



REPUBLIC OF KENYA



**Ethics & Anti-Corruption Commission v Kinuthia & 16 others (Anti-Corruption and Economic Crimes Civil Suit 5 of 2018) [2022] KEHC 12444 (KLR)
(Anti-Corruption and Economic Crimes) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12444 (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 5 OF 2018**

EN MAINA, J

JULY 28, 2022

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

STEPHEN NDUNG’U KINUTHIA 1ST DEFENDANT
OPENSYSYSTEMS INTERGRATION (OSI) KENYA LTD 2ND DEFENDANT
CHARLES KARISA MWADUNA 3RD DEFENDANT
MARS TECHNOLOGY ASSOCIATES LTD 4TH DEFENDANT
CHARMAINE NJERI KINUTHIA 5TH DEFENDANT
ENKEI HOLDINGS 6TH DEFENDANT
KENYAMILD FARMERS INVESTMENTS LTD 7TH DEFENDANT
CHARLES GITHINJI GICHOBI 8TH DEFENDANT
MAINA SHEM KAMAU PATRICK 9TH DEFENDANT
EPHANTUS KAIRU KAHWAE 10TH DEFENDANT
SYLVESTER KIPTOO KIPLAGAT 11TH DEFENDANT
ANNETTE MWANGI 12TH DEFENDANT
JUSTUS ONGERA 13TH DEFENDANT
DESMOND IRUNGU KINUTHIA 14TH DEFENDANT
NELSON KARANJA KINUTHIA 15TH DEFENDANT



EDWARD MULEWA MWACHINGA 16TH DEFENDANT

VALUE TEQ TRADING LIMITED 17TH DEFENDANT

RULING

1. By the notice of motion dated October 19, 2021 the 6th and 7th defendants/applicants seek an order to stay this suit pending hearing and determination of petition No E327 of 2021 which challenges the constitutionality of the [Proceeds of Crime and Anti-Money Laundering Act](#).
2. The application which is supported by an affidavit sworn by Stephen Ndungu Kinuthia is premised on grounds that: -
 - ' 1) That the 6th and 7th defendants/applicants were jointly charged together with other persons in Anti-Corruption Case No 28 of 2009 for the offence of alleged conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48 of the [Anti-corruption and Economic Crimes Act](#), No 3 of 2003.
 - 2) That before the commencement of the hearing of Anti-Corruption Case Number 28 of 2019, the plaintiff moved this court and filed this suit seeking for orders to allow it to recover and forfeit to the government assets belonging to the persons charged in Anti-Corruption Case Number 28 of 2019.
 - 3) That since these civil proceedings instituted for the recovery and forfeiture of the assets are provided under part VIII of the [Proceeds of Crime and Anti-Money Laundering Act](#), which legal provisions are subject to interpretation in the petition Suit Number E327 of 2021 filed on August 20, 2021 at the High Court of Kenya at Nairobi, it would be prudent for this honourable court to grant the orders sought in this application in a bid of protecting the applicants' constitutional rights of a fair hearing before the plaintiff proceeds to recover and forfeit assets belonging to them to the government.
 - 4) That it would be in the interest of justice and fairness to have this application be allowed as the outcome of the petition would have a direct bearing on this case.'
3. The gist of the application as can be discerned from the grounds, the supporting affidavit and the submissions of learned counsel for the applicants is that the 6th and 7th defendants/applicants were jointly charged together with other persons with the offence of conspiracy to commit an offence of corruption contrary to section 47A(3) as read with section 48 of the [Anti-Corruption and Economic Crimes Act](#) in Anti-Corruption case No 28 of 2019 but before that case could even start the plaintiff filed this suit seeking orders to forfeit to the government assets belonging to the accused persons. That the 6th and 7th defendants/applicant have since instituted a petition challenging the constitutionality of the part VIII of the [Proceeds of Crime and Anti-Money Laundering Act](#) upon which the suit is predicated and hence it would only be prudent that this suit be stayed pending the hearing and determination of the petition. It is argued that granting the application will be protecting the applicants' constitutional rights to a fair hearing before the assets are forfeited because should the petition succeed it will have a bearing on this case.



4. In opposition the plaintiff/respondent filed a preliminary objection and also grounds of opposition both dated November 9, 2021 and filed on even date.
5. In the preliminary objection it is stated that the matters raised in this application are res judicata as they have already been determined by this court in a ruling dated January 29, 2021. That the application is therefore bad in law, vexatious and an abuse of the court process and it ought to be dismissed.
6. The application is also opposed through the following grounds of opposition.
 1. That the notice of motion dated October 19, 2021 is an abuse of the court process;
 2. That the matters raised in the application dated October 19, 2021 are res judicata and they have already been determined by a court of competent jurisdiction and hence the application is bad in law, vexatious and an abuse of the court process and as such, it ought to be dismissed with costs.
 3. That this court has pronounced itself in a similar application dated September 18, 2020 by the same applicant herein and same deponent; and delivered ruling on January 29, 2021 dismissing the said application;
 4. That the 1st respondent is a body corporate established under section 3 of the Ethics and Anti-Corruption Act, 2011. It is mandated to undertake investigation of any acts of corruption or violation of codes of ethics or other matter prescribed under the *Anti-Corruption and Economic Crimes Act*, No 3 of 2003 and all relevant Acts. Under section 55 and 56 of the *Anti-Corruption and Economic Crimes Act* as read with section I 1 (l) (j) of the *Ethics and Anti-Corruption Commission Act*, 2011, the commission is also mandated to institute and conduct proceedings in court for the purposes of recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures;
 5. That the plaintiff/1st respondent filed the present suit pursuant to its statutory mandate, specifically section of the *Ethics and Anti-Corruption Commission Act*, 2011 and not part VIII of the proceeds of Crime and Anti-Money Laundering Act;
 6. That this is a court of competent jurisdiction; the 1st respondent's action in instituting this suit is no doubt consistent with its mandate and the import of the orders as prayed for by the applicant seek to interfere with the constitutional and statutory mandate of the 1st respondent;
 7. That the proceedings in this suit have been going on for over two years the applicant has not placed sufficient material before this court to support the orders sought if anything the 1st respondent prays that the court do expedite the hearing of this matter;
 8. That the suit the applicants seek to stay was filed in 2018 way before petition Suit No E327 of 2021 was filed and the said applicants have duly filed their defenses in this suit, furthermore the present application is another attempt by the applicant to stall these proceedings by obtaining orders which were denied in its application dated September 18, 2020;



9. That the grounds cited in the present application are not sufficient to grant a stay of these civil proceedings, this court has powers to ensure that all parties to this suit are not prejudiced;
 10. That the applicants have filed this application intended to delay the hearing of this suit because they intend on frustrating any proceedings filed against them;
 11. That the inherent powers of the High Court are intended to curtail delays, to ensure expeditious trial and substantive justice;
 12. That that the effect of the orders sought by the applicants if granted would be to clothe the applicants with immunity in total disregard of the constitutional and legal authority of the 1st respondent charged with ensuring that persons alleged to have committed corruption and economic crimes do not benefit from corrupt conduct;
 13. That it is in public interest that this suit is heard and determined to its logical conclusion;
 14. That the grounds alleged in the said application are not backed by any evidence and is purely calculated to attract sympathy from the court and stall any proceedings related to the matters in issue; and
 15. That the notice of motion application dated October 19, 2021 before this court lacks merit and should be dismissed with costs to the plaintiff/1st respondent.
7. In the written submissions dated March 31, 2022 the learned counsel for the plaintiff/respondent points this court to the ruling of Onyiego J dated January 29, 2021 which she states expresses the court's frustration at the turn of events in this case. Counsel also points out that the petition upon which this application is premised was filed by the 14th and 15th defendants but not by the 6th and 7th defendants. Counsel contends that the petitioners/applicants have in any event totally misapprehended the plaintiff's claim; that the plaintiff herein is not the entity envisaged in the *Proceeds of Crime and Anti-Money Laundering Act* nor has it filed this suit under that Act but that the present suit is distinct to the actions taken out under the *Proceeds of Crime and Anti-Money Laundering Act* and further that this suit is governed by a separate Act (the *Ethics and Anti-Corruption Commission Act*) which the plaintiff invokes for the recovery of public property gotten through corrupt conduct by the defendants/applicants.
 8. Counsel has also submitted and has urged this court to find that every statute carries with it the presumption of constitutionality unless otherwise proven. Counsel further argues that staying this suit would be akin to this court surrendering itself to the conduct of a court of concurrent jurisdiction, to wit the constitutional and human rights division. Counsel contends further that the application herein is but another attempt to scuttle the hearing of this suit; that the application ought to be dismissed and the suit set down for hearing expeditiously and on a priority basis as ordered by Onyiego J in the ruling dated January 29, 2021.
 9. Learned counsel for the 5th defendant intimated to this court that he had entered into negotiations with the plaintiff/respondent with a view to settling the claim out of court. He also intimated that the 14th and 15th defendants had entered into similar negotiations.
 10. Counsel for the 12th defendant however indicated that her client was in support of the application.



11. I have very carefully considered the application, the grounds thereof, the supporting affidavit, the preliminary objection, the grounds of opposition, the rival submissions of learned counsel for the parties and the cases cited therein. It is my finding that indeed the notice of motion before me is an abuse of the court process. The Constitutional Petition No 327 of 2021 upon which this application is predicated was transferred to this court by an order of Mrima J sitting in the constitutional & human rights division on March 24, 2022. It is indeed correct that the petition challenges the constitutionality of part VIII of the [Proceeds of Crime and Anti-Money Laundering Act](#) which allows for forfeiture of assets belonging to corruption suspects even before conclusion of the criminal proceedings against those suspects. It is the petitioners' case that section 92(4) of the [Proceeds of Crime and Anti-Money Laundering Act](#) negates the right to be presumed innocent until proven guilty and hence a violation of the suspect's right to fair trial. It is however noteworthy that the applicants herein are not parties in the petition. It is also instructive that the suit which the applicants seek to stay is not predicated on the provisions of the [Proceeds of Crime and Anti-Money Laundering Act](#) but a different Act altogether being the [Ethics and Anti-Corruption Commission Act](#) and as such the outcome in the petition is unlikely to affect these proceedings.
12. Moreover, it was held by Gikonyo J, in the case of [Kenya Wildlife Service vs James Mutembei \(2019\) eKLR](#) and I fully concur, that: -
- ' (5) Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent'
13. Similarly, in the case of [Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000 \(unreported\)](#) Ringera J stated:-
- ' In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. An in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.'
14. The above holding was echoed by Odunga J in the case of [Principal Kathiani High School & anther v Joseph Mbugua Githebu t/a Mwaki Jumla Supplies \[2021\] eKLR](#) where he stated:-
- ' 24. In [Vishram Ravji Halai vs Thornton & Turpin Civil Application No Nai 15 of 1990 \[1990\] KLR 365](#), the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under order 41 rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.



According to section 1A(2) of the Civil Procedure Act 'the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective' while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.'

15. The findings above find support in Halsbury's Laws of England, 4th Edition Vol 37 page 330 and 332, that: -

' The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.'

This is a power, which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.'

'It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.'

16. A party who invokes the discretion of this court must do so with the best intention which in my view has not been demonstrated by the defendants/applicants whose intention seems merely to be to delay the prosecution of this suit at whatever cost. In the ruling delivered by Onyiego J on January 29, 2021 the good judge expressed his frustration at the manner the defendants were conducting themselves by filing several applications so as to stall the suit. Indeed, the suit having been filed in 2018 can now properly be referred to as an old case and whereas I am not persuaded that the issues raised in this application are res judicata I find that the application by the 6th and 7th defendants lacks merit. As I have stated the proceedings herein have nothing to do with part VIII of the Proceeds of Crime and Anti-Money Laundering Act and in any case the applicants herein are not parties in the petition.
17. In any event even were they parties, this court could still set this suit down for hearing but ensure that the petition is heard and determined before the hearing date and in the event that the petition succeeds that would be the end of the suit. I therefore see no good reason to stay the suit as prayed.
18. The application is dismissed for lack of merit. Costs to the plaintiff/respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY, 2022.

E N MAINA

JUDGE

