce contracts for the sale of land or rights over land, claims for specific performance or for compensation or damages arising from transactions relating to land.
 30. From the definition of property, it is evident that it encompasses all the aspects of ownership, possession and unrestricted use or disposal of the property owned. The aim of Section 56 of ACECA is to restrict the exercise of rights over property such as land. Generally speaking, the property in respect of which a prohibitory order can be issued under Section 56 of ACECA includes land, motor vehicles, aircraft, ships and other vessels, books, equipment, appliances, cash in the bank or at hand, shares, treasury bills or bonds, crypto currency, precious metals such as gold, livestock, a going concern, trophies, crops or even a forest, life policies and insurance policies, funds held in the money market, works of art and other collectible valuables and of course intellectual property.
 31. ACECA came into force on 2/5/2003 prior to the promulgation of the 2010 Constitution before the ELC was established. Clause 7 of the Sixth schedule pursuant to Article 262 provides that all law in force immediately before the effective date would continue in force and should be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with the Constitution. Section 56 of ACECA has to be interpreted in light of that clause.
 32. It is apparent from a reading of the ELC Act that the court with the jurisdiction to deal with applications under Section 56 of ACECA where the property sought to be preserved is land or other rights over land is the ELC. If the property that is the subject matter of the proceedings is not land, then it would be the High Court to hear the application for preservation of such other asset under Section 56 of ACECA.
 33. The court declines to grant the orders sought in the application dated January 16, 2023. The Applicant in the original claim is awarded the costs of the application.



DELIVERED VIRTUALLY AT NANYUKI THIS 22ND DAY OF MARCH 2023.

K. BOR

JUDGE

In the presence of: -

Ms. G. Omari holding brief for Mr. B. Kyeli for the Applicant

Mr. K. Muturi and Mr. B. Mbaabu for the Respondent

Ms. Stella Gakii - Court Assistant

