



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ethics & Anti-Corruption Commission v Estama Investment & 20 others;  
Kenya Goodland Investments Co. Ltd & another (Interested Parties) (Anti-  
Corruption and Economic Crimes Civil Suit 1 of 2018) [2022] KEHC 15540 (KLR)  
(Anti-Corruption and Economic Crimes) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15540 (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 1 OF 2018  
EN MAINA, J  
NOVEMBER 21, 2022**

**BETWEEN**

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

**AND**

**ESTAMA INVESTMENT ..... 1<sup>ST</sup> DEFENDANT  
BUSINESS CAPITAL ACCESS LIMITED ..... 2<sup>ND</sup> DEFENDANT  
DIVERSITY DISTRIBUTION LIMITED ..... 3<sup>RD</sup> DEFENDANT  
MEDAFRICA LIMITED ..... 4<sup>TH</sup> DEFENDANT  
NJAGE MAKANGA ..... 5<sup>TH</sup> DEFENDANT  
DR. NICHOLAS MURAGURI ..... 6<sup>TH</sup> DEFENDANT  
EPHANTUS MAINA THIGA ..... 7<sup>TH</sup> DEFENDANT  
BENN KHADIAGALA ..... 8<sup>TH</sup> DEFENDANT  
MAMO UMURO ..... 9<sup>TH</sup> DEFENDANT  
PETER GACHENGE ..... 10<sup>TH</sup> DEFENDANT  
ELKANA ONG'UTI ..... 11<sup>TH</sup> DEFENDANT  
SUSAN OTIENO ..... 12<sup>TH</sup> DEFENDANT  
DR. OMBACHO KEPHA MOGERE ..... 13<sup>TH</sup> DEFENDANT  
KARIUKI IRERI NJAGE ..... 14<sup>TH</sup> DEFENDANT  
IBRAHIM MAALIM ANDULLAHI ..... 15<sup>TH</sup> DEFENDANT**



**IZAQ OKOTH ODONGO ..... 16<sup>TH</sup> DEFENDANT**  
**KIPKERICH CHUMO KOSKEI ..... 17<sup>TH</sup> DEFENDANT**  
**ABDULATIF ALI ..... 18<sup>TH</sup> DEFENDANT**  
**STEPHEN MATIBS NJAMA ..... 19<sup>TH</sup> DEFENDANT**  
**JULIUS NYAMOHANGA RIOBA ..... 20<sup>TH</sup> DEFENDANT**  
**DR. KHADIJAHKHASSACHOON ..... 21<sup>ST</sup> DEFENDANT**

**AND**

**KENYA GOODLAND INVESTMENTS CO. LTD ..... INTERESTED PARTY**  
**EDMAR ENTERPRISES LIMITED ..... INTERESTED PARTY**

### **RULING**

1. This suit was instituted through a plaint dated January 3, 2018 in which the plaintiff initially sought the following prayers against the 1<sup>st</sup> to 14<sup>th</sup> defendants jointly and severally:-
  - “a) A declaration against the Defendants jointly and severally that the subject tender award and contract were predicate on a crime.
  - b) An order for payment of the sum of Kshs 800,000,000.00 against the Defendants jointly and severally.  
In the alternative, the plaintiff prays for judgment against the defendants for:-
  - c) A declaration that the subject tender was over-valued by Kshs 491,140,000.00
  - d) An order for payment of Kshs 491,140,000.00 as the difference between the tender amount paid and the total market value of the prefabricated portable medical clinics as against the Defendants jointly and severally.
  - e) A declaration that payment of Kshs 1,000,000.00 to the 7<sup>th</sup> Defendant was a bribe.”
  
2. The record shows that the plaint was amended on March 2, 2018 to enjoin the 15<sup>th</sup> to 21<sup>st</sup> defendants and the two interested parties and also to include the following prayers:-
  - “g. A declaration that payment of Kshs 400,000.00 to the 14<sup>th</sup> Defendant was a bribe.
  - h. An order for payment of the said sum of Kshs 400,000.00 by the 14<sup>th</sup> Defendant.
  - i. A declaration that the Plaintiff is entitled to trace and recover a sum of Kshs 88,104,233.00 against the 2<sup>nd</sup> Defendant.
  - j. An order for payment of the said sum of Kshs 88,104,233.00 by the 2<sup>nd</sup> Defendant.



- k. A declaration that the Plaintiff is entitled to trace and recover a sum of Kshs 997,964.00 against the 2<sup>nd</sup> interested party.
  - l. An order for payment of the sum of Kshs 997,964.00 by the 2<sup>nd</sup> interested party.
  - m. Costs of and incidental to this suit.
  - n. Interest on (b), (d), (f) and (g) above.”
3. Upon amendment of the Plaintiff and as parties continued to comply with Order 11 of the [Civil Procedure Rules](#) the Plaintiff entered into negotiations with the 1<sup>st</sup> to 5<sup>th</sup> Defendants for an out of court settlement. These out of court negotiations were brought to the attention of the court on January 20, 2020 by Senior Counsel Mr Gatonye, Learned Counsel for the 1<sup>st</sup> to 5<sup>th</sup> Defendants. Counsel appearing for the other defendants intimated they were aware of those negotiations whereupon the hearing of the case was adjourned to give way to the negotiations. However, those negotiations broke down a fact which was revealed to this court on December 8, 2021 the same day on which the Plaintiff revealed that it was reviewing its case against some of the other Defendants.
  4. On April 4, 2022 the Plaintiff intimated that it had reached a consent with the 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and 21<sup>st</sup> Defendants to discontinue the case against them and they were praying that the consent be adopted as an order of this court. Once that position was confirmed by Counsel for the said Defendants this court adopted the consent and marked the case against those defendants as withdrawn with no orders as to costs. It was then that Counsel for the Plaintiff sought leave, which was granted, to file an application to amend the plaint so as to reflect the new position. That application is the one that forms the subject of this ruling.
  5. The application is brought under Order 8 Rules 3(1), 5 & 7, Order 25 (1) & (2), Order 51 Rule 1 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#). The gravamen of the application is to further amend the Plaintiff so as to remove the names of the 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and 21<sup>st</sup> Defendants from the proceedings as the investigations by the Plaintiff have revealed that they acted in the performance of their official duties; that the amendment is necessary for the effectual adjudication of the questions involved in the suit and further that the said defendants will not suffer any prejudice if the application is allowed.
  6. On June 21, 2022 this court directed that the application would be heard through written submissions. Only Counsel for the 7<sup>th</sup>, 14<sup>th</sup> and 19<sup>th</sup> Defendants have opposed the application. Apparently a similar application was also filed by the 19<sup>th</sup> Defendant. The application of the 19<sup>th</sup> Defendant is supported by an affidavit sworn by himself on June 14, 2022 although the court’s receipt stamp is dated June 10, 2022. The Notice of Motion that is on the record is not complete so the court cannot tell its date.
  7. I have carefully considered the Plaintiff/Applicant’s submissions dated July 29, 2022 and the 7<sup>th</sup>, 14<sup>th</sup> and 19<sup>th</sup> Defendants submissions dated August 25, 2022 all filed in respect of the Plaintiff’s application dated April 28, 2022.
  8. Amendment of pleadings is provided for under Order 8 of the [Civil Procedure Rules](#). Since pleadings in this case have closed the relevant provision is Order 8 Rule 3 (1) which provides:-
    - 8(3) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the
    - (1) following provisions of this rule, the court may at any stage of the proceedings,



on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

9. Order 1 Rules 9 and 10 and Order 24 Rules 3, 4, 5, 6 to which amendments are subject to provide:-  
Order 1

- (9). No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
- (10). Where a suit has been instituted in the name of the wrong persons as plaintiff,  
(1) or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
- (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
- (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.
- (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

Order 24 Rule (3)(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

- (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

- (4.) Where one of two or more defendants dies and the cause of action  
(1) does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant



dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.
- (5.) Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court.
- (6.) The bankruptcy of a plaintiff in any suit which the trustee or official receiver might maintain for the benefit of his creditors shall not cause the suit to abate, unless such trustee or official receiver declines to continue the suit or (unless for any special reason the court otherwise directs) to give security for the costs thereof within such time as the court may direct.
- (2) Where the trustee or official receiver neglects or refuses to continue the suit, and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's bankruptcy, and the court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate."

10. It is clear from the above provisions that this court has a wide discretion to grant or not to grant applications for amendment. The general principle however is that amendments are to be freely allowed if they are necessary to enable the real controversy between the parties to be determined and if they will not occasion prejudice to the opposite party – See *Kenya Cold Storage Services (Africa) Ltd* [1982] KLR 453, *Macharia v Guardian Bank Ltd & Another* [2003] KLR 271; *Mwakio v Kenya Commercial Bank Ltd* [1987] KLR 513).

11. Whereas the Plaintiff contends that the amendment should be granted as it is necessary to reflect the true position following discontinuance of the suit against some of the defendants. The 7<sup>th</sup>, 14<sup>th</sup> and 19<sup>th</sup> defendants have opposed the application for reason that it will not only prejudice them but that it offends the national values and principles of governance in the *Constitution of Kenya* for the following reasons:

- “(i) Paragraph 24(c) Whereas the 6<sup>th</sup> defendants name is sought to be deleted it is him who “initiated the procurement process by seeking an approval to procure the portable medical clinics through restricted tendering.”
- ii. Paragraph 24 (c) Whereas the 21<sup>st</sup> Defendant’s name is sought to be deleted from the pleadings he “approved the said memo on May 13, 2015” (meaning the request for use of restricted tendering.)
- iii. Paragraph 24(i)



Whereas the 7<sup>th</sup> defendant is allegedly liable for having been a member of both the ministerial Tender Committee and the Evaluation Committee, it seeks to remove the appointing authority being the 21<sup>st</sup> defendant.”

12. It is however instructive that the consent which culminated in the discontinuance of the affected defendants has already been adopted as an order of this court. Those defendants are no longer parties to the suit and the amendment is therefore necessary to reflect the reality of that fact. The 7<sup>th</sup>, 14<sup>th</sup> and 19<sup>th</sup> defendants have not demonstrated how they will be prejudiced by the amendment or how the same will result in violation of the principles of governance, equity, social justice, equality, non-discrimination, transparency, integrity and accountability. It is trite that it is never sufficient to allege. There being no proof of such prejudice I am not persuaded that the application is made in bad faith.
13. Moreover Order 25 Rules 1 and 2 of the Civil Procedure Rules empowers the Plaintiff to wholly discontinue its suit against all or any of the defendants. Similar power is granted to the court under Order 1 Rule 10 (2) of the Civil Procedure Rules. Likewise, Section 56(B)(2) of the Anti-Corruption and Economic Crimes Act empowers the Commission to negotiate and enter into a settlement with any person against whom it has brought a civil claim or application in court.
14. Counsel for parties are officers of this court and are always expected to act in utmost good faith. I find nothing to demonstrate that not to be the position in this case. The mala fides alleged by Senior Counsel Erick Mutua has not been demonstrated. The fact that the terms of the consent reached between the Plaintiff and the defendants was not disclosed to Counsel for the 7<sup>th</sup>, 14<sup>th</sup> and 19<sup>th</sup> defendants is not in my view a good reason to reject the application.
15. In the upshot the application to further amend the Plaint is granted. The Amended Plaint shall be filed and served within 21 days of this order. There shall be no order for costs.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2022.**

**E N MAINA**

**JUDGE**

