



Ethics and Anti-Corruption Commission v Isika & 3 others (Anti-Corruption and Economic Crimes Civil Suit E046 of 2022) [2023] KEHC 3621 (KLR) (Anti-Corruption and Economic Crimes) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3621 (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 E046 OF 2022**

EN MAINA, J

APRIL 27, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

DAVID KINYAE ISIKA 1ST DEFENDANT

**DAVINKA SUPPLIERS AND GENERAL MERCHANTS LIMITED 2ND
DEFENDANT**

WANGA TECH GENERAL ENTREPRISES LIMITED 3RD DEFENDANT

**BRUCE ISIKA KINYAE T/A BRYCEN SMART INNOVATIONS 4TH
DEFENDANT**

RULING

1. This Ruling is in respect of the Defendants/Applicants Notice of Motion dated January 19, 2023.
2. The Application is made under Section 6 of the *Civil Procedure Act*, Section 56(4) of the *Anti-Corruption and Economic Crimes Act* and Articles 23,38,40,41,47, 50, and 159 of *the Constitution* and seeks the following orders:
 1. That the suit be struck out with costs to the Defendants
 2. That alternatively, the suit herein be stayed pending hearing and determination of HC ACEC No E027 Of 2022
 3. That if necessary, leave be granted to the defendants to file an application under Section 56(4) *ACECA*.



4. That the order issued on December 20, 2022 be discharged, reviewed and or set aside.
 5. Any other relief or order as the court may deem fit to issue and or as the justice of the matter dictates.
 6. That costs of this application be provided for.
3. The Application is made of the following grounds stated on the face of it and in the supporting affidavits of the 1st Defendant/Applicant sworn on January 19, 2023: -
- “ 1. The matter and or issues raised in this case are also directly and substantially in issue in HC ACEC No E027 of 2022, Ethics and Anti-Corruption Commission v David Isika Kinyae & 5 Others.
2. The suit herein is a clear abuse of the court process.
 3. The defendants have been vexed with the following suits and or proceedings in respect of the same subject matter.
 - a. HC ACEC Misc. Application No E025 of 2021, Ethics & Anti-Corruption Commission v David Kinyae Isika & Wanga-Tech General Enterprises Ltd.
 - b. HC ACEC Misc. Application No E031 of 2021, Ethics & Anti-Corruption Commission v David Kinyae Isika & Wanga-Tech General Enterprises Ltd.
 - c. HC ACEC No E027 of 2022, Ethics & Anti-Corruption Commission v David Isika Kinyae, Joyce Wairimu, Urbanas Kioko Mbithi, Wanga-Tech General Enterprises Ltd, Davinka Supplies and General Enterprises Ltd & Bruce Isika Kinyae T/A Brycen Smart Innovations.
 - d. In ACEC Misc E025 of 2021 the plaintiff obtained orders freezing the defendants' bank accounts with effect from September 29, 2021 to 30th By orders issued on the 16th December 2022 in ACEC E027 OF 2022, the said orders were extended.
 - e. In ACEC 3025 of 2021 the plaintiff obtained an order freezing the defendants' bank account with effect from 13th October 2021 until December 30, 2022. By an order issued on 20th December 2022 in this matter, the said order was extended.
4. In addition to freezing the 1st defendant's assets, the plaintiff has unlawfully issued directives to the 1st defendant's employer to indefinitely suspend the 1st defendant. As a result of the said instructions, the 1st defendant has now been in suspension for a period of 16 months yet no criminal proceedings have been commenced against him. Owing to the orders freezing his bank accounts and assets coupled with failure by the plaintiff to lift the directive on suspension, the 1st defendant's right to earn income, labour and economic rights have been and continue to be violated.



5. By the Supporting Affidavit of Margaret Wambeti the plaintiff has acknowledged that out of the initial alleged unexplained assets the defendants have provided documentary evidence in relation to the assets which justify more than 50% thereof.
6. The plaintiff has failed to disclose to the court that in HC ACEC 027 of 2022, the defendants filed a List and Bundle of Documents running to 897 pages, which documents adequately answer the allegation of corruptly acquired properties and abuse of office.
7. There has been other material non-disclosure by the plaintiff.
8. The suit herein is incompetent, bad in law, vexatious and fatally defective.”

The response

9. The Plaintiff/Respondent opposed the Application vide its grounds of opposition filed herein on 31st February 2023.

The grounds are: -

1. This suit does not offend the subjudice principle as contained in section 6 of the [Civil Procedure Act](#) for the following reasons:
 - i. It raises a different cause of action from that claimed in I-IC ACEC No E027 of 2022 as it is brought under section 55 of the [Anti-Corruption and Economic Crimes Act, 2003](#) (ACECA) as an action in rem against the Defendants' properties as relates the concept of unexplained assets.
 - ii. Having related allegations of corruption, a similarity in some documents in both HC ACEC No E027 of 2022 and this suit cannot, per se, be interpreted to mean that the suits are alike in terms of the causes of action as it is through investigating the allegations of corruption that the plaintiff unearthed unexplained assets against the defendants herein thereby necessitating this suit, as a separate cause of action from that in HC ACEC No E027 of 2022.
 - iii. This suit seeks different reliefs from those mentioned in HC ACEC No E027 of 2022. The reliefs sought herein are specific to section 55 of [ACECA](#).
2. In making the application under section 56(4) and seeking prayer 3 in their application, the defendants misapprehend the provisions of sections 55 and 56 of [ACECA](#) in the following way:
 - i. A suit brought under section 55 of [ACECA](#) and an application made under section 56 of [ACECA](#) are different, the latter is an investigative tool available to the plaintiff to prevent the transfer, disposal of or other dealing with suspect property for a period of six months pending conclusion of investigations while the former is an action in rem against a defendant's properties as described in paragraph 1 (i) above.
 - ii. An application under section 56 subsection 4 does not require the leave of the court for any person or party to file an application envisaged thereat to discharge, vary, or dismiss an order made under section 56 of [ACECA](#) as sought by the defendants.
3. ACEC Misc. E025 of 2021 and ACEC Misc. E03 2021 were made under section 56 of [ACECA](#) against specific defendants to preserve specific assets for the purpose described in paragraph 20) above thus the allegations of vexing and multiplicity of suits as grounds in support of the application is misconstrued-



4. Grounds and averments contained in paragraphs 7 to 18 in the affidavit of David Kinyae Isika of January 19, 2023 in support of the application do not form the established principles for striking out or staying suits or for the granting of any of the other orders sought in the application.
10. Learned Counsel for the parties canvassed the application by way of written submissions.
- Issue for determination:

Whether this suit is sub judice on account of HC ACEC Suit No E027 of 2022 EACC v David Isika Kinyae and 5 others.

Analysis and determination

11. Section 6 of the [Civil Procedure Act](#) bars the court from hearing or determining any matter before them that is subjudice. The Section states:
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
12. The doctrine of subjudice was considered by the Supreme Court in [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#), where it was held that: -
- “The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
13. This court has painstakingly perused the pleadings filed in this suit and in HCACEC No E027/2022 EACC v David Isika Kinyae and 5 others.
14. It is apparent that the present suit is brought under Section 55 of the [Anti-Corruption and Economic Crimes Act](#) seeking the forfeiture of alleged unexplained assets owned by the Defendants as particularized in the Originating Summons dated December 19, 2022. The Plaintiff in its Originating Summons claims that the unexplained assets acquired by the Defendants during the period January 2014 to June 2021 (the period of interest) be forfeited to the Government of Kenya. The subject properties include Kshs. 135,532,957.92 in bank and mobile accounts of the Defendants, landed properties and motor vehicles acquired by the Defendants during the period of interest.



15. On the other hand, HCACEC No E027/2022 EACC v David Isika Kinyae and 5 others is a civil recovery suit against the Defendants which is filed pursuant to the Plaintiff's mandate in Section 11(1) (j) of the Ethics and Anti-Corruption Commission and Sections 51 and 53(3) of the *Anti-Corruption and Economic Crimes Act*. It is a civil recovery suit for recovery of public funds allegedly acquired by the Defendants through procurement irregularities, corrupt conduct and breach of fiduciary duty. The Plaintiff seeks judgment against the defendants for, *inter alia*, that they be held jointly and severally liable for the sum of Kshs. 233,486,767.95, an order for forfeiture for the sum of Kshs. 10,000,000 and Kshs 1,965,407.21 held in account No 01150487799500 and account No 01148487799500 respectively, both in Cooperative bank in the name of the 4th Defendant.

16. An analysis of the claims and reliefs sought by the Plaintiff shows that the two suits are based on different causes of action under different legal provisions of the *Anti-Corruption and Economic Crimes Act* and the Ethics and Anti-Corruption Commissions Act. There is no law that bars the plaintiff from instituting a claim in respect of unexplained assets under Section 55 of the *Anti-Corruption and Economic Crimes Act*, concurrently with a different claim for civil recovery of public funds, out of the same circumstances. In the case of *Ethics and Anti-Corruption Commission v Moses Kasaine Lenolkulal* (2021) eKLR it was held as follows on a similar issue:

“49. The proceedings under this provision is by way of originating summons, whereas the civil forfeiture which is now pending before the court is commenced by way of a plaint. The fact that the plaintiff has mandate under both civil forfeiture and unexplained asset to commence independent proceedings was stated by this Court in the case of Ethics And Anti-corruption Commission v Jamal Bare Mohamed [2019] eKLR where the court stated: -

“31. Under section 11 of the ethics and Anti – Corruption Act and Section 55 of Ethics and Anti-Corruption Act No 3 of 2003 the commission had mandate to undertake investigations into allegations of corruption or economic crimes and in appropriate cases to institute civil proceedings against any person for the recovery of assets whose value is disproportionate to his known sources of income.³² it is therefore in the interest of justice that the commission be allowed to exercise its mandate to determine whether the sum of money held by the defendant was rightfully acquired or whether the defendant is culpable of any economic crime. This can only be determined once originating summons is heard and determined.”

...

“52. It follows that one investigation can lead to establishment of two different causes of action and whereas the plaintiff/respondent has instituted the present proceedings, there is no law that bars the same from instituting a claim in respect of unexplained assets under the provisions of Section 55(4) (a) and before so doing must under Section 26 of the Act accord the applicant an opportunity to offer an explanation which it has done through the notice complained of.”

17. Forfeiture of unexplained assets is a substantially different and separate claim from a civil recovery of lost public funds. The Court of Appeal in *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* [2019] eKLR explained the essence of forfeiture of unexplained assets as follows:

“The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income ... the theme in evidentiary burden is in relation to unexplained assets.



It follows therefore that this suit concerns what is alleged by the plaintiff to be "...tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired."

18. It is for the foregoing reasons that I find that this suit is not *sub-judice* on account of HC ACEC No E027 of 2022. The Defendants' Application dated January 19, 2023 is unmerited and is accordingly dismissed with costs to the Plaintiff.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF APRIL, 2023.

E. N. MAINA

JUDGE

