



REPUBLIC OF KENYA



KENYA LAW
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**Ethics & Anti-Corruption Commission v Ahaza & 12 others (Anti-Corruption and Economic Crimes Civil Suit E017 of 2023) [2023] KEHC 22740 (KLR)
(Anti-Corruption and Economic Crimes) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22740 (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 E017 OF 2023

EN MAINA, J

SEPTEMBER 28, 2023

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

NATHANIEL MANYEVE AHAZA 1ST DEFENDANT
WILBERFORCE NDULA 2ND DEFENDANT
EMMA MULONGO KISEMBE 3RD DEFENDANT
BEATRICE ALOSA MAKUTI 4TH DEFENDANT
JOHNSON OMBAKA 5TH DEFENDANT
ERNEST AMBAKA LUKAYU 6TH DEFENDANT
VICTOR AYWAH KEYO 7TH DEFENDANT
PETER VULIMU EJIMBA 8TH DEFENDANT
BEATRICE MAKUNGU 9TH DEFENDANT
JOSEPH MALOBA CHITECHI 10TH DEFENDANT
ANTONIA MUYOKA SUNGURA 11TH DEFENDANT
ELIZABETH MASIDZA 12TH DEFENDANT
BOYSE VENTURES LIMITED 13TH DEFENDANT



RULING

1. This ruling pertains to the plaintiff's notice of motion dated June 26, 2023 which seeks a temporary injunction pending the hearing and determination of this suit and the 2nd, 3rd, 4th, 5th, 8th, 11th, 12th and 13th defendants.
2. In the notice of motion dated June 26, 2023 the plaintiff seeks a temporary injunction to restrain the 3rd Defendant from having any dealings in an apartment No SPG/03/02/t31/246 Tulip Court 3 on LR No 28223/33 Fourways Junction in Nairobi. The Plaintiff also seeks to restrain the 1st Defendant from having any dealings with a property named as Apartment No 7, Residential Tower B, Nextgen Park on LR No 209/18648, Mombasa Road. The above properties are alleged to have been purchased or acquired with funds corruptly acquired from the County Government of Vihiga. The Plaintiff alleges that its investigations established that the County Government of Vihiga was defrauded of a sum of Kes 13,989,450/= through fictitious contracts which were awarded uncompetitively and in blatant disregard of the provisions of the [Public Procurement and Disposal Act, 2005](#) and the [Public Procurement and Disposal Regulations 2006](#); that the 1st and 12th defendants illegally benefitted to the tune of Kes 13,989,450/- from fraudulent contracts awarded to the 13th defendants, contrary to section 33 of the [Public Procurement and Disposal Act 2005](#) which provides employees from entering into procurement contracts with the County; that the 2nd to 10th defendants being employees of the County Government of Vihiga blatantly abused positions of trust and fiduciary duty owed to the public by using their office to improperly enrich the 1st, 11th, 12th and 13th defendants; that the impugned suit properties were acquired from funds acquired through the fraudulent contracts.
3. The Plaintiff contends that it is reasonably apprehensive that should the orders sought not be granted, the defendants are likely to dispose the properties and the recovery proceedings of the assets reasonably suspected to constitute the proceeds of corruption and economic crimes shall be rendered nugatory. The Plaintiff therefore urges this court to grant the orders sought.
4. The 2nd, 4th, 5th, 8th, 11th, 12th and 13th defendants, on the other hand, contend that the Plaintiff's suit should be struck out for reasons that no summons to enter appearance were served upon the Defendants as is mandatory under order 5 rule 1 of the [Civil Procedure Rules](#); for being time barred under section 4 of the [Limitation of Actions Act](#) for being brought after six years from the date of the alleged cause of action; that the suit is premature for being filed before the expiry of the time stated in the demand letter.
5. Both the notice of motion and the preliminary objection were heard together by way of written submissions.
6. The 1st Defendant also vehemently opposed the application. It is his contention that the property in his name was acquired through funds which were legally obtained therefore the plaintiff does not have a prima facie case; that he together with his spouse (3rd Defendant) started paying for the apartment from 8th October 2014 to January 8, 2015; that the 13th defendant of which the 1st defendant is one of the directors was registered in the year 2006 and thereafter it traded in imports and general supplies of used motor vehicles and accessories as well as stationary, printing, general merchandise and consultancy; that it complied with the law on public procurement; that once the County was promulgated and he was appointed as a member of the committee since we was an employee of the County he declared his interest as required under sections 33 and 43 of the [Public Procurement and Disposal Act 2005](#) then stepped aside from the procurement process concerning his company; that the procurements



undertaken in the Financial year 2014/2015 were audited by the Kenya National Audit Office and the Public Procurement Oversight Authority but no malpractice was detected; that the plaintiff has not demonstrated that the work was not done and only relies on hearsay that the said contracts were not executed; that the plaintiff has not established a prima facie case with a probability of success; that he has demonstrated how he acquired the apartment No. 7 at Nextgen Park through a tabulation of the payments; that the Plaintiff has not demonstrated that the apartment is likely to be wasted or that it (the Plaintiff) will suffer irreparable harm or that in any event the balance of convenience tilts in its favour.

7. The 7th, 9th and 10th defendants have urged this court to dismiss the application with costs as no particular orders are sought against them. It is their contention that they served as low level officers at the County Government and at no point in the course of their employment were they involved in the processing of payments to the 13th defendant with knowledge that no goods or services were supplied or rendered; that they only became aware of this matter in the year 2021 when they were summoned by the Ethics and Anti-Corruption Commission to record statements; that the present application affects only the 1st and 3rd defendants which means that the alleged fraud, if any, did not accrue any benefit to themselves and hence the application ought to be dismissed with costs to them.
8. The 1st defendant further contends that this court has no jurisdiction to hear this case firstly in view of the criminal proceedings, which relate to the same procurement, against him in the Kakamega Chief Magistrate Court Anti- Corruption Case No E001 of 2022 and he has a right to be presumed innocent until proved guilty; that it is the Kakamega High Court where the Criminal case is domiciled and filing this case in this court which is many miles from where the cause of action arose is but a ploy to deny him of justice and make the hearing process as expensive and impossible for him. The 1st defendant also contended that section 24 of the Land Registration Act gives him absolute ownership of the apartment and reiterates that he obtained the apartment legally and as the plaintiff has also not demonstrated that it has a *prima facie* case the application should be dismissed with costs.
9. I have considered the pleadings, the rival submissions and the cases cited.
10. I shall start with the preliminary objection and then the issue of jurisdiction raised by the 1st defendant.
11. On the preliminary objection as it regards the summons to enter appearance learned counsel for the plaintiff/applicant has demonstrated that summons were served upon all the defendants/respondents and indeed there are copies in the court file. As regards the time of expiry of the demand letter it is indeed correct that failure to serve a demand only goes to the issue of costs but does not vitiate a suit.
12. In regard to limitation it is instructive that this is a suit brought by the Plaintiff pursuant to its powers under section 11(1)(j) of the Ethics and Anti-Corruption Commission Act section 53(3) of the Anti-Corruption and Economic Crimes Act which state: -

“ 11.

- (j) 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.”

“53(3) An amount for which a person is liable under Section 51 or 52 to a public body may be recovered by the public body or by the Commission on its behalf.”



The proceedings are therefore not affected by the *Limitation of Actions Act* as “a proceeding to recover an amount for which a person is liable under section 51 or 52 of the *Anti-Corruption and Economic Crimes Act* or a proceeding under section 55 or 56 of that Act” are excluded from the Act under section 42(1) (j) of the *Limitation of Actions Act*. The preliminary objection has no merit therefore and it is dismissed.

13. On the issue of jurisdiction as raised by the 1st defendant/respondent it is trite that it is everything and should the court find it is not properly seized of the matter it must down its tools. My finding however, is that this court is vested with jurisdiction to hear and determine this case. Civil proceedings for recovery of property alleged to have been acquired through corruption can run concurrently with criminal proceedings. There is a long line of cases to that effect but see the case of *Evans Kidero v Ethic & Anti-Corruption Commission and 13 others* Civil Application No. E003 of 2022 where the Court of Appeal in refusing to issue a stay of proceedings on this very ground stated:-

“28. In short, courts will not ordinarily grant a stay of civil proceedings simply by virtue of the existence of parallel criminal proceedings arising out of the same events or subject matter. This is the import of section 193A of the *Criminal Procedure Code* which expressly permits parallel criminal and civil proceedings.
...”

14. The pendency of the criminal proceedings at the Kakamega Chief Magistrates Anti-Corruption Court are therefore not a bar to these civil recovery proceedings.
15. As for want of jurisdiction due to the geographical location of this court it is instructive that the exclusive jurisdiction of the Anti-Corruption and Economic Crimes Division of the High Court to hear anti-corruption and economic crimes cases arises from the Practice Directions of the Court published by the hon. Chief Justice (Emeritus) David Maraga which were gazetted on December 9, 2016 which state: -

“ ...

2. All new cases relating to corruption and economic crimes shall be filed in the Principal Registry of the Division at Nairobi for hearing and determination.
5. The following matters shall be heard by the Anti-corruption and Economic Crimes Division of the High Court—
 - (a) petitions and Judicial Review applications on claims of infringement or the threatened infringement of constitutional rights relating to corruption and/or economic crimes related matters;
 - (b) all proceedings relating to corruption and economic crimes over which the Magistrates’ Anti-Corruption Court has no jurisdiction;
 - (c) all criminal reviews, revisions, appeals and any other applications arising from decisions of the special Magistrates appointed under section 3 of the *Anti-Corruption and Economic Crimes Act*, 2003;



- (d) cases relating to corruption and economic crimes filed under the following Acts:
- (i) [*Anti-Corruption and Economic Crimes Act*](#), cap. 65.
 - (ii) [*Proceeds of Crime and Anti-Money Laundering Act*](#), cap. 59B’.
 - (iii) [*Anti-Counterfeit Act*](#), cap. 130A
 - (iv) [*Leadership and Integrity Act*](#), Cap. 182.
 - (v) [*Public Procurement and Asset Disposal Act*](#), No. 33 of 2015.
 - (vi) [*Public Officers Ethics Act*](#), Cap. 183.
 - (vii) [*Public Finance Management Act*](#), No. 18 of 2012.
 - (viii) [*Extradition \(Contiguous and Foreign Countries\) Act*](#), Cap. 76.
 - (ix) [*Extradition \(Commonwealth Countries\) Act*](#), Cap. 77.
 - (x) [*Prevention of Organized Crimes*](#), Cap. 59.
 - (xi) [*Mutual Legal Assistance Act*](#), Cap. 75A.
 - (xii) Regional and International Treaties and Conventions on Anti-Corruption.
 - (xiii) Or filed under any other enabling provisions of law.
- (e) Disputes touching on or related to—
- i. offences or the recovery, or protection of public property, or
 - ii. the tracing of, freezing of, or confiscation of proceeds of corruption or related to corruption and money laundering, and
 - iii. the payment of compensation of proceeds of corruption and economic crimes.

16. The Special Magistrates appointed under section 3 of the [*Anti-Corruption and Economic Crimes Act*](#) do not have jurisdiction to hear civil forfeiture cases as is this case, and that jurisdiction lies with the High Court and more specifically with this Court/Division under the Practice Directions. The submission that this court does not have jurisdiction to hear this case and hence to grant the orders sought in this application, is therefore misconceived.

17. As for the argument that the 1st Defendant has absolute ownership of the property in issue I can only state that even Article 40(6) of [*the Constitution*](#) recognizes that the right to property does not extend to property that is unlawfully acquired. Should the property be found to be tainted it is liable to forfeiture. That the 1st Defendant has a constitutional right to own property is therefore not a bar to these proceedings.



18. On the merits it is my finding that the plaintiff has demonstrated that it has reasonable grounds to believe that the impugned apartments may have been acquired through proceeds of corruption. I find therefore that, noting that a *prima facie* case is not one that must succeed in the end, the plaintiff has demonstrated that it has a *prima facie* case with a likelihood of success as to warrant this court to grant it the temporary injunctions sought so as to ensure that the properties are not disposed of and render these proceedings nugatory. It would also be in the public interest that the properties are preserved pending the hearing and determination of the case.
19. The upshot is that the preliminary objection is dismissed but the application of the plaintiff is allowed and orders granted as follows: -
- a. That pending the hearing and determination of this suit the 3rd defendant by herself, her agents, servants and/or employees or any other person interested in the suit property herein shall be and are hereby restrained from alienating, selling, charging, further charging, leasing, transferring, wasting, disposing or in any other manner dealing with Apartment No. SPG/03/P2/T31/246 Tulip Court 3 erected on LR No. 28223/33 Fourways Junction Nairobi other than by way of surrender to the Government of Kenya.
 - b. That pending the hearing and determination of this suit the 1st Defendant by himself, his agents, servants and/or employees or any other person interested in the suit property herein shall be and are hereby restrained from alienating, selling, charging, further charging, leasing, transferring, wasting, disposing or in any other manner dealing with Apartment No 7, Residential Tower B, Nextgen Park situated on LR No 209/18648, Mombasa Road other than by way of surrender to the Government of Kenya.
 - c. That the costs of the preliminary objection and the notice of motion shall be in the cause.”

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 28TH DAY OF SEPTEMBER 2023.

E N MAINA

JUDGE

