



Ethics and Anti-Corruption Commission v Mutai t/a Homex Logistics Enterprises, Hygenic Ventures Facto Logistics Enterprise, Unique Supplies, Nerimas General Agencies & Trechris Investments & 9 others; Ogeto & 6 others (Interested Parties) (Civil Suit E043 of 2022) [2023] KEHC 1370 (KLR) (Anti-Corruption and Economic Crimes) (23 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1370 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL SUIT E043 OF 2022
EN MAINA, J
FEBRUARY 23, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

ERIC KIPKIRUI MUTAI T/A HOMEX LOGISTICS ENTERPRISES, HYGENIC VENTURES FACTO LOGISTICS ENTERPRISE, UNIQUE SUPPLIES, NERIMAS GENERAL AGENCIES & TRECHRIS INVESTMENTS 1ST DEFENDANT

OCHOKI OMAIYO JOSEPH 2ND DEFENDANT

SARAH KEMUNTO KERANDI 3RD DEFENDANT

JAMES NYANG'AU GEKOBÉ 4TH DEFENDANT

HUMPHREY WENDE ABOK 5TH DEFENDANT

ISAAC BARASA WEKESA 6TH DEFENDANT

MOSES JUMA SIRENGO 7TH DEFENDANT

JOSEPH KAMAU MWANGI 8TH DEFENDANT

MAGETO OMARI MIRERI 9TH DEFENDANT

JACK NYARIANGO OGAO 10TH DEFENDANT

AND

STEPHEN JEREMIAH OGETO INTERESTED PARTY

JOSHUA KIMUTAI KIKWAI INTERESTED PARTY



GEORGE OLUOCH APELA INTERESTED PARTY
HILLARY TOWETT ROTICH INTERESTED PARTY
ODIPO EDWIN INTERESTED PARTY
CATHERINE WAGUI NJUGUNA INTERESTED PARTY
JANICE NAOMI MUTHUKU INTERESTED PARTY

RULING

1. The Plaintiff/Applicant has filed the suit herein seeking to recover a sum of Kshs 247,145,500/= from the 1st Defendant or alternatively from all the defendants jointly and severally; a permanent injunction restraining the 2nd Defendant and the Interested Parties from dealing or disposing certain properties named therein; an order of forfeiture of the said properties and an order compelling surrender of several motor vehicles to the plaintiff. The Plaintiff seeks the above orders on grounds that the properties are proceeds of crime. Contemporaneous with the suit, the Applicant filed a Notice of Motion dated October 28, 2022 which seeks a temporary injunction to restrain the Defendants/Respondents from dealing or disposing the properties pending the hearing and determination of the suit.
2. The Application is brought under Sections 1A, 1B, 3A of the *Civil Procedure Act* and Order 40 (1) Order 51(1) of the *Civil Procedure Rules* and more specifically seeks orders as follows:-
 - “1) Spent
 - 2) Spent.
 - 3) That pending the hearing and determination of this suit, this Honourable court be pleased to grant an injunction restraining the 1st and 2nd Respondents and the 1st and 2nd Interested Parties, their agents, servants or any other persons from alienating, selling, charging or further charging, leasing, developing, subdividing, wasting, transferring, disposing and/or in any other way dealing with properties known as Nyaribari Chache.B/B/Boburya/9927 parcels number 15821 and 15822, LR. No 20857/62 and Kericho/Kipchimchim/6604.
 - 4) That pending the hearing and determination of this application the Honourable Court be pleased to issue an order restraining the 3rd, 4th, 5th, 6th, and 7th Interested Parties, their agents, and servants/or from selling, transferring, disposing, wasting and/or in any other way dealing with Motor Vehicles registration numbers KCH 360G, KCL 050T, KCH 5935, KCL 125R and KCL 778P.
 - 5) That pending the hearing and determination of this suit the Honourable Court be pleased to issue an order restraining the 3rd, 4th, 5th, 6th and 7th Interested Parties, their agents, and servants/or from selling, transferring, disposing, wasting and/or in any other way dealing with Motor Vehicles registration numbers KCH 360G, KCL 050T, KCH 593S, KCL 125R and KCL 778P.
 - 6) That pending the hearing and determination of this application the Honourable Court be pleased to direct the Registrar of Motor Vehicles to



place a restriction preventing transfer on the respective records of Motor Vehicles registration numbers KCH 360G, KCL 050T, KCH 593S, KCL 125R and KCL 778P.

- 7) That pending the hearing and determination of this suit the Honourable Court be pleased to direct the Registrar of Motor Vehicles to place a restriction preventing transfer on the respective records of Motor Vehicles registration numbers KCH 360G, KCL 050T, KCH 593S, KCL 125R and KCL 778P.
- 8) That this Honourable Court be pleased to issue an order directing the 3rd, 4th, 5th, 6, 7th, 8th and 9th Interested Parties to surrender motor vehicles registration numbers KCH 360G, KCL 050T, KCH 593S, KCL 125 and KCL 778P together with their logbooks to the Applicant within 14 days of the order failing which the Applicant shall be at liberty to seize, tow and detain the motor vehicle for purposes of preservation.
- 9) That in the alternative, this Honourable court be pleased to grant an order appointing a licenced auctioneer to seize and sell by way of public auction numbers KCH 360G, KCL 050T, KCH 593S, KCL 125R, KCN 475L, KCL 778P and the proceeds less auctioneer's expenses and fees be deposited in a joint interest earning account in the names of the 3rd, 4th, 5th, 6th, and 7th Interested Parties and the Plaintiff/Applicant.
- 10) That in the alternative, this Honourable court be pleased to grant an order against the 3rd, 4th, 5th, 6th, 7th, 8th and 9th Interested Parties to deposit in a joint interest earning account in their names and in the Applicant's name a sum of Kshs 30,598,300/- being the purchase price of motor vehicles registration numbers KCH 360G, KCL 050T, KCH 593S, KCL 125R, KCL 778P.
- 11) That this Honourable Court be pleased to issue any other or further orders it deems fit and just so as to preserve the suit properties pending the determination of the suit.
- 12) That the costs of this application be provided for.”

3. The Application is premised on the following grounds stated on the face of it and in the supporting affidavit of Dorothy Mnjala:

- “1) Under Section 11 of the *Ethics and Anti-Corruption Commission Act*, 2011, the Applicant is mandated to institute civil proceedings against any person for the recovery/restitution of such property or for the freezing or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.
2. The Plaintiff, in exercise of its legal mandate, investigated allegations of irregular/fraudulent payment of Kshs 450,138,000/= by the State Department of Correctional Services to seventeen (17) companies/business firms for goods not supplied to the State Department.
3. Investigations revealed that during the financial years 2016/2017, 2017/2018 and 2018/2019 the 1st Defendant, fraudulently acquired a total sum of Kshs 247,145,500/= from the State Department on account of goods (food and rations) not supplied



4. The 1st Defendant, purported to have supplied food and ration to various prison facilities in Nairobi through six (6) firms registered as business names in which he is the sole proprietor namely; Home Logistics Enterprises, Hygienic Ventures, Facton Logistics Enterprises, Unique Supplies, Nerimas General Agencies and Trechris Investments.
5. Investigations also revealed that the is Defendant conspired with the 3rd to 7th Defendants who are also employees of the State Department of Correctional Services to fraudulently acquire the said funds through abuse of the clearly set out Procurement procedures, misrepresentation and/or deceit.
6. As a result of the Defendants' impugned conduct, the State Department of Correctional Services lost Kshs 247.145,500/= in public funds on account of goods never supplied or requisitioned for in the first instance.
7. The Plaintiff has further established that the 1st Defendant/Respondent, utilized the illegally acquired funds to purchase properties known as Nyaribari Chache B/B/Boburya/9927 parcels number 15821 and 15822. L. No 20857/62 and Kericho/Kipchimchim/6604.
8. The aforesaid parcels of land are registered in the names of the 2nd Defendant and the 1st and 2nd Interested Parties, the 1st Interested Party being the 1st Defendant/Respondents close associate and the 2nd Interested Party being his parent.
9. The 1st Defendant/Respondent similarly purchased six (6) motor vehicles. registration numbers KCH 360G, KCL 050T, KCH 5935, KCL 125R and KCL 778P using the said public funds.
10. The motor vehicles were also acquired for an on behalf of the 1st Defendants/ Respondent's close associates and colleagues, the 3rd to the 7th Interested Parties.
11. In the course of investigations, the Plaintiff/Applicant sought preservation orders in respect of the assets aforementioned under Section 56 of the *Anti-Corruption and Economic Crimes Act 2003* vide ACEC Misc. E018 of 2022 which orders were granted for a period of six (6) months from April 14, 2022 and which lapse on October 14, 2022.
12. The Plaintiff/Applicant has concluded investigations and seeks inter alia, through the suit filed contemporaneously herewith, the forfeiture of the properties acquired through the funds which constitute proceeds of crime or corruption.
13. It is therefore just and fit to restrain/prohibit the 1st and 7th Defendants and the Interested Parties, their agents, servants or any other persons from disposing or further dealing with the parcels of land and motor vehicles subject of the suit pending the hearing and determination of this application and suit.
14. In the absence of an order stopping the 1st and 7th Defendants and the Interested Parties, from dealing, transferring, disposing of or wasting the



above-stated properties there is nothing to prevent them from dealing with the properties in the intervening period in a bid to defeat the course of justice.

15. The Applicant is apprehensive that unless this application is heard urgently and the orders sought are granted, there is a real danger that the assets will dissipate and shall not be recoverable by the Plaintiff/Applicant to the detriment of the public.
 16. The Plaintiff/Applicant has a prima facie case against the 1st and 7th Defendants and the Interested Parties, with very high chances of success given the nature and outcome of investigations conducted.
 17. The balance of convenience tilts in favour of the Plaintiff/Applicant since the matter is one of great public interest as it involves public funds; it is therefore only fair and in the interests of justice that this Honorable Court grants the Orders sought in the application.
 18. The Respondents will suffer no prejudice if the orders sought are granted.”
4. The Application is opposed by the 2nd, 6th, 7th, 8th and 10th Defendants, and the 1st, 4th and 5th Interested Parties who filed responses and submissions to the Application. The 1st, 3rd, 4th, 5th and 9th Defendants and the 2nd, 3rd, 6th and 7th Interested Parties did not file any responses or submissions so they did not participate in the application.

The plaintiff/applicant’s case

5. The Plaintiff’s case is that the 1st Defendant fraudulently acquired a sum of Kshs 247,145,500 from the State Department of Correctional Services on account of goods that were never supplied to 7 prison facilities within Nairobi. That the goods, to wit food and rations, were alleged to have been supplied by six (6) firms registered as business names in which the 1st Defendant is the sole proprietor namely; Home Logistics Enterprises, Hygienic Ventures, Facton Logistics Enterprises, Unique Supplies, Nerimas General Agencies and Trechris Investments; Further, that investigations revealed that the 1st Defendant conspired with the 2nd to 10th Defendants who are also employees of the State Department of Correctional Services to fraudulently acquire the said funds through abuse of the procurement procedures, misrepresentation and deceit hence occasioning a loss of Kshs 247.145,500/= in public funds. That the loss arose on account of goods never supplied or requisitioned for by the prison facilities.
6. The Plaintiff alleges that the 1st Defendant utilized the illegally acquired funds to purchase properties known as Nyaribari Chache B/B/Boburya/9927 parcels number 15821 and 15822, L. No 20857/62 and Kericho/Kipchimchim/6604, registered in the names of the 2nd Defendant and the 1st and 2nd Interested Parties, the 1st Interested Party being the 1st Defendant’s close associate and the 2nd Interested Party being his father. Also that the 1st Defendant purchased six (6) motor vehicles, registration numbers KCH 360G, KCL 050T, KCH 593S, KCL 125R and KCL 778P using the said public funds, and that the motor vehicles were also acquired for an on behalf of the 1st Defendant's close associates and colleagues; that the Plaintiff sought orders under Section 56 of the *Anti-Corruption and Economic Crimes Act 2003* vide ACEC Misc. E018 of 2022 to preserve the impugned assets which orders were granted for a period of six (6) months which have since lapsed hence this application.



The defendants'/respondents' case

7. The 2nd Defendant confined response and submissions to prayer 2 of the Application only. He contended that the Applicant had failed to satisfy the three-pronged test in the case of *Giella v Cassman Brown* under which the orders for an injunction could be granted; that the Applicant had not established a prima facie case against the Respondents; that the 2nd Defendant is not the owner of any of the properties subject of the suit; that the Applicant did not produce ownership documents for the properties in prayer 2 namely Nyaribari Chache B.B/Boburya/9927; parcel No 15821 and 158822; LR No 20857/62; Kericho/Kipchimchim/6604 and therefore does not have an arguable case against the Respondents.
8. Further, that the Plaintiff can adequately be compensated by an award for damages; that as one of the Plaintiff's prayers is for damages should it succeed the damages will be an adequate remedy; that therefore the Plaintiff has not demonstrated that it would suffer irreparable loss and that the balance of convenience is not in the Plaintiff's favour.
9. Through the Grounds of Opposition dated December 5, 2022 the 5th Respondent contends that the Plaintiff has not met the conditions for grant of the orders sought; that the Plaintiff has not come to court with clean hands; that the application has been made after inordinate delay, is scandalous, frivolous vexatious and an abuse of the court process; that the 5th Respondent is a stranger to the averments in the supporting affidavit and that the 5th Defendant did not benefit from the alleged corruption at all.
10. The 1st Interested Party and the 4th Interested Parties opposed the Application vide their replying affidavits dated December 24, 2022 and November 23, 2022 respectively. They both contend that they are the legal and beneficial owners and were innocent purchasers of motor vehicle KCH 360G and Land Reference No Nyaribari Chache B/B/Boburya/9927 purchased at Kshs 45,000,000. The 1st Interested Party also contended that he is the legal and beneficial owner of motor vehicle KBZ 747B purchased at Kshs 10,000,000, motor vehicle KCL 125R purchased at Kshs 15,000,000, motor vehicle KCG 079M purchased at Kshs 3,000,000, and Saloon known as Hygienic & Barber Shop purchased at Kshs 15,000,000. That the properties were lawfully acquired and hence they should be excluded from the suit.
11. In his replying affidavit dated November 23, 2022, the 5th Interested Party averred that he was an innocent purchaser of motor vehicle KCL 125R that is a subject of the proceedings, that he paid Kshs 3,500,000 to the 1st Defendant for the vehicle.

Analysis and determination

12. The issue for determination is whether the plaintiff/applicant has met the threshold for grant of a temporary injunction. in other words, has the plaintiff/applicant established a prima facie case against the respondents; has it shown that unless the order is granted it stands to suffer irreparable loss and if not does the balance of convenience tilt in its favour.



Whether the plaintiff/ applicant has established a prima facie case against the respondents

13. What constitutes a *prima facie* case was stated as follows by the Court of Appeal in the case of *Moses Mubia Njoroge & 2 Others v Jane W Lesaloi and 5 Others* [2014] eKLR, and affirmed in the case of *Unga Group PLC v Maureen Wanjiru Wanyanga* [2021] eKLR:-

“ A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”

14. The Applicant contends that the impugned property which forms the subject matter of this suit was acquired using a sum of Kshs 247,145,500/= fraudulently and corruptly acquired from the State Department of Corrections and there is therefore need to preserve the property pending the hearing and determination of the suit.
15. The Plaintiff/Applicant has argued that the 1st Defendant/Applicant obtained the funds during his employment with the State Department of Correctional Services and that he is the proprietor of six (6) firms registered in his name. The Plaintiff/Applicant annexed bank statements obtained in the course of investigations (DM 3 and DM 8) as proof of the receipt of funds by the 1st Defendant. The Plaintiff/Applicant also annexed witness statements confirming that no food rations were ever supplied by any of the firms, associated with the 1st Defendant, to the respective prisons facilities. Further, the Plaintiff/Applicant has through annexure 'PB 7' sought to show that no goods were ever received to support the payments made by the State Department of Correctional Services.
16. The Plaintiff/Applicant has further annexed evidence to demonstrate that the assets sought to be preserved were acquired with funds alleged to have been received from the State Department of Correctional Services. The Plaintiff contends that the 1st Defendant used Kshs 15,000,000/= each from bank accounts held in the names of Unique Supplies and Home Logistics to purchase Nyaribari Chache B/B/Boburya/9927 parcels number 15821 and 15822. A further Kshs 10,000,000/= was paid from the bank account of Hygienic Ventures. RTGS slips from the banks accounts of the respective enterprises were annexed and it is contended that the same indicated that the funds were used for purchase of the property.
17. The Plaintiff has alleged further that the 1st Interested Party and the 1st Defendant were well acquainted as the 1st Interested Party indicated the 1st Defendant as his next of kin in respect to bank account No 2165xxxx and No 21658xxxx held at Housing Finance Corporation. It is also alleged that a sum of Kshs 88,000,000/= changed hands between the two parties between July 3, 2017 and July 14, 2017. It is my finding therefore that the Plaintiff has established a *prima facie* case against the 1st Defendant and the Interested Parties to warrant this court to grant it a temporary stay as prayed in its application. It must however be borne in mind that this court is alive to the principle that a prima facie or arguable case is not one that must necessarily succeed.



Whether the plaintiff/applicant shall suffer irreparable injury which cannot be compensated by damages;

18. These are recovery proceedings of public funds and this case is therefore similar to the case of *EACC v Moses Kasaine Lenolkulal* [2019] eKLR where the court stated:-

“ 32. The second issue is whether the applicant will suffer irreparable damage if the orders are not granted. According to the plaintiff, in the event the orders are not granted, the property may be disposed off to a third party and the funds withdrawn. It is true that the applicant will suffer irreparable damage or loss should the properties be disposed or funds withdrawn as there will be nothing left to forfeit and recover in the event that the suit succeeds. It is therefore equitable that the orders sought seeking to preserve the properties and funds to issue as the defendant will not suffer any prejudice by so preserving them.”

19. Applying the principles in the celebrated case of *Giella v Cassman Brown Ltd* [1973] EA 358 and having found that the Plaintiff has established that it has a prima facie case against the Respondents it is my finding that should this court decline to grant the restraining orders the Plaintiff is likely to suffer irreparable damage that cannot be compensated by an award for damages as once the properties dissipate there shall be nothing to recover.

20. Accordingly, there is no doubt that the Plaintiff/Applicant has met the threshold for a temporary injunction and the application dated October 28, 2022 is allowed and orders are granted as prayed save that costs shall be in the cause.

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

E N MAINA

JUDGE

