



REPUBLIC OF KENYA



**Ethics And Anti-Corruption Commission v Obado & 19 others (Civil Suit E010 of 2021)
[2023] KEHC 17941 (KLR) (Anti-Corruption and Economic Crimes) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES**

CIVIL SUIT E010 OF 2021

EN MAINA, J

MAY 25, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

ZACHARY OKOTH OBADO 1ST DEFENDANT
EVELYNE ADHIAMBO ZACHARY 2ND DEFENDANT
DAN ACHOLA OKOTH 3RD DEFENDANT
SCARLET SUSAN OKOTH 4TH DEFENDANT
JERRY ZACHARY OKOTH 5TH DEFENDANT
JARED PETER OGOYO OLUOCH KWAGA 6TH DEFENDANT
FORMERLY KWAGTEC COMMUNICATIONS LIMITED 7TH DEFENDANT
DANKEY PRESS LIMITED 8TH DEFENDANT
ATINUS SERVICES LIMITED 9TH DEFENDANT
DELTRACK ICT SERVICES 10TH DEFENDANT
TARC HDOG PRINTERS LIMITED 11TH DEFENDANT
MATEBAC CONTRACTORS 12TH DEFENDANT
SELETRACK CONSULTANTS 13TH DEFENDANT
JOYUSH BUSINESS LIMITED 14TH DEFENDANT
SWYFCON ENGINEERING 15TH DEFENDANT
DOLPHUS SOFTWARE LIMITED 16TH DEFENDANT



KAJULU BUSINESS LIMITED	17TH DEFENDANT
PESULUS SUPPLIERS LIMITED	18TH DEFENDANT
VICTORIUS INVESTMENTS LIMITED	19TH DEFENDANT
OLIVER OKENO ODHIAMBO	20TH DEFENDANT

RULING

1. The 6th and 7th Defendants/Applicants filed this Notice of Motion dated March 21, 2023 supported by an affidavit sworn by Jared Peter Odoyo Oluoch Kwaga, the 6th Defendant/Applicant under Section 6 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules seeking for the following orders:
 - “1) That this Honourable Court be pleased to grant an order of Stay of proceedings in this suit pending the hearing and determination of ACEC NO 32 of 2018.
 2. That the costs of this application be in the cause.”

2. The Application is made on grounds as follows:-
 - “1) That the Applicant herein is the 1st Defendant in ACEC No 32 of 2018 wherein the Plaintiff herein seeks to recover a sum of Kshs 1,900,000,000/= from the Defendants in that suit.
 2. That the other Defendants in ACEC No 32 of 2018 are the 6th to 19th Defendants in this particular suit. The Plaintiff remains to be Ethics and Anti-Corruption Commission.
 3. That the amount the Plaintiff wishes to recover from the Defendants in this suit is part of Kshs 1,900,000,000/= which the same Plaintiff seeks to recover from the Defendants in ACEC No 32 of 2018.
 4. That this matter is sub judice on account of the matter before this same court in ACEC Suit No 32 of 2018 which is part-heard and was heard on March 17, 2023 and is scheduled to come up for hearing on June 6, 2023
 5. That in the event the Plaintiff succeeds in both suits against the Defendants, the Plaintiff will recover double the amount and therefore unjust enrichment.
 6. That Section 6 of the Civil Procedure Act provides that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. Therefore, this Court is barred from hearing the case herein in the existence of case No 32 of 2018.
 7. That the Applicant will be greatly prejudiced since he will be forced to Defend the same suit twice.



8. That the suit herein is malicious, frivolous and vexatious. It is meant to visit unnecessary suffering on the Defendants and is an absolute abuse of the court process.
 9. That accordingly, for the ends of justice to be met, it is only fair and equitable for the orders sought to be granted.”
3. The 10th, 11th, 12th, 13th, 14th 15th, 16th and 19th Defendants/Respondents supported the Application through a replying affidavit sworn by Joram Opala on May 12, 2023.

Response by the Plaintiff/Respondent

4. The Plaintiff/ Respondent opposed the Application through the affidavit of Anne Murigih sworn on April 4, 2023 and the written submissions dated May 12, 2023.
5. The Plaintiff/ Respondent contends that the Application is fatally defective and should be struck out as the Application was filed in violation of Order 9 of the Civil Procedure Rules in regard to recognized agents and advocates and that the application is bad in law, misconceived frivolous, totally devoid of merit.
6. It is the Plaintiff's contention that the application is an abuse of the court process and violates the provisions of Section 1A and 1B of the Civil Procedure Act, which speaks to the overriding objective in civil proceedings; that the application is an after-thought and a vain attempt to derail the course of justice; that the conditions for stay of this suit under Section 6 of the Civil Procedure Act have not been met; that the cause of action in this suit is different from the cause of action in HCACEC Suit No E010 of 2021 (OS); *EACC v Jared Peter Oduyo Oluoch Kwaga & 22 Others & 6 Interested Parties* as this suit relates to recovery of proceeds of corruption related to conflict of interest as against the individual beneficiaries being the 1st to 6th Defendants while the claim in HCACEC Suit No 32 of 2018 relates to forfeiture of unexplained assets as against the 7th -19th Defendants who are the contractors who purportedly traded with the County Government of Migori; that the 14th – 15th Defendants are not parties in HCACEC No 32 of 2018 (OS): *EACC v Jared Peter Oduyo Oluch Kwaga & 22 Others & 6 Interested Parties* and no claim is made against them in the said suit. The plaintiff avers further that the Claim in this suit is a specific claim for the funds used to pay school fees, purchase the impugned motor vehicles and Loresho Ridge House No C1 on LR No 21080/38 (Title Number IR 74363) while HCACEC Suit No 32 of 2018 (OS) are forfeiture proceedings seeking the determination of the questions therein, including. whether the Kshs 1,978, 592, 467.10/- paid from the County Government of Migori to the various companies, being the 7th - 19th Defendants herein, and assets acquired by the directors/shareholders, constitute unexplained assets within the meaning of Section 2 of the *Anti-Corruption and Economic Crimes Act*; that the prayers sought in the instant suit are different from the prayers sought in HCACEC Suit No 32 of 2018 and those prayers are sought against different parties in each of the suits; that the filing of the instant suit was informed by the cogent evidence obtained from further investigations and mutual legal assistance from foreign jurisdictions where the Governor's children resided and attended school which mutual legal assistance was received after the institution of HCACEC Suit No 32 of 2018. Further that the entire bundle of documents obtained through mutual legal assistance from foreign jurisdictions and filed in this suit, being evidence of monies electronically transferred to Australia, Scotland and England are not part of the evidence in HCACEC No 32 of 2018 (OS): *EACC v Jared Peter Oduyo Oluoch Kwaga & 22 Others & Interested Parties*.



7. It is also contended that no prejudice shall be occasioned to any party even were this suit to be determined because in the event the Plaintiff succeeds, the said sum of Kshs 73,474,376.53/=, can be deducted from the Kshs 1,978,592,467.10/- claimed in the other suit if need be. That on the contrary, the Plaintiff shall suffer immense prejudice since a stay of this suit will derail the recovery of stolen public funds.
8. The application was canvassed through written submissions.

Issues For Determination

1. Whether the Application is fatally defective
2. Where the Application meets the threshold for stay of proceedings pending the hearing and determination of ACEC No 32 of 2018 (05): *EACC v Jared Peter Odoyo Oluch Kwaga & 22 Others & 6 Interested Parties*

Analysis and Determination

Whether the Application is incompetent and hence not properly before this court.

9. The Respondent has raised a preliminary issue that the Application is incompetent and fatally defective due to the omission by the 6th and 7th Defendant's to enter appearance in the suit in violation of Order 7 Rule 1 of the *Civil Procedure Rules* and the omission of their Advocates to file a Notice of Appointment of Advocates as provided in Order 9 of the *Civil Procedure Rules*.
10. The appearance of parties is guided by Order 6 of the *Civil Procedure Rules* and Rule (1) thereof states:- Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons." Where Defendants appear by the same advocate the names of all the Defendants shall be in the same memo. (See Order 6 Rule (5).
11. Order 7 Rule 1 of the *Civil Procedure Rules* 2010 which is couched in mandatory terms, then states:-

7(1). Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service"
12. I have perused the physical record and the online judiciary e-filing system and indeed the 6th and 7th Defendants did not either enter appearance or file a defence either personally or through the firm of Sagana, Biriq and Co Advocates, this despite Mr. Sagana seeking and being granted leave by this court to do so. Be that as it may the 6th and 7th Defendants have through their advocates actively participated in the hearing of the suit which is now partly heard. This scenario arises from the fact that despite there being no defence on the record Counsel for the Plaintiff did not file a request for a default judgment as it should have and neither did they protest to the 6th and 7th Defendants participating in the hearing and as such they proceeded to cross examine the witnesses. While I am alive to the holding of the court in the case of *Simon Barasa Obiero vs Jackson Onyango Obiero* Busia HC Civil Appeal No 10 of 2016 that "Any memorandum of appeal, application, notices, submissions filed by any other party or firm of advocates, ostensibly on behalf of the Appellant without complying with Order 9 Rule 9 of the *Civil Procedure Rules* is null and void *ab initio*" the circumstances of this case cause me to depart from that holding and compel me to instead allow the Advocate for the 6th and 7th defendants to regularize



their position. They shall do so within 14 days. I shall in the circumstances proceed to determine the application on the merits.

Issue (2) whether the Application meets the threshold for stay of proceedings pending the hearing and determination of HCACEC Suit No 32 of 2018 (05): *EACC v Jared Peter Odoyo Oluoch Kwaga & 22 Others & 6 Interested Parties*: whether this suit is subjudice as alleged.

13. It is trite that stay of proceedings as a remedy is granted sparingly, and only in cases where the conditions under Section 6 of the *Civil Procedure Act* are met: That Section states: -

“6. Stay of suit

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.”

14. My interpretation of the aforesaid Section 6 is that the following four conditions must exist in order for a case to be declared sub judice:

- a. the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding.
- b. the parties are the same.
- c. the parties are litigating under the same title.
- d. the court has jurisdiction to grant the relief claimed.

15. I have perused the Complaint and the Originating Summons annexed to the supporting affidavit of the Plaintiff/Applicant as Annexures AM1 and AM2. It is my finding that the instant suit No E010 of 2021 is a recovery suit brought under Section 11(1)(j) of the *Ethics and Anti-Corruption Commission Act*, seeking to recover a landed property known as Loresho Ridge House No C1 LR 21080/38 (IR 74363) and two motor vehicles Regn No KCK 997W and KCK 722B or their value, which is given as Kshs 15,961,927, which are alleged to have been corruptly acquired by the Defendants. On the other hand, the claim in HCACEC Suit No 32 of 2018 relates to forfeiture of unexplained assets valued at Kshs 382,395,000/= allegedly acquired by the 1st to 6th Defendants during the period of interest and also a sum of Kshs 1,978,592,467.10/- allegedly obtained by the Defendants from the Migori County Government through fictitious procurement contracts. Though the parties in the two suits are substantially similar, it is apparent that the suits present two completely distinct causes of action with different reliefs under the law.

16. It is trite that the four conditions for stay of proceedings under Section 6 are mutually inclusive and must all be satisfied for the orders to issue. In the circumstances, the 6th and 7th Defendant's application falls short as this court has established that the causes of action are not the same.

17. Accordingly, the Notice of Motion dated March 21, 2023 is unmerited and it is hereby dismissed with costs to the Plaintiff/Respondent.

18. It is so ordered.



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

E N MAINA

JUDGE

