



IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC CIVIL SUIT NO. E008 OF 2021

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

VERSUS

DR. EVANS KIDERO..... 1ST DEFENDANT
PAUL MUTUNGA MUTUNGI..... 2ND DEFENDANT
JOHN NDIRANGU KARIUKI..... 3RD DEFENDANT
GEORGE WAINAINA NJOGU..... 4TH DEFENDANT
THE CUPS LIMITED..... 5TH DEFENDANT
JOHNNGARI WAINAINA..... 6TH DEFENDANT
ADUMA JOSHUA OWOUR.....7TH DEFENDANT
HANNAH MUTHONI KARIUKI..... 8TH DEFENDANT
PHILOMENA KAVINYA NZUKI..... 9TH DEFENDANT
NG'ANG'A MUNGAI 10TH DEFENDANT
EKAYA ALUMASI GHONZOUR..... 11TH DEFENDANT
JAMES MIMI MBUGUA..... 12TH DEFENDANT
ELIZABETH WANJIRU NDERITU..... 13TH DEFENDANT
ALICE NJERI MUNDIA..... 14TH DEFENDANT

RULING

1. This is a ruling on the 1st Defendant/Applicant's Notice of Motion dated 21st June 2021 and Preliminary Objection filed together with his written statement of Defence which this court ordered to be heard together. There is also on record a Notice of Motion dated 30th September 2021 by which the 7th Defendant (Aduma Joshua Owuor) seeks similar orders as those sought by the 1st Defendant/Applicant though on different grounds.

2. The 12th Defendant (James Mimi Mbugua) also filed a Notice of Preliminary Objection dated 12th July 2021 which raises similar grounds as those raised in the Notice of Motion of the 1st Defendant/Applicant and this ruling shall therefore apply to it. In the Notice of Motion dated 21st June 2021 the 1st Defendant/Applicant principally seeks orders that:-

1. This Honourable Court be pleased to strike out this suit in its entirety for being an abuse of the court process.

2. In the Alternative, that this suit be stayed pending hearing and determination of HCC ACEC No. 30 of 2019 formerly HC Petition No. 366 of 2019 and Chief Magistrates Anti-Corruption Criminal case No. 8 of 2019.

3. The gist of the application as can be discerned from the grounds on its face and in the supporting affidavit of Evans Odhiambo Kidero the applicant sworn on 21st June 2021 is firstly that the suit herein stems from Chief Magistrate Anti-Corruption case No. 8 of 2019 which he has challenged in this court vide High Court Anti-Corruption and Economic Crimes Petition No. 30 of 2019 and it is apparent that this suit is intended to defeat High Court Anti-Corruption and Economic Crimes Petition No. 30 of 2019 in the event that the same is allowed ; that in view of the existence of the other two cases, this suit is brought in bad faith; that this suit would prejudice, embarrass and delay the fair trial of High Court Anti-Corruption and Economic Crimes Petition No. 30 OF 2019 which contests the charges in the criminal case; that in view of the provisions of Section 48 of the **Anti-Corruption and Economic Crimes Act** regarding the punishment in the event one is convicted, it defeats justice to have another Civil Suit which would lead to the same punishment/penalty; that Section 54 of Anti-Corruption and Economic Crimes Act provides for compensation similar to what is sought to be achieved by this case; that in light of the petition in High Court Anti-Corruption and Economic Crimes Petition No. 30 of 2019 it is only fair and just that this suit be struck out or be stayed pending hearing and determination of the petition and further that this suit is brought in bad faith as it only seeks to discredit the applicant under Chapter 6 of the Constitution and also under the Leadership and Integrity Act and is aimed at barring him from vying for a gubernatorial seat in the general elections of 2022. The 1st Defendant/Applicant further avers that it is in the interest of justice that the orders sought are granted. He contends that even the criminal proceedings against him in the Chief Magistrates Anti-Corruption court are motivated by an ulterior motive which is why he filed High Court Anti-Corruption and Economic Crimes Petition No. 30 of 2019.

4. The 1st Defendant/Applicant's preliminary objection challenges the jurisdiction of this court to hear this suit. The grounds cited are that there are already two other cases (Chief Magistrates Anti-Corruption Court case No 8 of 2019 and High Court Anti-Corruption and Economic Crimes Petition No. 30 of 2019) which ostensibly deal with the same subject matter and that given the existence of the other two, this suit is an abuse of court process.

5. The notice of preliminary objection filed by the **12th Respondent** is premised on grounds that:-

"1. The suit directly infringes on the 12th Defendant's Constitutional Right to a fair trial as enshrined in Article 50 (1) (2) (a), (c), (d), (e) and (k) to the extent that;

a) There exists before the Nairobi Chief Magistrate Court, ACC No. 8 of 2019, R Vs Dr. Evans Kidero & 15 Others, pending hearing and determination in which the matter in issue, is also substantially and directly in issue herein.

b) The suit maliciously elevates unproved facts and assertions by the plaintiff in contravention of presumption of innocence of the 12th Defendant;

c) The 12th Defendant has not been found Guilty of "Corruption" or "Economic Crime" before a court of law and any such assertion and the resultant liability either by himself or with others is vexatious at the best and an attempt to collectively attribute baseless monetary liability;

d) The suit contravenes the Right if the 12th Defendant to adequate time and facilities to prepare for his defence in Nairobi Chief Magistrate Court, ACC No 8 of 2019, R Vs Dr. Evans Kidera & 15 Others;

e) The Suit contravenes the Right of the 12th Defendant to a having his trial begin and conclude without unreasonable delay; and

f) The Suit contravenes the Right of the 12th Defendant to adduce and challenge the evidence without self-incrimination in Nairobi Chief Magistrate Court, ACC No 8 of 2019, R Vs Dr. Evans Kidero & 15 Others.

2. The Plaintiff lacks *locus standi* to file a representative suit on behalf of the County Government of Nairobi in Contravention of Order 2 (8) of the Civil Procedure Rules.

3. The suit is in Contravention of Section 6 of the Civil Procedure Act and discloses no reasonable cause of action against the 12th Defendant.

4. The suit is intended to Prejudice, Embarrass and Delay the 12th Defendant's trial in Nairobi Chief Magistrate Court, ACC No 8 of 2019, R Vs Dr. Evans Kidero & 15 Others

6. The Notice of Motion dated 21st June 2021 and the preliminary objection were canvassed by way of written submissions. During the highlighting of the submissions the learned Counsel appearing for the 2nd to 14th Defendants intimated that they were in support of this application and did not wish to add anything. On his part, Mr. Mohochi, learned Counsel for the 12th Respondent intimated that he filed his application on 12th July 2021 but as he did not wish to occasion delay this court could go ahead and hear the application of the 1st Defendant/Applicant. This court therefore proceeded to hear the application and the preliminary points of law raised as if it was solely between the 1st Defendant/Applicant and the Plaintiff/Respondent but bearing in mind that the other Defendants support the same. Be that as it may as the issues raised in the preliminary objection of the 12th Respondent are similar to those raised by the 1st Defendant/Applicant this ruling shall apply *mutatis mutandis* to the preliminary objection of the 12th Respondent.

7. Briefly the 1st Defendant/Applicant's case is that the criminal case filed in the Chief magistrate's court stems from an alleged irregular approval and payment of a sum of Kshs. 58, 000, 000 to the firm of Wachira Mburu & Company Advocates as legal fees in HCCC 875 of 2010. He contends that the charges against him do not have any factual or legal basis because the said HCCC No. 875 of 2010 Kyavee Holdings Limited Vs City Council of Nairobi was heard, determined and the legal fees processed and paid before he became the Governor of the County Government of Nairobi; that in any event the firm of Wachira Mburu & Co. Advocates having represented the defunct City Council was entitled to the remuneration; that the Forensic Report that gave rise to the charges against him was erroneous and that the inference created that he acquired a sum of Kshs. 14,400,000 from M/S Cups Limited as proceeds of crime was erroneous as the said sum was the consideration paid to him by M/S Cups Limited for sale of a motor vehicle Regn. No. KBT 001 Toyota Lexus. It is his contention that the criminal charges were instituted to achieve ulterior political motives against him and that he filed HC Petition Anti-Corruption and Economic Crimes Petition No. 30 of 2019 to challenge the charges and to have them quashed. It is the 1st Defendant/Applicant's case that the present suit seeks to recover the sum of Kshs. 14, 400, 000 which is the subject of the criminal charges in Chief Magistrate Anti-Corruption Court case No. 8 of 2019 and that those are the same charges that he is asking this court to quash in High Court Anti-Corruption and Economic Crimes Petition No. 30 of 2019. He contends and that is also the submission of his Counsel, Prof Tom Ojienda SC, that this suit is intended to defeat the outcome of the petition and is therefore an abuse of the court process.

8. He also submits that the sum of Kshs. 14, 400, 000 ought to be recovered with interest upon the conclusion of the criminal case and only if there is a conviction as provided under **Sections 48(1) and 54 of the Anti-Corruption and Economic Crimes Act**. It is his further submission that it is in the public interest to stay civil proceedings where the same are filed concurrently with Criminal proceedings.

9. In support of his submissions Prof, Tom Ojienda SC learned Counsel for the 1st Defendant/Applicant relied on the following cases:-

- **Cephas Kamande Mwaura Vs Republic [2021] eKLR** where the court stated:-

“.....The sentence imposed against him was not a mandatory sentence. The court that imposed the sentence had discretion, within the parameters of the sentence prescribed by ACECA, to impose either a fine or custodial sentence.”

- **Ethic and Anti-Corruption Commission Vs Jamal Bare Mohamed [2019] eKLR** where it was observed that under Section 54 of ACECA there has to be a conviction before any compensation can be made and that enforcement under that section is done by the person in whose favour the order was made and as if the order was made in civil proceedings.

- **Kenya Anti-Corruption Commission Vs Judith Marilyn Okungu & another [2013] eKLR** where the court was of the view that because the defendants therein were charged in a criminal case with an offence under Section 45 as read with Section 48 of ACECA, 2003 and upon their conviction they were liable to pay compensation as provided in Section 54 of the Act then bringing a civil suit against them was akin to using a double edged sword and it was prejudicial to the Defendants and smacked of harassment. That court went ahead and stayed the civil suit to await determination of the criminal case facing the defendants.

- **Florence Ndalama Vs Mwene Lumpepe Mhango & Co. AS Administrators of Malawi Railways Limited & Rwsa Pascal T/A Pascal Investment Land Cause No. 59 of 2013** where again the court stayed the civil proceeding upon a finding that it was wrong and premature to give judgment in a civil case where a decision in a concurrent criminal case had to be made on the same facts.

- Other cases cited are:-

a) Githunguri Vs Republic [1985] KLR 3090

b) Ethics & Anti-Corruption Commission Vs Peter Mangiti & 17 Others [2016] eKLR where the court stated:-

“It is a fact that this current civil suit stems from the criminal case which charges the Applicant herein has disputed in the Petition. The courts have held that it is in the public interest to stay civil proceedings where criminal and civil matters have been made to run concurrently. The Court in Miscellaneous Application 7 of 2016 Ethics & Anti-Corruption Vs Peter Mangiti & 17 others [2016] eKLR stated that: '22.the normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal cases as the determination of the criminal cases as the determination of civil rights and obligations are not the subject of a criminal prosecution.' 23..... “In such instances, where there is a co-existence of a civil suit and a criminal case, it is rather that a stay be granted on the civil process pending the completion of the criminal case.....24. In the case of Jadra Karsan -vs- Harnam Singh (1953) 20 E.A.C.A 74, it was held; “There is no doubt that there is an inherent power of stay of proceedings where the ends of justice so require.” 25. This being a public interest matter and being guided by the above authorities, I do find that it is in the public interest as well as the interest of parties that one of these cases be stayed pending the hearing and determination of the other.....’

10. Counsel concluded by stating that this civil suit, the criminal case and the petition are intricately intertwined and any decision on the petition and criminal case would have a direct effect on this suit and it is therefore in the public interest that the suit herein is struck out and or stayed pending the hearing of the criminal case and the petition. Counsel also argued that this suit compromised the 1st Defendant/Applicant's right to fair trial (Article 50 of the Constitution) in the criminal proceeding. He reiterated his submission that the suit is an abuse of the court process and urged this court therefore to allow the Notice of Motion and the preliminary objection as prayed.

11. The application and Notice of Motion were vehemently resisted by the Plaintiff/Respondent. In opposition the Plaintiff/Respondent filed Grounds of opposition dated 1st July 2021, a Replying affidavit sworn by Mulki Omar on even date and written submissions dated 4th August 2021 the gist of which is that this suit is filed pursuant to the plaintiff's statutory mandate under **Section 11 (l) (j) of the Ethics and Anti-Corruption Commission Act 2011**; that under **Sections 55 and 56 of the Anti-Corruption and Economic Crimes Act (ACECA)** the

Commission is mandated to institute and conduct proceedings for the purpose 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; that the import of the 1st Defendant/Applicant's application is to interfere with the Constitutional and Statutory mandate of the Respondent and further that the Applicant has not demonstrated the existence of ulterior motive in the institution of the suit and that moreover the 1st Defendant/Applicant has filed its defence in the suit and will not therefore suffer prejudice. The Respondent has also argued that the hearing of Chief Magistrates Anti-Corruption Court case No. 8 of 2019 has not commenced and that in any event the legal sanctions there-at are distinct from those in this suit and that this application is merely intended to delay the hearing of this suit as the applicants are intent on frustrating any proceedings filed against them in relation to the subject matter both here and in the lower court. It is also contended that the effect of the orders sought would be to cloth the 1st Defendant/Applicant with immunity in total disregard of the Constitutional and legal authority of the Respondent to ensure that persons alleged to have committed corruption and economic crimes do not benefit from corrupt conduct. Counsel for the respondent further asserted that the grounds for the application are not supported by evidence and are merely calculated to attract sympathy from the court and stall any proceedings related to the matters in issue in furtherance of the 1st Defendant/Applicant's personal ambition. Counsel asserted that by virtue of Section 193A of the Criminal Procedure Code criminal proceedings can run concurrently with civil proceedings and the fact that any matter in issue in criminal proceedings is also in issue in a pending civil suit cannot be a ground for stay, prohibition or delay of the latter.

12. In regard to the prayer seeking to strike out the suit Counsel submitted that whereas this application is made under Order 2 Rule 15 (1) of the Civil Procedure Rules subrule 15 (2) provides that no evidence is admissible in such an application and that it ought to be evident from the grounds on the face of the application that no reasonable cause of action is demonstrated by the pleading sought to be struck out. Counsel contended that the plaint herein discloses a cause of action against the Applicant. Citing the case of **D T Dobie & Company (Kenya) Limited Vs Joseph Mbaria Muchina & another [1980] eKLR** Counsel cautioned that this court ought to exercise its power to strike out sparingly. Counsel further asserted that the suit has passed the test to be heard as it raises triable issues and it ought to be determined on its merit through discovery and oral evidence tested by cross examination. To support this submission Counsel cited the case of **Wenlock Vs Moloney [1965] 2 All E.R 871 where Danckwerts LJ** stated:-

“There is no doubt that the inherent power of the Court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case.”

13. Counsel for the Respondent also urged this court to peruse the affidavit of Mulki Omar sworn on 1st July 2021 to confirm that triable issues are raised and to further note that payment of the impugned sum of Kshs. 58,000,000 to the firm of Wachira Mburu Mwangi & Co. Advocates took place on 7th January 2014. Counsel also stated that Civil proceedings for forfeiture are distinct from the punishment prescribed in **Section 54 of the ACECA** and that proceedings under **Section 11 (1) (j) of the Ethics and Anti-Corruption Commission Act** are not punitive but merely intended to ensure that no person gains from ill-gotten wealth. To support her submissions and the submission that there needed to be no criminal conviction for recovery proceedings to be instituted Counsel cited the following cases:

- **Teckla Nandjila Lameck & another Vs The President of the Republic of Namibia & others case No; A54/2011**
- **Claim No. 20/2 HC Vs 02/20 between the Assets Recovery Agency and Audrene Samantha Rowe and 3 others [2014] JMSC civ 2**
- **Assets Recovery Agency Vs James Thuita Nderitu & 6 others [2020] eKLR**
- **Assets Recovery Agency Vs. Lilian Wanja Muthoni t/a Sahara Consultants & 5 others [2020] eKLR where the court stated:-**

“This is a claim for civil recovery. A claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct. The Plaintiff herein is therefore not required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA. In the case of **Director of Assets Recovery Agency & Ors, Republic versus Green & Ors [2005] EWHC 3168** the court stated that:

“In civil proceeding for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.” I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial. See – Kenya Anti-Corruption Commission v James Mwachethe Mulewa & another [2017] eKLR” (Emphasis added).

14. Based on the above decisions Counsel for the respondent urged that civil forfeiture should not be viewed as an alternative or substitute for the institution of criminal proceedings; that the Applicant has not demonstrated any real risk of serious prejudice as would lead to injustice in either one or both proceedings and further that **Sections 1A, 3A and 63I of the Civil Procedure Act** upon which the application is predicated are aimed at supplementing this court's power to do justice but are not intended to interfere with the powers of the Plaintiff/Respondent. Counsel reiterated that the application herein is merely intended to delay the hearing of this suit and that it is in the public interest that this suit be heard to its logical conclusion and be determined on its merits. She prayed that the application be dismissed with costs to the Plaintiff/Respondent.

15. In a brief rejoinder Prof Tom Ojienda SC pointed out that Counsel for the respondent failed to point out the similarities between this case and HCACEC Petition No. 30 of 2019. He also pointed out that Counsel for the Respondent did not state whether or not she is prosecuting the criminal case in the Chief Magistrate's court and reiterated that where there is a criminal case there must be a judgment before a recovery suit is commenced. He urged this court to allow the application.

16. **Analysis and Determination**

I have considered the application, the grounds thereof, the supporting affidavit, the notices of preliminary objection, the replying affidavit and grounds of opposition, the rival submissions of the learned Advocates for the parties both written and oral, the cases cited and the law. The central issues in this application are whether the same meets the test for the prayer for striking out under Order 2 Rule 15(1) of the Civil Procedure Act; whether this suit can properly and lawfully co-exist with the criminal proceedings in the Chief Magistrates Anti-Corruption court and the Petition by which the 1st Defendant/Applicant and his co-accused have challenged the criminal proceedings, whether this suit will compromise the 1st Defendant/Applicant's right in the Criminal proceedings and whether the decision in this suit will adversely impact HC ACECA Petition No. 30 of 2019 were the same.

17. On the main the 1st Defendant/Applicant seeks an order to strike out this suit in its entirety on the ground that it is an abuse of the court process. The prayer for stay of the suit pending the hearing and determination of the Criminal proceedings and the Petition challenging those proceedings is an alternative prayer. Striking out pleadings for being an abuse of the process of court is provided for in **Order 2 Rule 15(1) (d) of the Civil Procedure Rules**. Abuse of court process is a ground distinct from the ground that the pleading discloses no reasonable cause of action or defence in law provided for in Rule 15(1) (a). My reading of Order 2 Rule 15(2) is that the rule barring adduction of evidence applies only to applications brought under sub rule 1(a) so that a party bringing an application to strike out a pleading for being an abuse of the court process is therefore not prevented from adducing evidence in support of the application. Be that as it may it is trite that striking out a pleading is draconian and the discretion to do so must be exercised sparingly and only in the clearest of cases. To demonstrate that this suit is an abuse of the court process, the 1st Defendant/Applicant has adduced evidence that there are criminal proceedings based on the same subject matter and that he has filed a petition challenging those criminal proceedings in this very court. He has also in this suit challenged the charges levelled against him in the criminal proceedings by stating that the money the subject matter in both cases was paid long before he became the Governor of the County Government of Nairobi. It is also his contention that both the criminal proceedings and this suit are actuated by ulterior motives and that he will suffer prejudice should this suit be allowed to proceed concurrently with the criminal proceedings and the petition. He surmises that the Plaintiff/Respondent's motive for bringing this suit is to defeat the orders that may eventually be granted in the petition should it be determined in his favour.

18. My finding however is that he has not persuaded this court that this suit is an abuse of the court process. There is no dispute that the Plaintiff/Respondent is vested with power under **Section 11 (1) (j) of the Ethics and Anti-Corruption Commission Act** 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 of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya. This function is distinct from that provided in Section 11 (1) (d) – **investigate and recommend to the Director of Prosecutions the prosecution of any act of corruption, bribery or economic Crimes and other related conduct in that the former relates to civil proceedings and the latter to criminal proceedings**. The prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith are regulated by the Anti-Corruption and Economic Crimes Act (ACECA) and the criminal charges against the 1st Defendant/Applicant and his co-defendants are brought under that Act. The Anti-Corruption and Economic Crimes Act also regulates the proceedings for compensation and recovery of corruptly acquired property. **Section 51 of the Act states that a "person who does anything that constitutes corruption or economic crimes is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered."** **Section 53 (3)** of the Act states that an amount for which a person is liable under **Section 51 or 52** to a public body may be recovered by the public body or by the Commission on its behalf. **Section 55 of the Act** also empowers the Plaintiff/Respondent to bring forfeiture proceedings and provides for the procedure for so doing. The proceedings in all the aforesaid sections are civil in nature. In my considered opinion the above proceedings are not to be confused with the power of a court trying a corruption or economic crime to make compensation orders upon a conviction as provided in **Section 54 of the ACECA**. It is my finding therefore that the submission by learned Senior Counsel for the 1st Defendant/Applicant that bringing this suit when there is yet to be a conviction is, with utmost due respect, misconceived as it is clear from the wording of Sections 51, 52 and 53 that compensation recovery proceedings can be instituted independent of a conviction. Learned Counsel for the Plaintiff/Respondent cited a number of cases that support this view and whose findings I fully agree with. In the Jamaican case **Between the Assets Recovery Agency and Andrene Samantha Rowe and three others SC Judicature Jamaica Civil Division claim No 2012 HCV 02120**, the court stated:

"....There is no need for Assets Recovery Agency to prove the particulars as would be required in a criminal prosecution. It was held by Sullivan J in Director of the Assets Recovery Agency Vs Green [2005] EWHC 3168 (ADMIN), under similar legislation in England, that the director need not prove or allege the commission of any specific criminal offence. This position applies equally to the legislation in Jamaica. In addition there is the case of Serious Organised Crime Agency Gale [2009] EWHC 1015; [2010] Lloyd's Rep FC 39 where Griffith Williams J held that notwithstanding the discontinuance of criminal proceedings in Spain and the defendant's acquittal in Portugal, it was permissible to proceed with the civil recovery application in the United Kingdom. Griffith Williams J granted the order. It was upheld by the Court of Appeal [2010] 1WLR 2881 and the House of Lords [2011] 1 WLR 2760; [2012] 2 ALL ERI. The Court of Appeal expressly stated that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability.

.....It was also pointed out that the civil recovery proceeding is directed at the seizure of property and not the conviction of any individual and thus there was no reason to apply the criminal standard of proof.....Assets Recovery Agency need not prove a criminal conviction of anyone. All Assets Recovery Agency has to do is to establish on a balance of probabilities that unlawful conduct occurred and that the property targeted was property obtained through unlawful conduct."

19. The above case was one of the cases cited with approval in the Kenyan case of **Assets Recovery Agency Vs James Thuita Nderitu & 6**

others [2020] eKLR where the court held:-

“I agree with the sentiments expressed by the courts in the above decisions. A conviction in criminal trial is not necessary before a suit for recovery of funds or other assets reasonably believed to be proceeds of crime is instituted.....

.....As the outcome of criminal proceedings does not, under the law, have a bearing on forfeiture proceedings, the applicant does not have to await the conclusion of a criminal trial before instituting civil proceedings for recovery of funds or assets reasonably believed to be proceeds of crime.”

20. A similar finding was made in the case of **Assets Recovery Agency Vs Lilian Wanja Muthoni t/a Sahara Consultants & 5 others [2020] eKLR**.

21. In the case of **Director of Assets Recovery Agency & Others, Republic versus Green & others[2005] EWHC 3168** the court stated inter alia:-

“.....I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquire without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence whether as a result of lack of admissible evidence or a failure to discharge the burden of proof in a criminal trial. See – Kenya Anti-Corruption Commission Vs James Mwachethe Mulawa & another [2017] eKLR”

22. I agree and associate myself with the findings in the above cases that criminal proceedings for corruption offences can run concurrently with civil proceedings for compensation and recovery. Moreover there is also a long line of cases to the effect that the concurrent existence of criminal proceedings and civil proceedings generally would not ipso facto, constitute an abuse of the court process. The said findings flow from the provision of **Section 193 A of the Criminal Procedure Code**. Learned Senior Counsel for the 1st Defendant/Applicant cited the case of **Githunguri Vs Republic [1985] LL3090** but with due respect that case does not come to the aid of the 1st Defendant/Applicant or even the 12th Defendant or indeed any of the Defendants because that case is clearly distinguishable from this case in that there it was obvious that the criminal charges in that case were instituted in bad faith as the state had undertaken not to prosecute the applicant. What we have here are civil proceedings instituted pursuant to the law and there is nothing to demonstrate the allegation by the 1st Defendant/Applicant that the same were brought for an ulterior political motive. I also note that the HCACEC Petition No. 30 of 2019 which challenges the charges in the Chief Magistrate’s Anti-Corruption court is predicated on the violation of the 1st Defendant/Applicant’s rights. There is no probability that were the Plaintiff/Respondent to succeed in this case the judgment would impact negatively any decision made in favour of the 1st Defendant/Applicant in the petition. This is because as I have demonstrated above the criminal proceedings and the civil proceedings are distinct. The criminal proceedings are aimed at the accused person in the case while the civil proceedings are aimed at the property that is alleged to have been corruptly acquired and the Plaintiff/Respondent could still succeed in the civil proceedings even if the criminal proceedings collapse. (See also the case of **NDPP Vs Prophet (5926/01) (2003) 2AWCHC 16**).

23. It is also my finding that the case of **Chiumia Vs Southern Bottlers Ltd [1990] 13 MLR 114 (HC)** cited by learned Senior Counsel for the applicant is distinguishable from the present case as the issue in that case did not touch on corruptly acquired property recoverable under the Anti-Corruption and Economic Crimes Act. The cases I referred to earlier fit squarely in the circumstances of this case and wholly support my finding that the nature and circumstances of this case are such that it can co-exist with the criminal case facing the Defendants and the petition challenging those proceedings. I am therefore unable to find that this case is an abuse of the court process or even that it is in the public interest to stay it or to strike it out. No reasons have been demonstrated to warrant me to so find. In the upshot I find no merit in the application and it is dismissed. Costs shall be in the cause.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 25TH DAY OF NOVEMBER 2021.

E. N. MAINA

JUDGE