



**Ethics & Anti-Corruption Commission v Mulei (Civil Suit
68 of 2015) [2023] KEHC 18628 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 68 OF 2015
DKN MAGARE, J
APRIL 28, 2023
MULTI TRACK
IN THE MATTER OF ALL THOSE PROPERTIES REFERRED TO
AS IN THE ORIGINATING SUMMONS
AND
IN THE MATTER OF: THE ANTI-CORRUPTION &
ECONOMIC CRIMES ACT, [CAP 65] LAWS OF KENYA
BETWEEN
ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF
AND
GABRIEL MBITI MULEI DEFENDANT**

RULING

Introduction

1. Human mind is treacherous. It becomes blurrier as time passes. However, in this matter, the Applicant, went through a hearing without knowing where he got his properties when he was younger. After a decision has been made, he suddenly saw the light. His mind cleared up and he was able to recover documents to show how he acquired wealth, so he thought. This case there presents a scenario where a party has a rare uniqueness where, memory has gotten sharper with age and passage time.
2. In the case of *Assets Recovery Agency v Ali Adbi Ibrahim* [2022] eKLR, the court was of the view that: -
 - “ 64. The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondent where presumption of innocence is applicable. In the case of *ARA & Others vs*



Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120
the Court of Appeal stated:

“...that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof...” (Emphasis mine)

While in the case of *Assets Recovery Agency v Fisher Rohan and Miller Delores*, Supreme Court of Jamaica, Claim No. 2007 HCV 003259 it was held:-

“.....Even though these proceedings are quasi-criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized.”

3. In the case of *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* [2019] eKLR the Court of Appeal stated the following regarding Anti-Corruption & Economic Crimes Act: -

“79. Under Section 55(2) of *ACECA*, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. in other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. the cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate course of income. tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired”

4. The purpose of the defendant having a burden of proof on the acquisition is imbedded in section 112 of the *evidence Act.*, which provides as follows: -

“112. Proof of special knowledge in civil proceedings In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

5. The ownership of assets is purely within the knowledge of the Owner, the duty of the state agency involved is to show your known income and known assets. they will then require you to explain a sudden and undocumented wind fall. it is not much to ask. the reason is given in Section 2 of the *Proceeds of Crime and Anti-Money Laundering Act* defines ‘proceeds of crime’ as follows:

“Proceeds of crime” means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity



of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed”

6. The advantage will include freedom to use legitimate income extravagantly while covering basic needs with property that you cannot tell why it is yours. it could be stolen, a gift or even appreciation in value. The Same could even be through divine providence. just explain. In fact, all income is subject to tax. A tax trail will be useful in case some records are lost. If wealth was gotten legitimately, but no taxes are paid, it does not open one to forfeiture. parties need to deal with the taxman independently.

Background

7. This suit was filed by the Ethics and Anti-Corruption Commission. The filing was done on 26/5/2015. The Respondent had the following properties, that is, Plot xxxx, Malindi, Plot xx & xx Kwale Township, Ndithini/Mananja/ Block x/xxx, Ndithini/Mananja/ Block xx/xx Ndithini/Mananja/ Block x/xx, Ndithini/Mananja/ Block xx/xx, motor Cycle xxx, Nissan Mini-Bus/Matatu, KMCJ xxx, Bajaj Motor Cycle, KBF xxx; Toyota Corona, Account Number xxxxx Equity bank, Malindi, held in the name of Gabriel Mbiti Mulei; Account Number xxxxx held in the name of Gabriel Mbiti Mulei, Account Number xxxxx held in the name of Gabriel Mbiti Mulei and Account Number xxxxx held in the name of Gabriel Mbiti Mulei.
8. In short the Applicant had 4 Bank Accounts, motor vehicles, including a Bajaj Motor Cycle 6 plots. The Ethics and anti- corruption classified these as unexplained assets. They were said to be worthy 19,420,000 and Kshs. 10,536,199 in bank deposits.
9. The period under review the Defendant was earning a net salary of Ksh. 20,000/=. In other words, it requires 526 moths to accumulate the amount in the bank using salary only, where not even a coin is consumed. This translates to 43.9 years. It will take a further 971 months to acquire the landed properties and motor vehicles.
10. Appreciation in value exempted requires 80.9 years to accumulate this in that salary. If the Defendant was employed while at the age of 20 years, he must be 144 years old by now. If we add the income for what he consumed, he could be 200 years old now. This is not in line with section 60(1)(1) of the [evidence Act](#). The Applicant’s own annexure GMM 2, shows the Applicant was 53 years in 2015
11. In other words, had the Defendant had an explanation, he needed to offer the same. The declarations of income in custody of the Defendant excludes most of these properties.
12. To make matters worse, the Defendant declared assets valued at Ksh. 1,000,000/= and assets valued Ksh. 1,382,240. The cash flow excluding salary was 10,536,1999/=. To make matters even worse, the deposit of ‘salary’ was between 18/6/2008 and 11/2/2011. There were excluding the official salaries received from the employer, the government.
13. The Defendant being as a long serving Public Servant had opportunity to by some property thorough salaries, loans and clean business. However, these were within his knowledge
14. The defendant had the singular most important task. He knew how he acquired his property. He could have inherited the same from a long-lost childless uncle or concubine. He could even be running legitimate matatu business and even defaulted on taxes. This could be paid with penalties. However, just explain.



15. Under 26 of the *Anti-Corruption and Economic Crimes, 2003*-Statement of suspect's property provides as doth: -

“(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property —

- (a) enumerating the suspected person's property and the times at which it was acquired; and
- (b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

(2) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

(3) The powers of the Commission under this section may be exercised only by the Secretary.”

16. Further, under section 55 of *Anti-Corruption and Economic Crimes, 2003* the penalty is provided. The section states as doth: -

“55. Forfeiture of unexplained assets

(1) In this section, “corrupt conduct” means—

- (a) conduct that constitutes corruption or economic crime; or
- (b) conduct that took place before this Act came into operation and which—
 - (i) at the time, constituted an offence; and
 - (ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

(2) The Commission may commence proceedings under this section against a person if—

- (a) after an investigation, the Commission is satisfied that the person has unexplained assets; and



- (b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

[Rev. 2016] Anti-Corruption and Economic Crimes No. 3 of 2003 A17 - 25 [Issue 3]

- (3) Proceedings under this section shall be commenced in the High Court by way of originating summons.
- (4) In proceedings under this section—
 - (a) the Commission shall adduce evidence that the person has unexplained assets; and
 - (b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.
- (5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.
- (6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.
- (7) For the purposes of proceedings under this section, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds—
 - (a) are held in trust for the person whose assets are in question or otherwise on his behalf; or
 - (b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration.



- (8) The record of proceedings under this section shall be admissible in evidence in any other proceedings, including any prosecution for corruption or economic crime.
17. The Plaintiff required something very simple. Explain the source of assets. In the absence of a proper pleading on how the salary and clean business resulted in the properties, the Defendant failed to discharge its burden of proof. The Court is thus bound to infer that failure to produce evidence was due to that evidence being adverse.
18. The matter proceeded to full hearing and Judgment was entered. The Defendant filed submissions on 6/12/2021. The Plaintiff filed submissions on 20/11/21.
19. The Respondent only dealt with mundane issues of pleadings. On 13/6/2022, the Court, invariably found that several assets were unexplained and were forfeited under the *Anti-Corruption and Economic Crimes Act* Section 55, thereof. the said section provides as follows: -
- “ 55. Forfeiture of unexplained assets (1) In this section, “corrupt conduct” means —
- (a) conduct that constitutes corruption or economic crime; or
- (b) conduct that took place before this Act came into operation and which—
- (i) at the time, constituted an offence; and
- (ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.”
20. After the judgment was delivered, the Defendant filed a notice of appeal dated 1/7/2022. They also sought proceedings for appeal purposes. However, on 11/8/2022 the Defendant/Applicant made an application through the said firm of Ms J.O. Magolo and Company Advocates seeking the following prayers: -
1. That this Application be certified as urgent and service be dispensed within the first instance.
 2. That this Honourable Court be pleased to issue stay of execution of the judgment delivered on the 30th June, 2022 pending the hearing and determination of the Application herewith inter-parties.
 3. That this Honourable Court be pleaded to issue stay of execution of the ruling delivered on the 30th June, 2022 pending the hearing and determination of the Appeal filed therefrom.
 4. That this Honourable Court be review its judgment of 30th June, 2022 taking into account the new evidence.
 5. That this Honourable Court do grant any other orders it may deem fit to grant.
21. The Applicant was seeking basically to Review and set aside Judgment of 30/6/2022, urging the court to take into account new evidence. To be able as regards Review of Judgment and decree, Section 80 of the *Civil Procedure Act* is germane. the said section provides as doth: -

“ 80. Review Any person who considers himself aggrieved—



- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

22. Further, Order 45 Rule 1 of the [Civil Procedure Rules](#). Order 45 Rule 1 provides as follows: -

“Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellants, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

23. In order to rely in new evidence, the evidence must be such that it could not be found with diligence. The so-called evidence could not be found from October 2015 to August 2022.

24. The documents should be such that they could not be found even with diligence.
passed

25. The case of [Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others](#) [2021] eKLR, Justice John M. Mativo, stated as follows: -

“The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India [15] stated: -

“the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be



pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the Rule”

26. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 had this to say:-

“ the power can be exercised on the application of a person on the disalogous to those specified in the rule”

PAcovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

27. This was supported with the Court of Appeal decision in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR in which the Court stated: -

“The respondent failed to prove that it had discovered new evidence after the exercise of due diligence not within its knowledge or which could not be produced at the time when ruling was delivered. Order 45 Rule 3(2) provides that an application for review shall “... not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree was passed or made without strict proof of such allegation. Other than the confusion in dates, no sufficient reason was given by the respondent as to why the letters were not filed before the taxing officer. This to my mind was an oversight on the part of the respondent but it was not a mistake apparent on the face of the record.”

28. *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [*Supra*]

“discovery of new and important matter or evidence which, after the exercise of due diligence, was within his knowledge or could not be produced by him at the time when the order was made would refer only to a discovery made since the order sought to be reviewed was passed. An applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed. In the instant application, the applicant claims to have injected capital to the tune of US 1.5 million prior to the granting of the order sought to be reviewed. He is now claiming that he was not aware of the said evidence at the time of passing the order yet he claims he is the one who injected the capital. He claims he did not have the minutes. However, he had the information, so, nothing prevented him from availing the information to the court by way of a sworn affidavit.”

29. Now considering the evidence, I note that the so-called new evidence is just a pay slip. In that slip dated 24/8/22, this is after judgment was entered. It could not have been used to purchase, the properties in 2008 to 2015. In any case, net pay for October, 2015 was 66,411, it contains 59,220/= transfer allowance. This is a one-off payment.



30. Further, every worker knows where to get their own payslip. It is thus not new evidence. It does not even help his case. The second one was fish license dated 13/1/2015, is a document that surely the Appellant could know. Further, it is property they could easily declare. It does not show income from the alleged business. It is just a license.
31. The issue of allocation of a gift by Kwale Town Council, including those assets that needed to be declared. There is no declaration of those gifts. For the motor vehicle the evidence is just evidence of purchase of the said motor vehicle. There is no explanation on the source of the money to acquire the asset.
32. The other issue of this the payment for Ksh. 760,000 form Blue shield Insurance Company. Regarding the issue of law, the same was brought. However, the Defendant does not explain and even declare the source of funds to purchase the vehicle that was involved in the accident. Nothing turns on the same.
33. The motor vehicles proceeds were not deposited in any of the account. In any case motor vehicle registration No. KBP 987K is not one of the vehicles that have been surrendered to the state. It is not relevant to the case herein.
34. The issue of matatu business could not miss from the Defendant. Since 2023, the matatu sector is highly regulated licenses, Sacco membership and driver's licenses have been introduced.
3. The police are doing that enforcement. He could not have missed this evidence. I have seen the Replying Affidavit dated 9/9/2022. The only issue he raises is the issue of notice dated 3/5/2011. That notice remains unanswered, to date. Consequently, I do not find new evidence or any other reason for reviewing the judgment.

Determination

36. The upshot is that the application dated 10/8/2022 is bereft of merit and as such it is dismissed with costs of Ksh. 20,000/= to the Plaintiff, payable within 30 days in default execution to issue.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF APRIL, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Miss Songole for the Plaintiff

Magolo Paul for the Defendant

Court Assistant - Brian

