



REPUBLIC OF KENYA



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**Ethics and Anti-Corruption Commission v Kinyua & 2 others (Anti-Corruption and Economic Crimes Civil Suit E013 of 2022) [2023] KEHC 17651 (KLR)
(Anti-Corruption and Economic Crimes) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17651 (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 E013 OF 2022

EN MAINA, J

MAY 25, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPLICANT

AND

JEREMIAH KAMAU KINYUA 1ST DEFENDANT

CHERYA ENTERPRISES LIMITED 2ND DEFENDANT

BESTLINE ENTERPRISES LIMITED 3RD DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion Application under a Certificate of Urgency dated 10th May 2022 supported by an affidavit sworn by Danson Siba, Forensic Investigator sworn on an even date.
2. The Application is made under Sections 1A,1B,3A of the Civil Procedure Rules and Order 40(1), Order 51(1) of the *Civil Procedure Act* and Section 56A of the *Anti-Corruption and Economic Crimes Act*. The Applicant seeks the following orders:
 - “ 1) Spent
 - 2) Spent
 - 3) Spent
 - 4) Spent



- 5) That pending the hearing and determination of this Suit this Honourable Court be pleased to issue an order of injunction restraining the Respondents, their agents, servants and/or any other persons from selling, transferring, charging or further charging, leasing, developing, subdividing, disposing, wasting, or in any other way (howsoever described) alienating the following properties:
 - i. Properties registered in the name of Jeremiah Kamau Kinyua, 1st Respondent): LR No. 8226/21 IR 75601, Nairobi/Block 110/782, KJD/Kitengela/57666, KJD/Kitengela/65581, KJD/Kitengela/65582 with the total value of Kshs 68,800,000
 - ii. Properties registered in the name of Bestline Enterprises, 2nd Respondent LR No. 2922/14 located at Laikipia County with the total value of Kshs 18,000,000
 - iii. Properties registered in the name of Cherya Enterprises 3rd Respondent: Ruiru/Kiu Block 3/1379 located at Ruiru, Ruiru/Kiu Block 3/1380 located at Ruiru, Ruiru/Kiu Block 3/3627 located at Ruiru with the total value of Kshs 95,000,000
- 6) That pending the hearing and determination of this Suit, this Honourable Court be pleased to issue an order of injunction restraining the Respondents, their agents, servants and/or any other persons from selling, transferring, disposing, wasting, or in any other way (howsoever described) alienating the following Motor Vehicle: KCH 625 W Toyota Prado registered in the name of Cherya Enterprises
- 7) That pending the hearing and determination of the Suit, the Plaintiff be allowed to keep custody of the Kshs. 500,000.00 and Yuan 15,648.00 seized from the 1st Defendant's residential premises on 9th June 2021.
- 8) That the costs of this application be provided for.”

3. The Application is made on the grounds stated on the face of it and in the supporting and further affidavits of Danson Siba as follows:

- 1) The Commission pursuant to sections 55 of [ACECA](#) is mandated to investigate a person suspected of corruption and require such a person to explain the disproportion between his/her assets and the known legitimate sources) of income. Section 11(1) (j) of the [EACC Act](#) allows the Commission to institute and conduct proceedings in Court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.
- 2) The Commission received a report that Mr. Jeremiah Kamau Kinyua (the 1st Respondent herein), a former public officer in the employ of the Kenya Revenue Authority had amassed wealth that was not commensurate with his known sources of income.
- 3) To establish the veracity of the allegations, the Commission commenced investigations seeking to establish whether there were reasonable grounds to suspect that 1st Respondent was engaged in corruption and economic crimes as alleged and further seeking to establish whether



he had acquired and/or accumulated assets that were disproportionate to his known legitimate sources) of income irrespective of whether the suspect assets were held by himself or other parties.

- 4) The Commission has completed investigations and reasonably suspects that in the period between January 2012 and January 2021, (hereinafter "the period of interest" the is Respondent had indeed amassed wealth that was not commensurate with his known sources of income.
- 5) Investigations revealed that the 1st Respondent received huge and successive cash deposits in his various bank accounts which he could not satisfactorily demonstrate the source and therefore the Commission reasonably suspects that the same were bribes.
- 6) Investigations revealed that the 1st Respondent used the 2nd and 3rd Respondents/Defendants as conduits to receive, hold or otherwise conceal funds acquired in the course of or as a result of corrupt conduct.
- 7) From the investigations, the Commission established that during the period of interest in which the Respondents were reasonably suspected of corruption and economic crimes, they accumulated assets in landed properties, bank & mobile money (Mesa) deposits and a motor vehicle which assets were disproportionate to their known legitimate sources of income amounting to Kshs. 359,537,690.51 set out below:
 - i. 1st Respondent Kshs. 174,289,203.74
 - ii. 2nd Respondent Kshs. 18,000,000.00
 - iii. 3rd Respondent Kshs. 167,284,486.77Total Kshs. 359,537,690.51
- 8) On 26th November 2021, the Commission pursuant to section 26 and 55 (2) of ACECA, issued Notices to the Respondents to explain the disproportion in their assets with their known legitimate source(s) of income amounting to Kshs. 359,537,690.51 as enumerated above.
- 9) The Commission received responses from the Respondents on 14th January 2022 which responses were considered and upon further analysis, there was need for the Commission to obtain additional information from the Respondents. The Commission accordingly issued Supplementary Notices on 2nd February 2022.
- 10) The Commission received a further response from the Respondents and after analysis a cumulative value of Kshs. 83,140,717.80 was found to have been satisfactorily explained leaving out an unexplained disproportion of Kshs 271,396,972.71 as set out below:
 - i. 1st Respondent Kshs. 103,174,137.59
 - ii. 2nd Respondent Kshs. 18,000,000.00
 - iii. 3rd Respondent Kshs. 157,298,486.77Total Kshs. 278,472,624.36
- 11) On 14th April 2022, the Commission issued demand notices to the Respondents to remit the above unexplained wealth of Kshs. 278,472,624.36.



- 12) Pursuant to Section 55(2) of *ACECA*, the Commission has instituted a Suit (accompanying this Application under a Certificate of Urgency) seeking forfeiture of the above stated assets amounting to Kshs. 278,472,624.36 which were acquired during the period of interest when the Respondents were reasonably suspected of corruption or economic crimes.
 - 13) In the alternative, the Commission is seeking through the suit that where the said assets have been wasted or otherwise unavailable for forfeiture, an order for payment of the assets' equivalent in monetary value be made to the Government of Kenya.
 - 14) The Respondents have in the past engaged in schemes to conceal the illicit assets in corporate entities, the 2nd and 3rd Respondents herein, in an effort to distance the assets from their illegitimate source. In the circumstances, there is an urgent need to prohibit any dealings whatsoever with the said assets to obviate their dissipation which would compound or render the forfeiture proceedings nugatory.
 - 15) It is therefore just and in the public interest to prohibit the Respondents their agents, servants and/or any other persons from transferring, alienating, disposing of, dissipating or otherwise wasting the suit properties pending the hearing and determination of this application and further pending the hearing and determination of the accompanying suit (Originating Summons) for forfeiture.
4. The Application was opposed by the Defendants/Respondents *vide* a Grounds of Opposition and Preliminary Objection both dated 10th May 2022.
 5. The Defendants raised an objection to that the Plaintiff's supporting affidavit offends the mandatory provisions of Rule 9 of the *Oaths and Statutory Declarations Rules*. They further raised 5 Grounds of Opposition as follows: that the Notice of Motion application dated 10th May 2022 is fatally defective and incompetent, that the said application not supported by any evidence under Oath is thus misconceived, unmeritorious, frivolous and vexatious; that the application is defective in form as it purports to cover assets acquired in 2012 which is outside the audit period; that the supporting affidavit does not comply with Rule 9 of the *Oath and Statutory Declaration Rules*; and the averments in the supporting affidavit do not support or are not in tandem with the prayers sought.
 6. The Plaintiff and the Defendants filed written submissions in support of their respective cases, which I have considered.
 7. Issues for determination:
 - 1) Whether the supporting affidavit of Danson Siba sworn on 10th May 2022 is defective
 - 2) Whether the Plaintiff/Applicant has met the threshold for the grant of an interlocutory injunction in respect of the suit properties

Analysis and determination

Whether the supporting affidavit of Danson Siba sworn on 10th May 2022 is defective

8. The Defendants/Respondents have challenged the Notice of Motion Application dated 10th May 2022 as being fatally defective for failure to attach and rely on any annexures in the supporting affidavit. They contend that since the annexures were not properly and procedurally produced for consideration by the court, it offends Rule 9 of the *Oaths and Statutory and Statutory Declaration Rules*. They cited *Inamol Jesus Berakoetxea & 2 Others v Edward Buria & 2 Others* [2018] eKLR in support.



9. The Plaintiff's rejoinder is that the affidavit complies with the said Rule 9, as the deponent at paragraph 4 averred that that they relied on the affidavit filed in support of the Originating Summons.
10. Rule 9 of the *Oaths and Statutory and Statutory Declaration Rules* provides:
- “All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”
11. I have considered the impugned supporting affidavit by Danson Siba dated 10th May 2022. Indeed, he does not directly produce any exhibits, but refers the court to the supporting affidavit annexed to the Originating Summons filed alongside the Application. He avers at paragraph 4 of the supporting affidavit:
- “4. That I swear this affidavit in support of this Application for injunction. The Plaintiff/Applicant will also rely on my affidavit and annexures therein sworn in support of the Originating Summons filed herein in urging this application”
12. It is my understanding that by the above reference, the Plaintiff/Applicant relied on both the supporting affidavits on record, sworn by Danson Siba on 10th May 2022. There is no law that prohibits the Applicant from making a cross-reference to a document they have already filed in court. Indeed, the affidavit in support of the originating summons is voluminous and a duplication of the same would result in wastage of resources. Accordingly, it is my view that the supporting affidavit is properly on record as it meets the formal and procedural requirements of Rule 9 of the *Oaths and Statutory and Statutory Declaration Rules*. The Objection by the Defendants/Respondents is unmerited and therefore overruled.

Whether the Plaintiff/Applicant has met the threshold for the grant of an interlocutory injunction in respect of the suit properties.

13. The test for the grant of an interlocutory injunction was well settled in *Giella v Cassman Brown* [1973] eKLR from the issues for determination. That the Applicant must establish a prima facie case with a probability of success; demonstrate irreparable injury if a temporary injunction is not granted and if the court is in doubt as to the first two conditions, the application ought to be determined on a balance of convenience. The court of appeal in *Joseph Ntombura v Godfrey Simiyu & 4 others* [2018] eKLR reiterated these principles as follows:
- “24. The threshold for an interlocutory order is well stated in the case of *Giella v Cassman Brown & Co. Limited* [1973] E.A. 358. First, an applicant must show a prima facie case with a probability of success; second, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and third, if the court is in doubt, it will decide an application on the balance of convenience. Those principles were further considered by this Court in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, as follows; -
- “These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is



expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd - v - Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *Prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit leap frogging" by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

14. The plaintiff's case is that the 1st defendant, being a public officer employed by the Kenya Revenue Authority (KRA), received huge successive cash deposits disproportionate to his legitimate sources of income, which he invested in landed properties and motor vehicles through the 2nd and 3rd Respondents. They contend that the 1st Respondent while working as a public officer at the Kenya Revenue Authority (KRA), had amassed wealth that was not commensurate with his known sources of income. That the Plaintiff conducted investigations into the said allegations and upon conclusion of its investigations established that in the period between January 2012 and January 2021, (the period of interest) the 1st Respondent, who at the time of his resignation from the Kenya Revenue Authority had amassed wealth that was not commensurate with his known sources of income. That their investigations revealed that the 1st Respondent received huge and successive cash deposits in his various bank accounts which he could not satisfactorily demonstrate the source and therefore the Plaintiff reasonably suspects that the same were monies received by the 1st Respondent by virtue of his office and reasonably suspected to be bribes. The total unexplained assets stood at Kshs. 359,537,690.51, but upon issuance of notices the respondents were able to explain only Kshs. 83,140,717.80 leaving assets valued at Kshs. 278,472,624.36 as unexplained assets, subject of the recovery proceedings.
15. The Defendants/Respondents have not filed any affidavits contending the allegations. They have also not challenged the allegations raised in the Notice of Motion and Supporting affidavits by the Plaintiff/Applicant. From a cursory review of the Originating Summons, the affidavits and annexures filed, it is my considered view that the Plaintiff has established a prima facie case with a likelihood of success. It does not help the Defendants have failed, as at the date of this Ruling, to file any response to the Originating Summons.
16. On the second principle of whether the Applicants shall suffer irreparable harm, the Applicant contends that there is a threat of irreparable injury. Indeed, the Plaintiff seeks an injunction prohibiting the transfer, alienation or wastage of the assets subject of the recovery suit as listed in the prayers in the Application.



17. This court, while considering the issue of irreparable harm in a similar suit in [*Ethics & Anti-Corruption Commission v Moses Kasaine Lenolkulal*](#) [2019] eKLR held as follows:

“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.”

18. There is an apparent risk that the Defendants, if not restrained, are likely to transfer, sell, or deal with the assets subject of recovery in a manner that would be detrimental to the Plaintiff’s ability to recover the suit properties should they be successful. They would then be constrained to spend public resources in the tracing of the assets and proceeds, which surely an uneconomical way to spend public funds. Accordingly, it is my view, that the Plaintiff/Applicant is likely to suffer irreparable harm should the court decline to grant injunctive reliefs as sought.

19. Lastly, on a balance of convenience, despite this court not being in doubt on the first two limbs of the test in *Giella v Cassman Brown*, it is my view that the scales tip in favour of the Plaintiff/Applicant. This court granted an interim injunction in terms of prayers 1,2,3 and 4 of the Application on 12th May 2022. The Defendants have not shown to this court, the inconvenience suffered that would outweigh the impending risk of loss or dissipation of the suit properties. It therefore goes without say, that it is convenient, in the circumstances, to grant the injunction in favour of the Plaintiff/Applicant.

20. The upshot is that the Plaintiff/Applicant’s Notice of Motion dated 10th May 2022 is successful. Prayers 1,2,3, and 4 having been already granted by this court in the order dated 12th May 2022, prayers 5,6 and 7 of the Application are granted as prayed and it is hereby ordered:

(a) That pending the hearing and determination of this Suit this Honourable Court be pleased to issue an order of injunction restraining the Respondents, their agents, servants and/or any other persons from selling, transferring, charging or further charging, leasing, developing, subdividing, disposing, wasting, or in any other way (howsoever described) alienating the following properties:

- i. Properties registered in the name of Jeremiah Kamau Kinyua, 1st Respondent): LR NO. 8226/21 IR 75601, Nairobi/Block 110/782, KJD/Kitengela/57666, KJD/Kitengela/65581, KJD/Kitengela/65582 with the total value of Kshs 68,800,000
- ii. Properties registered in the name of Bestline Enterprises, 2nd Respondent LR No. 2922/14 located at Laikipia County with the total value of Kshs 18,000,000
- iii. Properties registered in the name of Cherya Enterprises 3rd Respondent: Ruiru/Kiu Block 3/1379 located at Ruiru, Ruiru/Kiu Block 3/1380 located at Ruiru, RUIRU/Kiu Block 3/3627 located at Ruiru with the total value of Kshs 95,000,000

(b) That pending the hearing and determination of this Suit, this Honourable Court be pleased to issue an order of injunction restraining the Respondents, their agents, servants and/or any other persons from selling, transferring, disposing, wasting, or in any other way (howsoever described) alienating the following Motor Vehicle: KCH 625 W Toyota Prado registered in the name of Cherya Enterprises



- (c) That pending the hearing and determination of the Suit, the Plaintiff be allowed to keep custody of the Kshs. 500,000.00 and Yuan 15,648.00 seized from the 1st Defendant's residential premises on 9th June 2021.
- (d) The costs of the application shall be in the cause.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 25TH DAY OF MAY 2023

E N MAINA

JUDGE

