



**Ethics & Anti-Corruption Commission v Ajwang & another; Ajwang & 7 others (Interested Parties) (Anti-Corruption and Economic Crimes Civil Suit E012 of 2023) [2024] KEHC 14542 (KLR) (Anti-Corruption and Economic Crimes) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14542 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E012 OF 2023  
EN MAINA, J  
NOVEMBER 22, 2024**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... APPLICANT**

**AND**

**MICHAEL AUKA AJWANG ..... 1<sup>ST</sup> RESPONDENT**

**HYDEOUT RIVIERA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SIPROSE AKINYI AJWANG ..... INTERESTED PARTY**

**BARVE OUMA AJWANG ..... INTERESTED PARTY**

**FELIX OMONDI AJWANG ..... INTERESTED PARTY**

**GEOFFREY OGUNA AJWANG ..... INTERESTED PARTY**

**MARY AGIK ..... INTERESTED PARTY**

**BRENDA AJWANG ..... INTERESTED PARTY**

**VIVIAN AMONDI AJWANG ..... INTERESTED PARTY**

**BERYL AJWANG ..... INTERESTED PARTY**

**RULING**

1. By its Notice of Motion dated 30<sup>th</sup> September 2024 the Commission/Applicant urges this court to find that the Respondents are in breach of the consent order entered between the parties on 15<sup>th</sup>



July 2024 and adopted as a judgment of this court on 16<sup>th</sup> July 2024 and replace it with a judgment against the Respondents for the sum of Kshs. 198,000,000/-, costs and interest. The said sum of Kshs. 198,000,000 is the cumulative value of the assets in issue in the consent order less the sum of Kshs.790,000/- that had already been seized by the Commission.

2. The gravamen of the application is that the Respondents have reneged on the consent by refusing to pay the sum of Kshs. 22,000,000/- as agreed in the first clause of the agreement and instead proposes to give up the parcel of land to the Commission/Applicant to dispose by way of public auction which according to the Commission/Applicant shall occasion it costs an event not in the public interest.
3. On their part, the Respondents dispute that they are in breach of the consent judgment and contend that the law dictates that the asset itself but not its value should be what is surrendered to the Government and therefore its proposal to give up the asset to the Commission/Applicant is in accordance with the law and should be upheld.
4. The application was canvassed by way of written submissions. I have carefully considered the grounds for the application, the affidavits in support and in reply, the attachments thereto, the rival submissions, the cases cited and the law.

### **Analysis and Determination**

5. The terms of the consent judgment were as follows: -

“By Consent: -

- i. Kshs.22,000,000 being cost of parcel number South Sakwa/Barkawino/6934 to be paid to the Plaintiff by the Defendants within 30 days from the date of entry of this judgment.
  - ii. Kshs.176,000,000 being cost of developments of The Hydeout Riviera Hotel, to be paid to the Plaintiff by the Defendants within 12 months from the date of this judgement.
  - iii. In default thereof, The Hydeout Riviera Hotel, measuring approximately 0.19 Ha be hived off from Parcel Number Kisumu/Reru/1454 and the Plaintiff be at liberty to execute and the decretal sum to accrue interest at 12% per annum.
  - iv. The sum of Kshs.799,000 cash seized from the Defendants be forfeited to the Plaintiff.
  - v. There be liberty to apply.
  - vi. The injunctive orders issued by this court on 1<sup>st</sup> August, 2023 be lifted.”
6. From a reading of the pleadings and the rival submissions it is apparent that what the parties are seeking is to set aside and/or vary the consent judgment. For either party to merit the judgment being set aside and/or varied, it must demonstrate: -

“circumstances as would give rise to reasons for varying or rescinding a contract between the parties such as fraud or collusion or that the agreement is contrary to the policy of the court or the consent was given without sufficient material facts or in a misapprehension or ignorance of such facts in general or for a reason which would enable the court to set aside



an agreement”. – see the case of Kenya Commercial Bank v Specialised Engineering Co. Ltd [1982] KLR 485.

7. None of the parties have demonstrated any of the conditions prerequisite to setting aside or varying the consent as are set out in the above cases. The consent letter was duly executed by Counsel for the parties. The said Counsel also attended court on 16<sup>th</sup> July 2024 albeit virtually and confirmed to this court that the consent was arrived at freely and voluntarily. There is therefore no evidence of fraud or collusion. Counsel also assured this court that the terms of the consent were clear and unambiguous and indeed they are.
8. It is also trite that a consent order may also be set aside “if certain conditions remain to be fulfilled which are not carried out” – See the case of Hirani v Kassam [1952] 19 EACA 131.
9. The fact that the Respondents did not pay the sum of Kshs.22,000,000/- as agreed in the first clause would not constitute a sufficient reason to set aside the consent given that the agreement has a default clause upon which the Commission/Applicant was to fall back upon. The Commission/Applicant has not demonstrated to this court that it is unable to execute that default clause.
10. The upshot is that there is no merit in the application and it is dismissed. The consent shall be left to be fulfilled in the terms agreed in default of which the Commission/Applicant shall be at liberty to fall upon Clause (3) thereof and shall only be at liberty to apply in the event of impossibility to execute.
11. Whereas costs follow the event the order that commends itself to me in the circumstances, is that each party shall bear its own costs.

Orders accordingly.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**

**E. N. MAINA**

**JUDGE**

