



REPUBLIC OF KENYA



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**Ethics & Anti-Corruption Commission v Mulei (Civil Suit  
68 of 2015) [2022] KEHC 17068 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 17068 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL SUIT 68 OF 2015**

**MN MWANGI, J**

**JUNE 30, 2022**

**IN THE MATTER OF ALL THOSE PARCELS OF LAND KNOWN AS;**

**PLOT 11335 MALINDI,**

**PLOTS 29 & 30 KWALE TOWNSHIP,**

**NDITHINI/MANANJA/BLOCK 1/278,**

**NDITHINI/MANANJA/BLOCK 1/286,**

**NDITHINI /MANANJA/BLOCK 5/30,**

**NDITHINI/MANANJA/BLOCK 5/42,**

**IN THE MATTER OF MOTOR VEHICLES REGISTRATION NUMBERS:-**

**A) KBG 776A: TOYOTA CORONA SALOON**

**B) KBD 176G: NISSAN MINI - BUS/MATATU**

**C) KMCJ 001Q: BAJAJ MOTOR CYCLE**

**D) KBF 685E TOYOTA CORONA SALOON**

**E) KAJ 823Y VAN**

**F) KZU 623 TOYOTA HILUX;**

**IN THE MATTER OF BANK ACCOUNTS:-**

**EQUITY BANK, MALINDI - 0440192053435**

**BARCLAYS BANK, HAILE SELASSIE - 3849249**

**CO-OPERATIVE BANK, MALINDI - 01109260054400**

**STANDARD CHARTERED, MALINDI - 0100304802700**

**AND**

**PAGE 1 OF 18 NJOKI MWANGI, J**

**HCCC NO. 68 OF 2015 (OS)**



**IN THE MATTER OF: THE ANTI-CORRUPTION & ECONOMIC  
CRIMES ACT NO. 3 OF 2003**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**GABRIEL MBITI MULEI ..... DEFENDANT**

**JUDGMENT**

1. Pursuant to the provisions of section 55 of the *Anti-Corruption and Economic Crimes Act* No 3/2003 (hereinafter the ACECA), the Ethics and Anti-Corruption Commission (hereafter the plaintiff), filed an Originating Summons dated May 26, 2015 against Gabriel Mbiti Mulei (hereinafter the defendant) seeking determination of the following issues-
  1. Whether the defendant is in possession of 'unexplained assets' pursuant to the provisions of the *Anti-Corruption and Economic Crimes Act*, No 3 of 2003 as itemised hereunder in paragraph 3;
  2. Whether the properties listed in paragraph 3 should be preserved pending the determination and or declaration on whether the said assets constitute unexplained assets pursuant to the provisions of section 55 of the *Anti-Corruption & Economic Crimes Act*, No 3 of 2003;
  3. Whether a declaration should issue that the following properties/money, constitute unexplained assets pursuant to the provisions of section 55 of the *Anti-Corruption and Economic Crimes Act*, No 3 of 2003-
    - a) Plot xxxx Malindi,
    - b) Plots xxxx & xxxx Kwale Township,
    - c) Ndithini/Mananja/Block xx/xxxx,
    - d) Ndithini/Mananja/Block xx/xxxx,
    - e) Ndithini/Mananja Block xx/xxxx
    - f) Ndithini/Mananja Block xx/xxxx
    - g) Equity Bank, Malindi - xxxx
    - h) Barclays Bank, Haile Selassie - xxxx
    - i) Co-operative Bank, Malindi - xxxx
    - j) Standard Chartered, Malindi - xxxx
    - k) KBG xxxx - Toyota Corona Saloon
    - l) KBD xxxx - Nissan Mini-Bus/Matatu
    - m) KMCJ xxxx - Bajaj Motor Cycle



- n) KBF xxxx - Toyota Corona Saloon
  - o) KAJ xxxx - Van
  - p) KZU xxxx - Toyota Hilux;
4. Whether the defendant should be ordered by this honourable court to pay to the Government of Kenya Kshs 10,536,199.00 being the cumulative bank deposits made by the defendant between June 18, 2008 and February 18, 2011 and Kshs 19,420,000.00 being the value of the above landed properties all of which constitute unexplained assets or any other amount that this honourable court finds to constitute unexplained assets; and
  5. Who is to meet the costs of this suit?
2. The application is premised on the grounds stated on the face of it and a supporting affidavit sworn on May 26, 2015 by Mutembei Nyagah, an Investigator with the Ethics and Anti-Corruption Commission.
  3. In response to the originating summons, the defendant on January 22, 2021 filed a statement of defence dated January 21, 2021 in which he challenged the averments in the plaint, and denied ownership and or possession of the alleged unexplained assets.

#### **The Plaintiff's case**

4. The plaintiff's case was that the plaintiff received information to the effect that the defendant was soliciting for bribes from road users in Malindi whilst serving as the Traffic Police Base Commander. That preliminary investigations disclosed that the defendant had been employed by the Kenya Police Service as a Chief Inspector and deployed to Malindi Police Station from February 2008.
5. In the affidavit in support of the Originating Summons sworn by Mutembei Nyagah, an Investigator with the Ethics and Anti-Corruption Commission (EACC), he averred that a warrant to search the defendant's house resulted to the retrieval of various documents and it was established that the defendant was operating an account number xxxx in Barclays Bank of Kenya, Haile Selassie Avenue Branch and that his net salary was approximately Kshs 20,000/= per month. That they also established that the defendant was running account number xxxx in Equity Bank, Malindi Branch, Account Number xxxx in Co-operative Bank, Malindi Branch, Account No xxxx in Standard Chartered, Malindi Branch and that the aforementioned bank accounts were reasonably suspected to have been used as "conduits" for acquisition and concealment of illicit wealth.
6. The deponent deposed that from the statement of accounts of the above stated bank accounts, they established that between June 18, 2008 and February 11, 2011, the defendant made cash and cheque deposits totaling Kshs 10,536,199.00 in his various bank accounts excluding his salary account.
7. It was further averred that the defendant's salary account number xxxx operated at Barclays Bank (K) Ltd, Nairobi demonstrated that in the defendant's entire period of service as the Base Commander, Malindi Police Station, he had received several Million Shillings over and above his salary.
8. The deponent deposed that in the afternoon of June 23, 2011, the plaintiff obtained orders prohibiting the defendant from transferring, disposing of, wasting or in any way dealing with account numbers xxxxxxx in Barclays Bank of Kenya, Haile Selassie Avenue Branch, Account number xxxx in Equity Bank, Malindi Branch, Account Number xxxx in Co-operative Bank, Malindi Branch and Account No xxxx in Standard Chartered, Malindi Branch. It was stated that by the time the orders were served



upon the banks, the defendant had already withdrawn all the funds from the said accounts with a view of concealing his unexplained wealth.

9. It was averred that after inquiries and valuations, the plaintiff established that the defendant also owned a parcel of land known as Plot xxxx Malindi measuring 0.0375 Hectares; Mananja /Ndithini Block xx/xxxx; Manaja/Ndithini Block xx/xxxx; plots number xxxx and xxxx Kwale Township; Mananja/Ndithini Block xx/xxxx and Manaja/Ndithini Block xx/xxxx.
10. It was the plaintiff's case that the value of the transactions and assets owned by the defendant were not commensurate with his income as a Traffic Police Base Commander or any other legitimate sources of income. The plaintiff's deponent stated that the plaintiff reasonably suspected that the defendant was involved in corruption, since he was unable to explain the discrepancy of Kshs 27,573,959.00 between the assets acquired from February, 2008 to May, 2010 and his known sources of income.
11. It was averred that on October 13, 2010 and January 26, 2011, the plaintiff issued notices to the defendant requesting him inter alia to furnish it with a written statement enumerating his properties and the time when the same were acquired pursuant to the provisions of Section 26 and 55 of the ACECA. That the defendant responded to the plaintiff's notice dated August 3, 2011 but declined to give the particulars sought. The plaintiff stated that according to the defendant's declaration of Income, Assets and Liabilities for the period November 1, 2007 to October 31, 2009, the defendant declared an income of Kshs 1,382,240.00 being his gross salary, dividends and "shamba" income. That he declared assets of only Kshs 1,000,000/= being the value of motor vehicle registration No KBG xxxx and unspecified land at Kangundo.

#### **The defence case**

12. In his defence, the defendant denied the claim and averred that the plaintiff's application was brought in bad faith and the same was incurably defective, as it sought no specific prayer.
13. In a replying affidavit sworn on December 1, 2021 and filed on December 6, 2021, the defendant Gabriel Mbiti Mulei deposed that he had already been acquitted from malicious charges brought against him in Anti-corruption case No 16 of 2012. The defendant further averred that he had been in active employment for over two decades having served in different places in the coastal region, and that he was a member of the Police Sacco. He deposed that he had also engaged in side businesses, as well as being a marksman, which had supplemented his income.
14. He also confirmed that he owned all the listed motor vehicles but they had since grown old and had been written off. The defendant denied owning plot Number xxxx Malindi or any plot in Malindi or any plot in Kwale. He confirmed that he owned parcels of land in Ndithini/Mananja/Blocks xx/xxx and 286 as well as Block xx/xxxx and that the purchase of the said parcels of land were facilitated by his late father; and that he would pay in instalments from his savings, loans and money received from shooting competitions as a marksman. He stated that the records of the said purchases cannot be traced anymore.

#### **Submissions**

15. On November 20, 2021, the plaintiff's Advocate Brilian Asingwa filed written submissions, while the defendant's submissions were filed on December 6, 2021 by the law firm of JO Magolo & Co Advocates.
16. Mr Asingwa submitted that the preservation orders granted to the plaintiff on June 23, 2011 were never challenged by the defendant and a notice issued under Section 26 of ACECA was not complied



with, since the defendant failed to explain his known legitimate sources of income and his vast wealth and in anticipation of being served with a Preservation Order, he withdrew all the monies in the listed bank accounts. It was also submitted that the defendant's declaration between the periods of June 18, 2008 and February 11, 2011 revealed that the defendant had acquired more wealth than what he had declared in his declaration. The plaintiff's Counsel submitted that the plaintiff had met the threshold in *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* [2019] eKLR on the evidentiary burden cast upon a person under investigation to provide a satisfactory explanation to establish the legitimate origin of his/her assets.

17. He also submitted that the defendant had acquired assets worth over Kshs 27,573,959.00 within a very short period of time and made numerous suspicious transactions in his three bank accounts. As such, his income was not proportionate to his sources of income, which was contrary to section 55(2) of the ACECA, which embodies the concept of income being proportionate to legitimate sources of income.
18. It was also submitted that the defendant was through a requisite notice given adequate time to explain and justify his source of wealth but he declined to offer any explanation and instead withdrew all the money deposits in his various bank accounts in order to defeat the Preservation Order. It was the plaintiff's submission that the defendant acted contrary to Section 55(4)(a) & (5) of ACECA when he failed to discharge his burden of proof when it shifted to him after the plaintiff discharged its burden.
19. Mr Magolo, learned counsel for the defendant submitted that no evidence was adduced to prove that the vehicles and properties in issue were acquired as proceeds of crime and that the instant application had failed to meet the threshold required.
20. He further submitted that the instant application as drafted could not be granted by the court since no specific order had been sought by the applicant. He relied on the finding in *Re Estate of Bakari Marakweli Mwakwisha (Deceased)* [2008] eKLR, where it was held that the court can only decide on the prayers before it.

### **Analysis and Determination**

21. I have considered the pleadings by the parties in this matter, as well as their respective submissions. The issues that arise for determination are-
  - i. Whether the defendant is in possession of unexplained assets; and
  - ii. Whether the defendant gave a cogent explanation as to the source of the money and assets in issue.
22. It is not in dispute that the plaintiff issued to the applicant a statutory notice under the provisions of Sections 26 and 55(2) of ACECA to explain the disproportion between his assets and the known legitimate sources of his income. It is also not in dispute that the defendant through his Advocates on record, through a letter dated August 11, 2011 indicated that he would not abide by the said notice because the content of the said notice wholly infringed upon the defendant's constitutional rights.
23. It is important to first examine the legislation governing the seizure of unexplained assets before determining the case at hand. The ACECA contains the statutory foundation for recovering unexplained assets. Section 55 provides as follows:

“(1) In this section, “corrupt conduct” means—

- (a) Conduct that constitutes corruption or economic crime; or



- (b) Conduct that took place before this Act came into operation and which—
  - (i) at the time, constituted an offence; and
  - (ii) If It had taken place after this Act came into operation, would have constituted corruption or economic crime.
- (2) 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 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).

24. Section 55(4) of ACECA ensures that the right to natural justice is adhered to in the hearing of a matter relating to a claim that a party has in his possession unexplained assets by providing that:

- “(4) In proceedings under this section—
- (a) The commission shall adduce evidence that the person has unexplained assets; and
  - (b) The person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.” (emphasis added).

25. Section 55(5) of the said Act contains the evidential burden imposed on a defendant in a matter where there is an allegation of possession of unexplained assets. It states as follows-

- “(5) If After the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.” (emphasis added).

26. Whereas section 55(6) of ACECA outlines the powers of the court, if not satisfied that all the assets were acquired from corrupt conduct, Section 55(7) expounds on the properties that may be subject to an order relating to unexplained assets. The said sections provide as follows-

- “(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value



of the unexplained assets that the court is not satisfied were acquired otherwise than as the result of corrupt conduct.

- (7) For the purposes of proceedings under this section, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds—
  - (a) Are held in trust for the person whose assets are in question or otherwise on his behalf; or
  - (b) Were acquired from the person whose assets are in question as a gift or loan without adequate consideration.”

#### **Whether the defendant is in possession of unexplained assets.**

27. The Court of Appeal in *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* (supra) held as follows-

“(79) Under section 55(2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired.” (emphasis added).

28. Similarly, in *Ethics And Anti-Corruption Commission v Patrick Ochiengo Abachi & 6 others* [2021] eKLR, Mumbi J (as she then was) stated as follows-

“(149) Thus, the jurisprudence from our courts is that the plaintiff, in seeking to recover unexplained assets, is not required to prove corrupt acts on the part of the public servant concerned. All that is required is for the plaintiff to show, on a balance of probabilities, that the defendant in a matter has acquired assets, which are not commensurate with his known legitimate source of income. Once that is done to the satisfaction of the court, the burden shifts to the defendant to explain the source of the assets at issue.

[150] It is thus permissible, under our legislative framework and as determined by our courts, for the plaintiff to institute proceedings alleging that a public servant has acquired assets that are not commensurate with his known legitimate sources of income. The plaintiff must place before the court evidence that indeed shows that the defendant is a public servant, that he has assets that are not commensurate with his known legitimate source of income, and that he has not been able to explain the source of the said assets. The question is whether the plaintiff has been able to do this in the case before me.”

29. In the instant case, the plaintiff claimed that the defendant between June 18, 2008 and February 11, 2011 had made cash and cheque deposits totaling Kshs 10,536,199.00 in his various bank accounts,



excluding his salary account. Bank statements from Barclays Bank of Kenya Haile Selassie Avenue Branch, Equity Bank, Malindi Branch, Co-operative Bank, Malindi Branch and Standard Chartered Bank, Malindi Branch were produced and the defendant's transactions in the said bank accounts were demonstrated to court.

30. The plaintiff also claimed that the defendant owned the following parcels of land: Plotxxxx,Malindi; Plot Nos xx & xxxx Kwale Township; Ndithini/Mananja/Blockxx/xxxx; Ndithini/Mananja/Blockxx/xxxx;Ndithini/Mananja/BLOCK xx/xxxx and Ndithini/Mananja/ Block xx/xxxx and motor vehicle registration numbers KBG xxxx Toyota Corona Saloon; KBD xxxx Nissan Mini-Bus/Matatu; KMCJ xxxx Bajaj Motor Cycle; KBF xxxx Toyota Corona Saloon; KAJ xxxx Van and KZU xxx Toyota Hilux
31. As a Public Officer, the defendant was required to make declarations of wealth every two years. In his wealth declaration forms for the years 2007-2009 marked as annexure MN 14 to the plaintiff's supporting affidavit, he declared income in the form of a gross salary for the two years as Kshs. 1,026,240.00, Sacco dividends for 2 years at Kshs 56,000/= and shamba income of Kshs 300,000/= for the two years. His assets were declared as being a motor vehicle registration number KBG xxxx worth Kshs 800,000/= and land at Kangundo valued at Kshs. 200,500.00.
32. What was required of the plaintiff was to show on a balance of probabilities that the defendant herein had acquired assets which were not commensurate with his known legitimate source of income. Once that was done to the satisfaction of this court, the burden shifted to the defendant to explain the source of the assets in issue. An individual once served with a notice by EACC has the evidential burden to offer a satisfactory explanation on the legitimate acquisition of the assets in issue or forfeit such assets. I have compared the defendant's declared assets and undeclared assets to the known legitimate sources of his income and his wealth declaration annexure MN 14. Arising from the foregoing, it is this court's considered opinion that the properties the subject of this suit, as well as the deposits in the defendant's bank accounts, raise questions with respect to their sources. I am satisfied, on the evidence placed before me by the plaintiff, that the defendant has unexplained assets within the meaning of Section 2 of ACECA, which states thus-  
  
"unexplained assets" means assets of a person—
  - (a) Acquired at or around the time the person was reasonably suspected of corruption or economic crime; and
  - (b) Whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation."
33. When the burden of proof shifted to the defendant, he made a feeble attempt to respond to the claims by the plaintiff by stating that he had been in active employment for two decades and had been earning a decent salary. He also stated that he had engaged in side business and undertakings which had added to his income. He further acknowledged owning the listed motor vehicles, but averred that they had since grown old and had been written off and were no longer in his possession.
34. It was the defendant's evidence that he did not own any plot in Kwale or in Malindi. He however admitted to the ownership of Ndithini/ Mananja/Blockxx/xxxx; Ndithini/Mananja/Blockxx/xxxx; Ndithini/Mananja/Blockxx/xxxx and Ndithini/Mananja/BlocK xx/xxxx and stated that the said parcels were obtained through payment by instalments, funds from shooting competitions and loans. He however stated that he could not trace the records for the purchase of the said parcels of land.
35. I have considered the evidence on record in totality and it is my finding that the defendant did not offer any explanation as to why deposits amounting to Kshs 10,536,199.00 were made to his various



bank accounts, excluding his salary account. Further, the claim that all the listed motor vehicles were old and were written off was not supported by any evidence. I therefore hold that the defendant did not discharge his burden of proof on the status of the said motor vehicles and/or explain how they were acquired.

36. In regard to the various parcels of land belonging to the defendant, I hold that he did not disown the indenture dated March 15, 2010 annexed as MN 8 to the plaintiff's supporting affidavit, between him and one Lidia Wairimu Njoroge. As such, this court is not persuaded that Plot 11335 Malindi valued at Kshs 11,000,000.00 is not owned by the defendant. The same applies to plots No xx & xxx situated in Kwale, where a land sales agreement annexed as MN 11 to the plaintiff's supporting affidavit was disowned by the defendant.
37. In relation to the admitted assets, I find that the defendant did not provide any supporting document to prove how he acquired Ndithini/Mananja/ Blockxxx/xxxx valued at Kshs 420,000.00; Ndithini/Mananja/Blockxxx/xxxx valued at Kshs 1,200,000.00; Ndithini/Mananja/Blockxxx/xxxx valued at Kshs 3,600,000.00; and Ndithini/Mananja/Blockxxx/xxxx valued at Kshs 1,500,000/=.
38. In the end, I hold that the plaintiff has proved its case on a balance of probabilities against the defendant, and that the defendant has failed to discharge the burden of proof in explaining and showing a legitimate source of the funds in the bank accounts in issue, save for his salary account. He also failed to show the source of the funds used to acquire the parcels of land and the motor vehicles in issue. In the said circumstances, it is my finding that the originating summons dated May 26, 2015 has merit. It is hereby allowed in the following terms-
  1. I hereby declare that the defendant is in possession of the following unexplained assets:
    - a) Plot xxxx Malindi,
    - b) Plots xxxx & xxxx Kwale Township,
    - c) Ndithini/Mananja/Block xx/xxxx,
    - d) Ndithini/Mananja/Block xx/xxxx,
    - e) Ndithini/Mananja Block xx/xxxx
    - f) Ndithini/Mananja Block xx/xxxx
    - g) Equity Bank, Malindi - xxxx
    - h) Barclays Bank, Haile Selassie - xxxx
    - i) Co-operative Bank, Malindi - xxxx
    - j) Standard Chartered, Malindi - xxxx
    - k) KBG xxxx - Toyota Corona Saloon
    - l) KBD xxxx - Nissan Mini-Bus/Matatu
    - m) KMCJ xxx - Bajaj Motor Cycle
    - n) KBF xxxx - Toyota Corona Saloon
    - o) KAJ xxxx - Van
    - p) KZU xxxx - Toyota Hilux;



2. I declare that the assets set out in paragraph 1 above constitute unexplained assets within the meaning of sections 2 and 55 of the *Anti-Corruption and Economic Crimes Act* and shall be forfeited by the defendant to the Government of Kenya;
3. The defendant shall pay the sum of Kshs 10,536,199.00 to the Government of Kenya being the cumulative bank deposits made by him between June 18, 2008 and February 18, 2011. The said amount shall be paid within 30 days of this order;
4. The defendant shall bear the costs of this suit.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF JUNE, 2022. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

No appearance for the plaintiff

Mr. Magolo Paul for the defendant

Mr. Oliver Musundi – Court Assistant.

