



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC CIVIL SUIT NO. E009 OF 2021

ETHICS & ANTI-CORRUPTION COMMISSION.....APPLICANT

AND

CHARLES MUIA MUTISO.....RESPONDENT

RULING

1. The Notice of Motion dated 3rd May 2021 which is brought under Sections 1A, 1B & 3A of the Civil Procedure Act, Order 40(1) & Order 51(1) of the Civil Procedure Rules, Section 56A of the Anti-Corruption and Economic Crimes Act (ACECA) and all other enabling provisions of law seeks the following orders:

“1. Spent

2. Spent

3. Spent

4. Spent

5. Pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order of injunction prohibiting the Respondent, his agents, servants or any other persons from alienating, selling, charging or further charging, leasing, developing, sub-dividing, wasting, transferring, disposing and/or in any other way dealing with funds in bank account numbers 0754xxxx, 203xxxx and 203xxxx all held at Absa Group Limited in the name of the Respondent; bank account number xxxxxx held at Co-operative Bank Limited in the name of the Respondent; and bank account number xxxxxx held at KCB Bank in the name of the Respondent.

6. Pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order of injunction restraining the Respondent, his agents and servants from transferring, disposing, wasting and/or in any other way dealing with Motor Vehicle Toyota Vanguard registration number KCH 393M.

7. Pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order directing the Respondent to surrender Motor Vehicle Registration No. KCH 393M together with its logbook to the Applicant within 7 days of the order failing which the Applicant be at liberty to seize, tow, and detain the motor vehicle for purposes of preservation.

8. In the alternative to prayer 6 & 7 above, pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order appointing a licensed auctioneer to seize and sell by way of public auction Motor Vehicle Registration No. KCH 393M and the proceeds less auctioneer's expenses and fees be deposited in a joint interest earning account in the name of both the Applicant and the Respondent as security the sum of Kshs. 2,400,000/- being the current value of the motor vehicle KCH 393M.

9. In the alternative to 6, 7 and 8 above, pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order against the Respondent to deposit in a joint interest earning account in the name of both the applicant and the Respondent as security the sum of Kshs. 2,400,000/- value of the motor vehicle.

10. In the alternative to 6, 7, 8 and 9 above, pending the hearing and determination of this suit, this Honourable Court be pleased

to grant an order against the Respondent to deposit with the Applicant security in form of a bank guarantee for Kshs. 2,400,000/- being the current value of motor vehicle KCH 393M.

11. Pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order of injunction against the Respondent, his agents, servants or any other persons from alienating, selling, charging or further charging, leasing, developing, sub-dividing, wasting, transferring, disposing and/or in any other way dealing with the parcels of land known as L.R. No. Matungulu Sengani/3503 located within Matungulu, Machakos valued at Kshs. 8,000,000/- (part) and L.R. No. Donyo Sabuk/Kiboko Block 1/908 located within Matungulu, Machakos valued at Kshs. 3,500,000/-.

12. Pending the hearing and determination of this suit, the Respondent be restrained from demanding, collecting and/or receiving monthly rental income and leave be granted to the Applicant to appoint a receiver for the collection of the monthly rental income, management, control and possession of property known as LR No. Matungulu Sengani/3503 (6 units of two bedroomed) under the provisions of section 56A of the Anti-Corruption and Economic Crimes Act.

13. That this Honourable Court be pleased to issue any other or further orders it deems fit and just so as to preserve the suit property pending the determination of the suit.”

2. The application is supported by the grounds on its face which are reiterated in the affidavit of Feiza Abdi, an investigator with the applicant, sworn on the 3rd May 2021. It is averred that under Section 55 of Anti-Corruption and Economic Crimes Act, the applicant has the mandate to undertake investigations into allegations of corruption and economic crimes and to institute civil proceedings for the recovery of assets whose value is disproportionate to a person’s known legitimate source of income; That on 28th February 2018 the applicant received a report to the effect that the respondent, who is a public officer at the National Treasury, was suspected to have abused/taken advantage of his position from the time he was appointed as a Senior Assistant Director, External Resources and had accumulated assets whose value was disproportionate to his known legitimate source of income; That, upon receipt of the complaint the applicant undertook investigations into the allegations for the period between 1st April 2015 and 30th April 2020 which period the respondent was suspected of corruption; that, investigations established that the respondent was appointed as a Senior Assistant Director External Resources with effect from 16th July 2014, which designation was subsequently regraded to Deputy Director on 1st August 2019; That as at 30th April 2020, the respondent earned a monthly gross salary of Kshs. 144,675.60 and an average monthly net salary of Kshs. 118,691.17 in the five-year period and, that he operated bank **Accounts Numbers 0754xxxx, 203xxxx and 203xxxx held at Absa Group Limited, Account No. xxxxxx held at Co-operative Bank Limited and Account No. xxxxxx held at KCB Bank.** It was also deponed that in furtherance of its investigations to establish whether the respondent’s bank accounts had been used as conduits for acquisition and concealment of illicit wealth, the Commission in exercise of its powers under **Sections 23 and 29 of Anti-Corruption and Economic Crimes Act** obtained warrants **under Sections 180 and 106B (4) of the Evidence Act and Sections 118 and 121 of the Criminal Procedure Code** in Chief Magistrates **Misc. Applications No. 1549 of 2020, No. 1550 of 2020 and No. 1814 of 2020** to investigate the respondent’s bank accounts stated above and obtained bank statements and that, an analysis of the bank statements revealed that other than his salary from the National Treasury the respondent received numerous unexplained inward remittances, EFTs and cash deposits totalling Kshs. 46,789,317.40/-.

3. It was further deponed that the Commission in exercise of its powers **under Sections 23 and 29 of Anti-Corruption and Economic Crimes Act** obtained warrants under **Sections 180 and 106B (4) of the Evidence Act and Sections 118 and 121 of the Criminal Procedure Code** in Chief Magistrates Misc. Application No. E2153 of 2020 to investigate the respondent’s **Mpesa Account No. 0722xxxx** held at Safaricom Limited and obtained the Mpesa statement and that an analysis of the statement revealed that the respondent had received deposits amounting to Kshs. 9,838,890.20/- which credits amounted to a monthly average of Kshs. 163,000/-.

4. Further that the commission in exercise of its powers under **Sections 23 and 29 of Anti-Corruption and Economic Crimes Act** obtained warrants in Chief Magistrates Misc. Application No. 1714 of 2020 to search the respondent’s residence in Nairobi County in which the applicant retrieved several titles to property including title deeds for landed properties known as L.R. No. Matungulu Sengani/3503 located within Matungulu, Machakos valued at Kshs. 8,000,000/- (part) and L.R. No. Donyo Sabuk/Kiboko Block 1/908 also located within Matungulu, Machakos valued at Kshs. 3,500,000/- and that the search further established that the respondent had acquired a motor vehicle registration number KCH 393M during the period in issue.

5. It is also deponed that the Commission requested and obtained from the Kenya Revenue Authority (KRA) the respondent’s income tax returns for the impugned period so as to ascertain the extent of the income of the respondent and an analysis of the income tax returns established that the respondent declared his source of income to be from employment only and that he only filed monthly rental income for the year 2018, 2019 and 2020 having earned a total of Kshs. 1,350,000/- with the minimum monthly rental income being Ksh. 40,000/- and the maximum monthly rental income being Kshs. 60,000/-.

6. It is also deponed that the Commission in investigating the respondent also requested and obtained the respondent’s declaration of income assets and liabilities (Wealth Declaration) for the period 2015 to 2020 from the Public Service Commission (PSC) and did an analysis which revealed that the respondent did not declare rental income for the year 2015, 2016, 2017, 2018 and 2019 as he had concealed rental income on L.R. No. Nairobi /Block 140/775, Matungulu Sengani/3503, L.R. No. Nairobi/Block 79/392, L.R. No. 209/19764 I.R 102436 and, L.R. No. 209/121108.

7. Further that upon conclusion of the investigations, the Commission established that the respondent had accumulated unexplained assets amounting to Kshs. 96,656,814.60/- and issued him with a statutory notice **under Sections 26 and 55 of Anti-Corruption and Economic Crimes Act** giving him an opportunity to explain the disproportion between his known legitimate sources of income and his assets.

8. The applicant deposes that the respondent gave an explanation as requested which upon analysis by the applicant was partly satisfactory; **That**, upon reviewing the evidence available and taking into consideration the explanation by the respondent, the applicant established that the respondent’s known legitimate sources of income including his salary and travel allowances amounted to Kshs. 17,945,291.95/- and that in just 5 years between 1st April 2015 and 30th April 2020 the respondent had accumulated assets valued at Kshs. 64,390,993.30/- giving an unexplained disproportion of Kshs. 46,445,701.35/- . It was further asserted that the respondent having accumulated unexplained assets

valued at Kshs. 46,445,701.35/- is reasonably suspected of corruption and economic crimes which the applicant seeks that the respondent is ordered to pay to the Government of Kenya being the difference between his total assets and his known legitimate sources of income or any other amount that this Honourable Court may find to be the value of the respondent's unexplained assets.

9. It is averred that the applicant completed its investigations and filed the current suit against the respondent and it was apprehensive that unless the orders sought in this Notice of Motion are granted the respondent who is in possession and control of the properties shall seek to dispose of, or transfer or part with the properties so as to frustrate any decree that may be passed by this court.

10. It is averred that the applicant has a prima facie case with a high probability of success as it has documentary evidence to show the respondent has unexplained assets to the tune of Kshs. 46,445,701.35/-; that no prejudice shall be occasioned to the respondent as he is still earning his salary and is financially able to cater for his subsistence. It is also averred that the balance of convenience tilts in favour of the applicant since the respondent will continue enjoying his salary and income from other legitimate sources and that moreover, the matter is of public interest as it involves the fight against endemic corruption and abuse of public positions of trust for private benefit.

11. In response to the application, the respondent filed a replying affidavit dated 20th August 2021 where he deposed that the essence of the Commission's application is for him to provide security for the satisfaction of any decree that may be passed against him. He deposed that he has instructed his advocate on record to enter into negotiations with the applicant with a view of settling and or entering into a consent over the application and that vide a letter dated 19th May 2021 his advocate, with the respondent's consent, offered several landed and developed properties with a value of Kshs. 40,500,000/- as security. He deposed that he also proposed that restriction could be placed against any dealings on the properties pending the hearing and determination of the main suit but the applicant rejected the proposal giving reasons that it was not enough and that there was no precedent for such a proposal. The respondent swore that the proposal was made in good faith considering that he did not have access to his bank accounts since July, 2020. He deposed that the properties proposed are prime and that if the applicants offered them for sale should the main suit be successful it would not be difficult to find suitable purchasers. He further stated that he is currently on suspension from work and on half pay and that his rental income has been affected negatively owing to the Covid-19 pandemic and he cannot therefore meet financial obligations to his family and his sister-in-law and widowed aunt who he is supporting financially. The respondent further deposes that he is a man of means and that the properties he has offered have a consolidated market value of Kshs. 40,500,000/- and he shall be in a position to perform any decree passed against him by this court. He has urged this court to consider his offer of security and has pleaded with this court to lift the caveats placed over his bank accounts.

12. In response to the respondent's replying affidavit, Feiza Abdi filed a supplementary affidavit sworn on 4th November 2021 where she deposed that the essence of the Commission's application was not for the respondent to provide security as no such prayer had been sought. She deposed that the issue of security could only arise if this application was brought to court under **Order 39(5) of the Civil Procedure Rules** and asserted that the present application was brought under **Order 40 of the Civil Procedure Rules** which gives this court discretion to issue interlocutory injunctions where: **any property in dispute is in danger of being wasted, damaged or alienated by a party to the suit or wrongfully sold and where the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree.** Further that the Commission rejected the proposal for security by the respondent and plea for access to the money in the accounts for reason that monies in the respondent's accounts are part of the assets that constitute unexplained assets; **That** it is easier to satisfy a decree using money readily available in cash as opposed to landed property and that it would be costly to satisfy a decree using landed property as the Commission would incur costly expense using public funds such as advertisement, auctioneers expenses etc. Feiza Abdi also deposed that the respondent had not taken any steps to review this court's order that froze his bank accounts. Further, that allowing the respondent to access his bank accounts would amount to allowing him to utilize monies that were corruptly acquired and which monies the Commission is seeking to forfeit to the government in the Originating Motion.

13. Ms. Abdi further deposed that the suit is straightforward and can be determined expeditiously. She asserted that the respondent has not demonstrated to the court that he is unable to meet his financial obligations but he has to the contrary confirmed that he is a man of means as he is receiving money from one of his properties not the subject of the suit herein.

Submissions

14. On 20th September 2021 this court gave directions that the application would be heard by way of written submissions and Counsel duly complied. The applicant's submissions are dated 5th November 2021 while those of the respondent are dated 10th November 2021.

Applicant's submissions

15. Ms. Murugi, learned counsel for the applicant, reduced the issues for determination to four as follows and submitted on the same separately:

“ 1). What are the parameters of an application for injunction?

2) Whether the applicant has established a prima facie case with a probability of success?

3) Whether an award of damages is adequate?

4) Whether the balance of convenience tilts in favour of the applicant?”

16. On the first issue Counsel submitted that the principles for granting an injunction were settled in the case of **Giella vs Cassman Brown Co. Ltd & Anor (1973) EA 358** where it was held that the applicant must demonstrate the existence of a *prima facie* case with a probability of success; that an injunction would not be issued where an award of damages is adequate to compensate the applicant and that if the court is

in doubt the matter would be decided on a balance of convenience.

17. On the second issue Counsel submitted that investigations confirmed that there were reasons to suspect that the respondent was involved in corruption and economic crimes between 1st April 2015 and 30th April 2020 when he acquired the assets the subject of this case. Counsel submitted that other than his salary from the National Treasury, the respondent received numerous unexplained inward remittances, EFTs and cash deposits in his bank accounts with Absa Group Limited which were disproportionate to his legitimate known source of income. Further, that the respondent frequently received large monthly amounts at times as many as six times in a month and that he withdrew the funds immediately either over the counter, by cheque or by cash.

18. Counsel contended that the Commission retrieved several titles to properties during the investigations and established that in the period of five years which is material to the investigation the respondent acquired landed properties having a total value of Ksh. 50,500,000/-. Counsel stated that the respondent had also within that period purchased a motor vehicle registration number KCH 393M valued at Kshs. 2,400,000/-. Counsel added that the respondent concealed income received over the material period while filling his returns with KRA and concealed houses and rental income while declaring his income and assets (Wealth Declaration). Counsel submitted that from the findings of the investigations the issues raised are weighty and require to be tried and that given the circumstances the prospect of success is favourable.

19. On whether an award of damages is adequate, Ms. Murugi submitted that there is a threat of irreparable injury if the respondent is left to deal with the monies in the subject bank accounts as the applicant will have nothing to recover in furtherance of its statutory mandate. In support of this submission Counsel cited the case of **Ethics and Anti-Corruption Commission vs Jimmy Mutuku Kiamba & 4 Others [2016] eKLR**. Counsel reiterated that this application was not for the respondent to provide security as it had been brought under **Order 40 of the Civil Procedure Rules** and not **Order 39(5) of the Rules**. Counsel argued that the assets sought to be injuncted are the same ones the Commission seeks to have forfeited to the government for being unexplained assets and if the monies were to be withdrawn and the assets allowed to dissipate, then the suit would no longer be available. Counsel contended that the applicant had therefore established a *prima facie* case with a high probability of success and that an award of damages would not be sufficient to compensate the applicant and further that the suit would be rendered nugatory were the assets to be disposed.

20. On whether the balance of convenience tilts in favour of the applicant, Counsel submitted that it does since the matter was one of great public interest as it involves public funds. She stated that the applicant would be more inconvenienced as it would be compelled to file multiple suits to pursue the properties disposed of. That it would also be forced to trace, value, advertise, appoint an auctioneer etc in order to sell the assets of the respondent to recover the money which economic cost would be borne by the public. She relied on the case of **Nairobi HCC No. 33 of 2016 Ethics & Anti-Corruption Commission vs Jimmy Mutuku Kiamba (unreported)** and the case of **Kenya Anti-Corruption Commission vs Stanley Mombo Amuti [2011] eKLR** where the court stated that an order of forfeiture of property can only be made if the property was still available. Counsel further contended that the respondent did not demonstrate that he is unable to meet his financial obligations but had rather confirmed that he is a man of means and that he was receiving rent from some of his properties that are not the subject of this suit. Counsel prayed that Notice of Motion dated 3rd May 2021 be allowed. Counsel also cited the case of **Shivabhai Nathabhai Patel v Manibhai Hathibhai Patel (1950) EA 907** where the court stated:

“...it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the Plaintiff succeeds in this suit (and part of his claim is based on this cheque) there might be a barren result; and that it is the duty of the court to try and avoid.”

Respondent's submissions

21. Mr. Mwangela, learned Counsel for the respondent, submitted that the essence or purport of the application is for the respondent to provide security over any decree that may be passed against him in the event that the applicant is successful in the main suit. Counsel submitted that it does not matter how such a decree is satisfied provided that it is satisfied. Counsel stated that the respondent in good faith offered his properties worth Kshs. 40,000,000/- as security and that it was not in order for the applicant to state that the alternative is not good. Counsel contended that the overriding principle of law is to do justice and to facilitate the just and expeditious and proportionate administration of justice. He urged this court to do justice by issuing an order for the respondent to provide sufficient security for any decree that may be passed in lieu of the orders sought by the applicant. Counsel relied on the case of **Giella vs Cassman Brown & Co. Ltd (supra)** which he submitted set out the threshold to be satisfied for an order of injunction to issue. He submitted that the applicant had failed to establish a *prima facie* case with chances of success as the applicant's case hinges on the fact that the Commission was not satisfied with the respondent's explanation upon its inquiry over the respondent's assets. He contended that the applicant's opinion was not the opinion of the court nor the opinion of the law as the court may actually find the respondent's explanation satisfactory. Counsel submitted that the applicant has not established what rights would be infringed if the respondent provides security as stated in his replying affidavit. He stated that the applicant had failed to demonstrate how it would suffer irreparable loss that would not be compensated by damages. He contended that the threshold of irreparable harm is harm or loss that cannot be quantified in money terms or which cannot be cured. Counsel further submitted that the amounts of money in the respondent's bank accounts are quantified and are quantifiable and any loss suffered by the applicant was curable by way of damages. He further stated that the respondent was offering security in the form of properties whose value was known and which properties could be sold to compensate any loss suffered by the applicant.

22. On whether the balance of convenience tilted in favour of the applicant, Mr. Mwangela reiterated that the respondent had offered properties as adequate security for any decree that may be passed against him. He stated that the respondent had been denied access to money in the bank which severely affected the upkeep and daily sustenance and livelihood of his family and himself. He urged this court to exercise its discretion in the respondent's favour and order him to provide security as proposed and grant him access to his bank accounts.

Analysis and Determination

23. I have considered the application, the grounds thereof, the response thereto, the rival submissions and the law. The issues for determination are: -

“1) Whether the applicant has met the threshold for the grant of the orders sought.

2) Whether this court ought to order the respondent to give security in lieu of the restraining orders sought by the applicant.

24. The principles that guide the courts in applications for temporary injunctions were settled in the case of **Giella v Cassman Brown & Co. Ltd (1973) EA** cited by the parties herein, and are as follows:

1) The applicant must first establish a prima facie case with a probability of success.

2) The applicant must then demonstrate that they stand to suffer irreparable loss that cannot be adequately compensated by an award of damages.

3) Where there is doubt on the above, the court shall consider whether the balance of convenience tilts in favour of the applicant.

25. The Court of Appeal defined a prima facie case as follows in the case of **Mrao Ltd v First American Bank of Kenya and 2 others [2003] eKLR:-**

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

26. In this application the applicant contends that it received a report to the effect that the respondent, a public officer at the National Treasury was suspected to have abused/taken advantage of his position between 1st April 2015 and 30th April 2020 and had accumulated assets whose value was disproportionate to his known legitimate source of income. The applicant alleges that it carried out investigations and established that other than his salary from the National Treasury the respondent received numerous unexplained inward remittances, EFTs and cash deposits totalling Kshs. 46,789,317.40/- and that the respondent’s **Mpesa account number 0722xxxx** held at Safaricom Limited had received credits amounting to Kshs. 9,838,890.20/- which credits amounted to a monthly average of Kshs. 163,000/-. It is also the applicant’s case that the respondent acquired **L.R. No. Matungulu Sengani/3503** located within Matungulu, Machakos valued at Kshs. 8,000,000/- (part) and **L.R. No. Donyo Sabuk/Kiboko Block 1/908** located in the same area valued at Kshs. 3,500,000/- and further that it was established that the respondent had acquired a motor vehicle registration number KCH 393M valued at more than Kshs. 2 million during the period under inquiry. That upon conclusion of the investigations, the Commission established that the respondent had accumulated unexplained assets amounting to Kshs. 96,656,814.60/- against an average monthly net salary of Kshs. 118,691.17/- in the five-year period under inquiry. It is contended that the respondent’s explanation was partly satisfactory as the applicant established that the respondent’s known legitimate sources of income for that period amounted to Kshs. 17,945,291.95/- and that in just 5 years between 1st April 2015 and 30th April 2020 the respondent had accumulated assets valued at Kshs. 64,390,993.30/- giving a disproportion of Kshs. 46,445,701.35/- that he could not explain.

27. The powers of the Commission as set out in **Section 11(1) of the Ethics and Anti-Corruption Commission Act (EACCA)** are *inter alia:-*

“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 or compensation, or other punitive and disciplinary measures.”

Section 55(2) of the Act also provides that:-

“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 own 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.” (Emphasis added)

28. A reading of the above sections conjunctively reveals that the applicant has powers to institute proceedings for the freezing or confiscation of suspected proceeds of crime and it may commence a suit where it is not satisfied with the explanation pertaining to a person’s unexplained assets as is its position in this case. As in all applications for injunctions this court is cognisant of the principle that it is not concerned with the merits of the case but only with whether there is a prima facie case with a likelihood of success. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** the Court of Appeal stated: -

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

29. Applying the definition of what constitutes a *prima facie* case and the above principle to this case I am satisfied that from the facts placed before this court the applicant has indeed demonstrated that it has a *prima facie* case **with a likelihood of success** against the respondent.

30. As to whether the applicant will suffer irreparable damage if the orders are not granted, it is the applicant's submission that there is a threat of irreparable injury should the respondent be allowed to deal with the immoveable properties and the monies in the subject bank accounts as the applicant will have nothing to recover in furtherance of its statutory mandate. It is my finding that indeed the applicant stands to suffer irreparable 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. I agree fully with Serгон J's finding in the case of **Ethics and Anti-Corruption Commission v Jimmy Mutuku Kiamba and Others** (*supra*) where he stated that: -

“In my humble assessment of the competing arguments, I am of the view that the Applicant has shown that unless the order is granted, the Applicant will suffer irreparable loss in that the Defendants/Respondents will be at liberty to deal with the mentioned properties in the manner stated on the face of the motion. This will mean that the Applicant will have nothing to recover in furtherance of its statutory mandate. This in my view is irreparable loss which cannot be compensated in monetary terms.”

31. I am not persuaded that an order to deposit security would suffice as what is offered as security is also **alleged** to be part of the unexplained assets an issue which can only be determined upon a full hearing of the suit.

32. The purpose of an injunction is to prevent the property the subject matter of the suit from being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. An injunction is also issued if the defendant threatens or intends to remove or dispose the property. In the present application, the monies in the respondent's accounts are suspected to be proceeds of corruption and economic crime as they **are alleged** to be disproportionate to his known sources of income. The applicant seeks to have the said monies forfeited to the state if **they are proved** to be proceeds of corruption and economic crime. It would be presumptuous of this court therefore to allow the respondent to deal with the property as he deems.

33. What about the balance of convenience? In the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR** the court defined the phrase “balance of convenience” as follows: -

‘The meaning of balance of convenience in favour of the plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's' to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.

In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

In the present case I find that the balance of convenience tilts in favour of the Plaintiff commission which will be inconvenienced if the orders sought are not granted. It is the commission **which if it succeeds** will have to expend resources to trace and recover the money and even where security is provided, the applicant would in the end if it succeeds bear the cost of taking all the legal steps to ensure that any landed properties issued as security are sold which cost would be borne by the tax payers. For his part the respondent risks to suffer no prejudice because were the proceedings to determine in his favour his properties both landed and cash would be restored to him. I further find that the respondent's argument that he is unable to support his needs and those of his family is not borne by the record. Indeed, in his affidavit he deposes that he is a man of means, that he has other properties where he collects rental income and that he is involved in agriculture and has an electronic shop as a source of income. Additionally, he has deposed that his accounts have been frozen since July 2020, which is over one and a half years, yet he has never taken any steps to discharge or vary the freezing orders issued by this court as he would have been entitled to do under the law.

34. In the upshot it is my finding that not only has the applicant demonstrated that it has a prima facie case and that it shall suffer irreparable loss which cannot be compensated by an award of damages but that the balance of convenience tilts in its favour. It is also in the public interest that the assets the subject matter of the suit be preserved pending hearing and determination of the recovery proceedings. Accordingly, the application is allowed and the following orders shall issue: -

1) That pending the hearing and determination of this suit, an order of injunction be and is hereby issued prohibiting the Respondent, his agents, servants or any other persons from alienating, selling, charging or further charging, leasing, developing, sub-dividing, wasting, transferring, disposing and/or in any other way dealing with funds in bank account numbers 0754xxxx, 203xxxx and xxxxxx all held at Absa Group Limited in the name of the Respondent; bank account number xxxxxxx held at Co-operative Bank Limited in the name of the Respondent and bank account number xxxxxxx held at KCB Bank in the name of the Respondent.

2) That pending the hearing and determination of this suit, an order of injunction be and is hereby issued restraining the Respondent, his agents and servants from transferring, disposing, wasting and/or in any other way dealing with Motor Vehicle Toyota Vanguard registration number KCH 393M.

3) That pending the hearing and determination of this suit, an order be and is hereby issued directing the Respondent to surrender Motor Vehicle Registration No. KCH 393M together with its logbook to the Applicant within 7 days of this order failing which the Applicant shall be at liberty to seize, tow, and detain the motor vehicle for purposes of preservation.

4) That pending the hearing and determination of this suit, an order of injunction be and is hereby issued against the Respondent, his agents, servants or any other persons from alienating, selling, charging or further charging, leasing, developing, sub-dividing, wasting, transferring, disposing and/or in any other way dealing with the parcels of land known as L.R. No. Matungulu Sengani/3503 located within Matungulu, Machakos valued at Kshs. 8,000,000/- (part) and L.R. No. Donyo Sabuk/Kiboko Block 1/908 located within Matungulu, Machakos valued at Kshs. 3,500,000/-.

5) That pending the hearing and determination of this suit, the Respondent be and is hereby restrained from demanding, collecting and/or receiving monthly rental income and leave be and is hereby granted to the Applicant to appoint a receiver for the collection of the monthly rental income, management, control and possession of property known as LR No. Matungulu Sengani/3503 (6 units of two bedroomed) under the provisions of section 56A of the Anti-Corruption and Economic Crimes Act.

6) That the costs of this application be in the cause.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 20TH DAY OF JANUARY, 2022.

E.N. MAINA

JUDGE