



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC CASE NO. 15 OF 2019

(FORMERLY HIGH COURT CIVIL SUIT & ELC SUIT NO. 423 OF 2008)

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSIONPLAINTIFF/RESPONDENT

VERSUS

PATRICK OCHIENO ABACHI1ST DEFENDANT

ROSALINE WANJIRA ABACHI2ND DEFENDANT

BENJAMIN MAKOKHA ABACHI3RD DEFENDANT

MOSES ODUORI.....4TH DEFENDANT

LORIAN JUMA5TH DEFENDANT

ODEAR NASEWA HOLDINGS LIMITED.....6TH DEFENDANT

RICKAIR TRAVEL AGENCIES LIMITED.....7TH DEFENDANT

RULING

1. This ruling relates to the defendants' application dated 2nd February 2016.

The application is brought by way of Notice of Motion and is expressed to be brought under Order 40 Rules 6 and 7, Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. The defendants seek in the said application the following orders:

1. That the Court Order made on 20/12/2007 in Miscellaneous Civil Application No. ELC 100 of 2007 be and is hereby discharged;

2. That the sum of Kshs. 1,990,000/= the subject of the court order made on 20/12/2007 in Miscellaneous Civil Application No. ELC 100 of 2007 held by the Plaintiff/Respondent be released to the Defendants/Respondents forthwith;

3. That the Registrars of Land in the localities where all the properties the subject of the court order made on 20/12/2007 are situated namely:

a. Ngong/Ngong/14888, Kajiado District;

b. Bukhayo/Mundika/6555, Busia District;

- c. Bukhayo/Mundika/6616, Busia District;
- d. Plot No. 337/1543, Mavoko Municipality Council;
- e. Plot No. 337/1544, Mavoko Municipality Council;
- f. Kajiado/Kitengela/6491, Kajiado District;
- g. Apartment No. 4- Block A5, L.R No. 209/11646, Parkview, South C, Nairobi;
- h. Apartment No. 7- Block B4, L.R No. 209/11646, Parkview, South C, Nairobi;
- i. House No. HG.60, L.R No. 146/69, Mugoya Estate, Nairobi;
- j. Kajiado/Kitengela/20644, Kajiado District;
- k. Kajiado/Kitengela/20580, Kajiado District;
- l. Kajiado/Kitengela/20641, Kajiado District;
- m. Kajiado/Kitengela/20609, Kajiado District;
- n. Plot No. MN/1/5134, Nyali-Kongowea, Mombasa;

be and are hereby directed to cancel any entries of the court order dated 20/12/2007

4. That the Registrar of Motor Vehicles be and is hereby directed to cancel any entries of the court order dated 20/12/2007 in respect of the following motor vehicles:

- a. Motor Vehicle Registration No. KAS 336X, Toyota Saloon;
- b. Motor Vehicle Registration No. KAU 372M, Toyota Station Wagon;
- c. Motor Vehicle Registration No. KAS 108X, Toyota Pick Up;
- d. Motor Vehicle Registration No. KAV 170 C, Toyota Lexus; and
- e. Motor Vehicle Registration No. KAU 105 T, Mitsubishi Saloon.

5. That the log books in respect of the following motor vehicles held by the Plaintiff be released to the Respondents forthwith:

- a. Motor Vehicle Registration No. KAS 336X, Toyota Saloon;
- b. Motor Vehicle Registration No. KAU 372M, Toyota Station Wagon;
- c. Motor Vehicle Registration No. KAS 108X, Toyota Pick Up;
- d. Motor Vehicle Registration No. KAV 170 C, Toyota Lexus; and
- e. Motor Vehicle Registration No. KAU 105 T, Mitsubishi Saloon.

6. That the orders restraining the Defendants/Applicants from accessing the following bank accounts be discharged forthwith:

- a. Barclays Bank Of Kenya Limited A/C No. 948780127;
- b. Co-operative Bank Limited A/C No. 0110200614200;
- c. Housing Finance Limited A/C No. 2000031140;
- d. Equitorial Commercial Bank Limited A/C No. 3010100117;
- e. Co-operative Bank Limited A/C No. 01102006142000002; and

f. Housing Finance Limited A/C No. 105001110920001.

7. That this suit be dismissed and any orders made herein against the Applicants be discharged forthwith;

8. That the Respondent bears the costs of this application.

2. The application is supported by an affidavit sworn by Patrick Ochieno Abachi and is based on the following grounds:

1. That the orders granted by this Honourable Court against the Defendants/Applicants on 20/12/2007 have already lapsed;

2. That the Respondent has not made efforts to prosecute its case against the Applicants;

3. That the Applicants have been suffering, are suffering and continue to suffer irreparable loss as long as the court order made on 20/12/2007 continues to be in force;

4. That the Respondent is not interested at all to expedite this matter to its conclusion;

5. That this suit discloses no cause of action against the Applicants;

6. That this suit is a gross violation of the Applicants' rights guaranteed under the constitution;

7. That the substratum of the suit is non-existent and/or has disappeared;

8. That it is in the interest of justice that this application be allowed.

3. In the affidavit sworn in support of the application, Mr. Abachi echoes the grounds set out in support of the application and the procedural history of the matter, which is also echoed in the written submissions dated 5th November 2019.

The Defendants'/Applicants' Case

4. According to the defendants, the plaintiff/respondent initiated the proceedings against them through **Miscellaneous Civil Application No. ELC 100 of 2007** dated 18th December 2007. In the said application, it sought injunctive orders against the defendants restraining them from dealing with, accessing or transacting with the properties the subject of the application. On 20th December 2007, the plaintiff was granted the order sought, *ex parte*, such orders to remain in force for a period of six months. The defendants submit that the plaintiff was required to prosecute and finalize its application dated 18th December 2007 within a period of six months, and to file, prosecute, and finalize its case against the defendants as expeditiously as possible.

5. The defendants submit that the plaintiff has failed and/or neglected to prosecute its application dated 18th December 2007 to its conclusion. It has also failed to prosecute its case against the defendants, and a period of twelve years has elapsed since the plaintiff commenced these proceedings, yet the suit has never been set down for hearing. They contend that the temporary injunctive orders granted to the plaintiff lapsed years ago.

6. The defendants submit that they have been subjected to irreparable loss and damage as a result of the plaintiff's indolence in prosecuting this matter since they cannot access their assets and bank accounts in order to sustain themselves.

7. The defendants argue that under section 56 of the **Anti-Corruption and Economic Crimes Act (ACECA)**, on an *ex parte* application by the plaintiff, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct. They further contend that under section 56 (3) of ACECA, an order under the section shall have effect for six months and may be extended by the court on the application of the Commission.

8. The defendants cite the decision of Warsame J (as he then was) in **Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another [2004] eKLR** to submit that the plaintiff was granted interim injunction orders against the defendants for a period of six months from 20th December 2007. They contend that since the orders were granted, the plaintiff only made an application for extension of the orders on 22nd September 2008 and 2nd October 2008, and thereafter went to sleep. It is their case that the plaintiff did not prosecute the application dated 18th December 2007 and as a result, the defendants have been kept out of their properties, and the plaintiff has been holding their money and documents illegally.

9. The defendants cite **Practice Direction No. 3** of the Practice Directions of this Division which they state require that in hearing matters before it, the court shall be guided by Article 159 of the Constitution, sections 1A and 1B of the Civil Procedure Act and section 4 (4) of ACECA in order to facilitate the just, expeditious, proportionate and accessible adjudication of all disputes related to corruption and economic crimes. They further cite **Practice Direction No. 26** which provides the circumstances under which the court may decide that a party has failed to comply, being that the party has not provided sufficient information to enable the above objectives to be met or has not acted within the time limit set out in the relevant statute or within a reasonable time.

10. The defendants further rely on the decision in **Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another (supra)** in which Warsame J decried delay in prosecution of cases to submit that the plaintiff in this case has failed to prosecute its case with reasonable expedition or at all and has failed to set its application filed on 18th December 2007 for hearing for a period of twelve (12) years. It is their

contention that the plaintiff has not offered any explanation regarding the delay in prosecuting its case, which has never been stayed at any time by an order of the court. They term the delay inordinate and unexplainable and grossly unjust to the defendants.

11. The defendants further rely on Order 40 Rules 6 and 7 of the Civil Procedure Rules which provides that an injunction shall lapse if the suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, unless the court orders otherwise for any sufficient reason. The defendants reiterate that the temporary orders in this case were granted to the plaintiff twelve years ago and have only served to cause suffering and loss to them. They ask the court to allow their application and grant the orders that they seek as well as the costs of the application.

The Response

12. Like the defendants, the plaintiff, in opposing the application dated 2nd February 2016, sets out, from its perspective, the history of this matter. It notes that a scrutiny of the court record would reveal that **Miscellaneous Application No. ELC 100 of 2007** was filed by the Kenya Anti-Corruption Commission, the predecessor in title to the Ethics and Anti-Corruption Commission, the present plaintiff, under Certificate of Urgency on 18th December 2007 pursuant to section 55 and 56 of the ACECA. Following that application, preservation orders were granted on 20th December 2007. The defendants never sought discharge of these orders as they were entitled to under section 56 (4) of ACECA.

13. According to the plaintiff, it then filed an Originating Summons dated 18th September 2008 on 22nd September 2008 and a Chamber Summons application of the same date in **ELC Suit No. 423 of 2008**. Visram, J. (as he then was) granted interim orders for 14 days on 22nd September 2008, pending hearing and determination of the injunction application. The plaintiff states that the defendants entered appearance on 29th September 2008 and on 2nd October 2008, the matter came up for hearing before Osiemo, J. but it could not be reached, presumably due to the court's case load for the day, and the interim orders were extended to 8th October 2008.

14. Thereafter, the defendants filed a notice of objection dated and filed on 30th September 2008. They then filed their response to the plaintiff's Chamber Summons application together with a list of authorities dated 2nd October 2008. The application came up for hearing on 8th October 2008 but was adjourned to 5th November 2008 by consent. The plaintiff states that when the application came up for hearing on 5th November 2008, it was brought to the court's attention that the defendants had surreptitiously filed **Nairobi High Court Petition No. 615 of 2008, Patrick Abachi & Others vs. KACC**, which was also listed for mention on the same date before Nyamu, J. (as he then was). Consequently, the parties agreed to have this suit mentioned on 18th November 2008 for the court to make further orders. On that date, according to the plaintiff, the parties agreed to stay this matter pending the hearing of the defendant's petition.

15. The plaintiff states that on 15th December 2008, the court directed that the defendants file submissions on their petition and on 7th January 2009, the plaintiff wrote to the defendants to serve it with submissions on the petition. This matter came up on 9th May 2009 for directions and the court directed that the defendants file and serve their reply to the plaintiff's application dated 25th January 2009, which had been filed in the petition, within 14 days, and the suit was stayed pending the outcome of the petition.

16. The plaintiff states that hearing of its application dated 25th January 2009 in the petition was fixed for 1st July 2009. It appears that the application was not heard and, according to the plaintiff, on 18th August 2009, the defendants changed advocates to the firm of Kaplan & Stratton advocates.

17. A ruling was delivered in the petition on 19th February 2010, the court noting in its ruling that the plaintiff's Chamber Summons application dated 18th September 2008 was pending because of the defendants having filed the petition, which caused this suit to be stayed. The court proceeded to strike out the petition and to direct the defendants to return to this suit in order for this suit to proceed.

18. The plaintiff states that on 2nd August 2010, it invited the defendants to fix a date for the hearing of the matter on 11th August 2010. The defendants' Advocates, Kaplan & Stratton, requested on 9th August 2010 for a copy of the plaintiff's Chamber Summons application, stating that it was not in their possession.

19. On 4th February 2011, the plaintiff again invited the defendants to fix a hearing date for the Chamber Summons application dated 18th September 2008, and it was fixed for hearing on 2nd June 2011.

20. The plaintiff observes that on 4th February 2011, Rawal, J. (as she then was) in **Nairobi HCC No. 48 of 2008 (O.S.) KACC vs. Stanley Mombo Amuti**, declared section 55 of ACECA unconstitutional. This suit was then mentioned on 4th November 2015 and the court was informed that the Court of Appeal had overturned the decision of Rawal, J on 2nd October 2015. The plaintiff also informed the court that it was ready to proceed with the hearing of the main suit and requested for a hearing date. The defendants' Advocates, Kaplan & Stratton, however indicated that they had received a letter from the firm of Kariuki Muigua & Company Advocates indicating that the latter had instructions to take over the conduct of the matter on behalf of the defendants. The court therefore directed parties to take a mention date at the registry to sort out the issue of representation of the defendants. A notice of change of advocates was filed by the defendants' present advocates, the firm of Kariuki Muigua & Company Advocates, on 12th November 2015. Thereafter, on 3rd February 2016, the defendants filed the application the subject of this ruling.

21. The plaintiff notes that on 2nd December 2016, the Environment and Land Court directed that it has jurisdiction to determine this suit following the establishment of that Court pursuant to Article 162 (2) (b) of the Constitution. This was after the plaintiff had requested that the suit be transferred to this Division. The plaintiff notes that this ruling was reviewed by the ELC on 22nd May 2019, leading to the transfer of the matter to this court.

22. The plaintiff further notes that the defendants were dissatisfied with the ruling of the ELC transferring the matter to this court and they filed an application dated 26th June 2019 seeking to stay all proceedings in this suit pending hearing and determination of an intended appeal against the decision to transfer the suit to this court. That application was dismissed on 24th July 2019.

23. The plaintiff invites the court, in determining this matter, to be guided by the decision in **Maxam Limited & 2 others vs. Heineken East Africa Import Co. Ltd & 2 others [2017] eKLR** where, in an application made under Order 40 rule 6, the court held that the rule in the said section was not intended to cause injustice to either party, and a mere lapse of twelve months alone should never be enough to see the interlocutory order vacated. Further, that in determining whether or not to allow the interim orders to continue beyond twelve months, the court should interrogate why the trial was not commenced and finalized within twelve months, and whether there are special circumstances that would warrant the extension of the orders.

24. It is its submission that based on the history of the matter which it had placed before the court, there exist exceptional circumstances in this case to disallow the defendants' application. It observes that **Misc. Civil Application No. ELC 100 of 2007** was an *ex parte* application filed under section 56 of ACECA. This section, according to the plaintiff, allows it to apply for an order prohibiting the transfer or disposal of property suspected to have been corruptly acquired. That section 56(3) provides that an order under the section shall be for a period of six months and may be extended by the court on application by the Commission. It submits that this is intended to enable the plaintiff to conclude investigations into the manner of acquisition of the suspect property. It is its submission that **Misc. Civil Application No. ELC 100 of 2007** was therefore an application and not a suit properly so called.

25. The plaintiff further submits that the primary issue for determination in a suit for recovery of unexplained assets such as is presently pending before this court in this matter is whether the defendants can explain the disparity between their assets and their known sources of income as provided for under section 55 of ACECA. It is its case that this issue cannot be determined unless the plaintiff is afforded an opportunity to adduce evidence on the known assets of the defendant as well as the reasons why it was not satisfied with the explanation given by the defendant upon being issued with a notice to so explain. Its submission is that this issue cannot be determined in an application for preservation orders under section 56 of ACECA.

26. According to the plaintiff, in **Misc. Civil Application No. ELC 100 of 2007**, the main issue before the court was whether the EACC had established that there was reasonable suspicion that the defendants had acquired the property by corrupt conduct. The only order the EACC could obtain at that point is an order for preservation of the defendants' property pending investigations. Its case was that the evidence presented to court in a preservation application under section 56 of ACECA is based on preliminary findings in the course of investigations. The court cannot, at that stage, make any final findings, which in its view explains why the orders are only granted temporarily for six months.

27. The plaintiff's submission was that the purpose of such orders is to allow it to complete its investigations and prevent the respondents from disposing of the property in a bid to defeat any recovery proceedings filed upon conclusion of investigations. Further, that the only order that can be obtained under section 56 of ACECA is for preservation for a period of six months, and the court makes this order in exercise of a special and limited jurisdiction.

28. The plaintiff submitted that the present application is founded on misapprehension of the law, that it is defective, misconceived, fatally bad in law, amounts to abuse of the court process and should be dismissed with costs to the plaintiff. This was on the basis, first, that the *ex parte* orders issued on 20th December 2007 which are the subject of the present application were issued pursuant to section 56 (1) of ACECA which grants the court power to issue orders prohibiting transfer, disposal or dealing with any property if it is satisfied that there are reasonable grounds to suspect that the property was acquired through corrupt means. Once such orders are issued, the respondent is given an opportunity to apply for discharge of the orders within 15 days from the date of service.

29. The plaintiff's contention therefore is that the application before the court is filed under the wrong provisions of law. That it ought to have been filed under section 56 (4) and 56(5) ACECA and not Order 40 rules 6 and 7 of the Civil Procedure Rules 2010, yet the defendants do not deny that they were served with the preservation orders obtained on 20th December 2007. The plaintiff notes that the present application was filed 9 years after the grant of preservation orders rather than 15 days after service of the *ex-parte* preservation orders as provided by law. It submits that no cogent reason has been given for filing the application 9 years later, and its position is that the application is extremely out of time and cannot be excused by the court.

30. It is the plaintiff's further submission that subsequent to the grant of the preservation orders issued on 20th December 2007, it had instituted recovery proceedings pursuant to section 55 of the ACECA, being the present suit, **Nairobi HCC No. 423 of 2008** vide Chamber Summons dated 18th September 2008 and Originating Summons dated 18th September 2008. In these proceedings, it had obtained interim injunctive orders on 2nd of October 2008. Its case is that the record of the court as set out in its submissions explains why the recovery proceedings had not been prosecuted. It contends that the defendants have demonstrated dishonesty in alleging that the plaintiff has failed to prosecute these proceedings yet the defendants have never filed any response to the plaintiff's Chamber Summons application dated 18th September, 2008 seeking injunctive orders or to the Originating Summons dated 18th September, 2008 seeking recovery of the subject property.

31. The plaintiff posits that in the circumstances of this case, taking into account the cumulative litigation history, it cannot be objectively accused of delay and lethargy in the manner in which it has prosecuted this suit. It has always made the necessary steps to set the suit down for hearing since the grant of interim injunctive orders. It further notes that it is curious that even when the court, as in the concluding paragraph of the ruling by this court dated 24th July 2019 directed that this suit be fixed for hearing, the defendants have sought to resuscitate the application which was filed more than 3 years ago. In its view, the application is tainted with bad faith, the defendants have not approached the court with clean hands, and the court should infer that the application is but an attempt at delaying this suit and should dismiss the application with costs.

Analysis and Determination

32. I have considered the application before me and the submissions of the parties with respect thereto. In particular, I have noted the history of the proceedings in this and related matters as set out in the parties' respective pleadings and submissions. Having done so, I take the following view of the matter.

33. First, it is not in dispute that the present matter has its genesis in 2007. This is when the plaintiff filed against the defendants **Miscellaneous Civil Application No. ELC 100 of 2007** under section 56(1) of ACECA, which provides as follows:

“On an ex-parte application by the commission, the High Court may make an order prohibiting transfer or disposal of or order dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct”.

34. It is not in dispute that the said orders were granted as prayed, and the defendants do not dispute service of the said orders. Section 56 (4) ACECA provides that:

“A person served with such an order under this section may within 15 days after being served apply to the court to discharge or vary the order and the court may after hearing the parties, discharge or vary the order or dismiss the application.”

35. As is evident from the contents of the application before me, the defendants did not act in accordance with the provisions of section 56(4) of ACECA. Rather, some 9 years later in 2016, they filed the present application under the provisions of the Civil Procedure Code seeking to discharge the orders issued under ACECA. The orders sought in the application seek to discharge the preservation orders issued in **Miscellaneous Civil Application No. ELC 100 of 2007** on 20th December 2007. Under the provisions of ACECA set out above, the present application to discharge the orders is thus more than 8 years too late-the timeline given for the application being 15 days after service of the order. Further, it was filed in the wrong matter, for the application for preservation orders was not part of the present proceedings.

36. However, as submitted by the plaintiff and not disputed by the defendants, a lot more has happened in the interim. The plaintiff had filed the present suit- **ELC Suit No. 423 of 2008** on 22nd September 2008 and obtained interim orders. This was in the Chamber Summons application dated 18th September, 2008 and an Originating Summons of the same date seeking recovery of the defendants' properties which the plaintiff contends were acquired corruptly. Though the defendants filed grounds of opposition and the Chamber Summons application was scheduled for hearing, it did not proceed as it initially could not be reached, then was taken out by consent, then was stayed pending determination of a petition filed by the defendants, **Nairobi High Court Petition No. 615 of 2008, Patrick Abachi & Others vs. KACC**.

37. The procedural history set out by the plaintiff indicates that following the determination of the defendant's petition and litigation on the constitutionality of section 55 of ACECA, the plaintiff had made attempts to list the suit for recovery of the properties for hearing. However, the matter did not proceed due, in part, to a change of advocates by the defendants. Thereafter, it had not proceeded due to applications on the question of which court had jurisdiction to determine the matter, and recently, on the question of whether this court should stay the proceedings pending appeal by the defendants on the question of jurisdiction.

38. There has thus been a considerable time lapse since the plaintiff first obtained interim preservation orders in **Miscellaneous Civil Application No. ELC 100 of 2007**. As argued by the defendants in the present application, more than 12 years, now going on 13 years, have elapsed since the initial application was filed. However, a consideration of the record shows that the fault for the time lapse cannot be laid at the feet of the plaintiff. The principles enunciated in the case of **Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another (supra)** relied on by the defendants are apt and constitute a proper pronouncement on the law with respect to delay caused by a party to whom an interim injunction has been issued under the Civil Procedure Code.

39. They, however, do not apply to the facts and circumstances of this case where the procedure with respect to interim preservation orders is provided for in section 56 of ACECA. The defendants were served with the preservation orders issued by the court but did not seek their lifting or variation as provided under section 56(4) of ACECA within 15 days of service. Instead, they filed the present application in this suit, **ELC Suit No. 423 of 2008**, some 9 years after they ought to have filed the application for discharge or variation of the orders in the proceedings in which they were issued, **Miscellaneous Civil Application No. ELC 100 of 2007**.

40. The defendants further filed a constitutional petition, **Nairobi High Court Petition No. 615 of 2008, Patrick Abachi & Others vs. KACC**, and the present suit was therefore stayed pending the determination of the petition. I note that the plaintiff argues, and this has not been controverted by the defendants, that it has made attempts to have the present matter prosecuted and has not caused the delay in the hearing of the matter. In the circumstances and for the above reasons, I find no merit in the application dated 2nd February 2016. It is therefore dismissed with costs to the plaintiff.

41. I observe in closing that in the ruling of this court delivered on 24th July 2019 on an application by the applicants/defendants seeking stay of proceedings in this matter pending appeal, I directed the parties to take a date for the substantive hearing of the suit. The matter then came up before Onyiego J when directions were given for the parties to file their respective witness statements. However, when the matter came up again before the court on 9th October 2019, Mr. Njenga indicated that the defendants had a pending application dated 2nd February 2016 which they wished to dispose of first. Directions were accordingly given for the parties to dispose of the application by way of written submissions. Mr. Njenga expressed the wish of the defendants to dispose of the said application when the matter came up before me on the 27th of November 2019 after the court intimated that it was ready to dispose of the substantive suit, which would have addressed all outstanding issues. The parties hereto are once again directed to take dates with a view to proceeding with the substantive suit in this matter.

42. The plaintiff has submitted that the defendants are yet to file a response to the Originating Summons dated 18th September 2008. To avoid further delay in the hearing of this matter, the defendants are directed to file their response thereto within 14 days of this ruling.

Dated Delivered and Signed at Nairobi this 30th day of January 2020

MUMBI NGUGI

JUDGE