



**Ethics and Anti-Corruption Commission v Hartland Enterprises Limited &
5 others (Anti-Corruption and Economic Crimes Civil Suit E030 of 2022)
[2023] KEHC 1157 (KLR) (Anti-Corruption and Economic Crimes) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1157 (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 E030 OF 2022
EN MAINA, J
FEBRUARY 23, 2023**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

**HARTLAND ENTERPRISES LIMITED 1ST DEFENDANT
JAMES MUMALI OYUKAH 2ND DEFENDANT
MARY PAULINE ODUOR 3RD DEFENDANT
ODHIAMBO DANIEL KAUDO 4TH DEFENDANT
FAITH ADHIAMBO APUKO 5TH DEFENDANT
PATRICK TONUI 6TH DEFENDANT**

RULING

1. There were two applications before this court. The first application was by the EACC/Plaintiff. The same is dated August 22, 2022 and sought orders of injunction so as to preserve funds in two accounts held by the 1st Defendant at the Co-operative Bank. That application was allowed by this court on November 15, 2022 upon the court observing that the same was not opposed. This Ruling therefore concerns only the 5th Defendant/Applicant's application dated September 6, 2022 which is supported by an affidavit sworn by the 5th Defendant on even date. The application is brought under Sections 51, 52, 53, 54, 55 and 56 of the *Anti-Corruption and Economic Crimes Act*, Order 1 Rule 10 of the *Civil Procedure Rules 2010*, Sections 1a,1b,3b of the *Civil Procedure Act* and Articles 50 and 159(2) (d) and (e) of the *Constitution* and seeks the following orders:-



- 1) Spent
 - 2) That the name of the 5th defendant herein, Faith Adhiambo Apuko be struck out from the entire proceedings for misjoinder
 - 3) That costs of this application be provided for.”
2. The grounds for the application are stated to be: -
- 1) That the fifth defendant is being subjected to malicious prosecution before this honorable court, a suit involving strange matters that doesn't involve or associate with her at all.
 - 2) That the suit and its application fail to disclose any cause of action against the fifth defendant since they fail to highlight the fundamental legal necessity for similar procedures, as provided in Sections 51 through 55 of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003 (2016). The said provision(s) demands disclosure of “Unexplained assets” relating to the 5th defendant as a prerequisite requirement; in this case, no “asset” has been listed or subjected to the entire proceedings. This makes the suit against the 5th defendant bad ab initio.
 - 3) That the properties in question belong to the 1st , 2nd and 3rd defendants and has nothing to do with the 5th Defendant; this should be a legal requirement under Section 55 of the *ACECA* Act no 3 of 2003 (2016).
 - 4) That the plaintiff disseminated the misjoinder on social media and to numerous stations with phrasing intended to portray the 5th defendant as the sole beneficiary of the money at issue, notwithstanding the fact that the 5th defendant is not connected or concerned in any way recognized under the law.
 - 5) That in these types of proceedings, there is a legal need for a genuine cause of action to exist so as not to taint the image and reputation of the defendant who risk suffering consequence of malicious prosecution.
 - 6) That in light of the aforementioned grounds, the plaintiff has no cause of action against the fifth defendant in this case.
 - 7) That the procedure is malicious and the plaintiff is using it to tarnish the image of the fifth defendant on social media, radio, and local newspapers, which is not only unethical but also res sub judice.
 - 8) That the proceedings that should have been initiated by originating summons as required by Section 55 of the *ACECA Act 2003* (2016) were instead initiated by a plaint. The motive of the bizarre breach is to violate the rules of pleadings, abuse court process, convolute proceedings and prolong a process that should have been uncomplicated with a view of maliciously involving the 5th defendant in a bad suit and prosecute her on social media.
 - 9) That proceeding of this sort is image-tainting and should be initiated only after a thorough investigation and the identification of “Unexplained assets” as a basic legal necessity.
 - 10) That lastly, the perception of possession of millions of money without any proof or cause risks life of the 5th defendant and her family; It's not strange in Kenya where people kidnap young family members of persons believed to have money for ransom; this is a breach of security on the part of the 5th defendant, especially when allegations are just baseless and without sound legal basis.”



3. The Plaintiff/Respondent opposed for the Application vide its grounds of opposition dated October 18, 2022.
4. The Application was canvassed by way of written submissions. Those of the 5th Defendant/Applicant are dated October 26, 2022 and those of the Plaintiff/Respondent November 2, 2022. The other Defendants did not participate in the application.

Analysis and determination

5. From a review of the application and supporting affidavit, grounds of opposition and the parties' submissions, the following issue arises for determination:-

Whether the 5th Defendant/Applicant is properly enjoined to these proceedings.

6. The 5th Defendant/ Applicant invokes this court's jurisdiction under Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) which provides as follows: -

Or. 1 Rule 10(2)

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

7. The 5th Defendant/Applicant contends that the Plaintiff cannot commence civil recovery proceedings where there are no “unexplained assets” associated with the 5th Defendant/ Applicant. That the 5th Defendant does not own any “unexplained assets”, and that none of her assets have been the subject of investigation by the Plaintiff. That while exercising its mandate under Section 11 of the [Ethics and Anti-Corruption Commission Act](#) the Plaintiff may only commence civil recovery proceedings, as in this suit under Section 55(2) of the [Anti-Corruption and Economic Crimes Act](#) (ACECA), upon the basis that the Defendants have unexplained assets. That there is no property in the entire suit belonging to the 5th Defendant that is the subject of these proceedings.
8. Learned Counsel for the 5th Defendant/Applicant submitted that the particulars of abuse of office cannot hold as that allegation is criminal in nature and there are no criminal proceedings against the 5th Defendant in regard to the same; that the joinder of the 5th Defendant in this suit is malicious as the contract and payments in issue were executed before she took office as Clerk of the Assembly; that the proceedings have been publicized on social media and tarnished her name; that the newspapers have partially reported the matter as though the 5th Defendant is a thief; that the plaintiff first circulated the demand letter of the 5th Defendant on social media before sending it to her; that the Plaintiff was rushed for filing even before the period of notice issued by the Plaintiff elapsed. Counsel argued that the above matters have all been admitted by the Plaintiff in their grounds of opposition. Counsel urged this court to consider the nature of Anti-corruption proceedings and reiterated that there is no property belonging to the 5th Defendant that is the subject of investigation or even preservation by this court. Counsel urged this court to allow this application.
9. For the Plaintiff/Respondent it is contended that the 5th Defendant/Applicant is a necessary party to these proceedings. Placing reliance on Order 1 Rule 3 and the case of [Boniface Omondi v Mathare Youth Sports Association and another](#) [2021] eKLR Counsel for the Plaintiff submitted that the 5th



Defendant's presence in these proceedings is necessary to enable the court determine all the issues in controversy. Counsel cited the case of *Werrot and Company Limited & others v Andrew Douglas Gregory & Others* [1998] KLR, cited in *Boniface Omondi* [Supra], where he stated that the established the twin test rule on who is a necessary party as follows:

“For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

10. Counsel also cited the case of *Kizito M. Lubano v KEMRI Board of Management & 8 Others* [2015] eKLR where he submitted that the test was expounded thus:-

“The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein...”

11. I have perused the Complaint dated August 22, 2022. The Plaintiff's claim is against the defendants, jointly and severally, for Kshs. 36,270,032.68 in respect of irregular payment for services not rendered or which were partially performed. The claim is alleged to have arisen from the payment of Kshs. 66,714,925.14 made by the Homa Bay County Assembly to the 1st Defendant for construction works of the proposed MCA's offices between June 25, 2020 and June 30, 2021. It is alleged further that the 5th Defendant took part in irregularly and fraudulently extending the project period from 12th August 2019 to 8th January 2021 and that she conferred a benefit to the 1st Defendant by authorizing and facilitating the processing of the second interim payment to the tune of Kshs.31,597,605.14 while aware that the contract period had lapsed, the project had stalled and there was no valid performance of the contract. The Complaint sets out the particulars of breach of fiduciary duty and trust against the 4th, 5th and 6th defendants by virtue of the offices they held at the time the alleged irregular payments were made, including failing to ensure proper management and control as well as accounting for the finances of the Homa Bay County Assembly contrary to Section 147 and Section 196 of the *Public Finance Management Act*; and authorizing and facilitating the processing of the payments to the 1st Defendant. It also seeks orders that the Defendants be held jointly and severally liable for the amounts paid.
12. The plaintiff's contentions against the 5th defendant on the alleged breach of fiduciary duty, abuse of office et al are not issues that can be determined at this stage. It is my finding that it would be premature for this court to determine whether there is any merit in these allegations on the basis of affidavit evidence only; that there subsists a reasonable cause of action against the 5th Defendant which can only be resolved upon hearing evidence and as such, she is a necessary party to these proceedings.
13. In the premises I am inclined to come to the conclusion that the 5th Defendant/Applicant's application dated September 6, 2022 has no merit and it is hereby dismissed but with an order that costs shall be in the cause.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF FEBRUARY 2023.

E N MAINA

JUDGE

