



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CIVIL SUIT NO 15 OF 2019

(FORMERLY HIGH COURT CIVL SUIT NO. 423 OF 2008)

ETHICS AND ANTI- CORRUPTION COMMISSION.....PLAINTIFF/RESPONDENT

VS

PATRICK OCHIENO ABACHI.....1ST DEFENDANT/APPLICANT

ROSALINE WANJIRA ABACHI.....2ND DEFENDANT/APPLICANT

BENJAMIN MAKOKHA ABACHI.....3RD DEFENDANT/APPLICANT

MOSES ODUORI.....4TH DEFENDANT/APPLICANT

LORIAN JUMA.....5TH DEFENDANT/APPLICANT

ODEAR NASEWA HOLDINGS LTD.....6TH DEFENDANT/APPLICANT

RICKAIR TRAVEL AGENCIES LTD.....7TH DEFENDANT/APPLICANT

RULING

1. The plaintiff in this matter, the Ethics and Anti-corruption Commission, had filed the suit seeking forfeiture of certain properties owned by the defendants. The matter was initially before the High Court, but was subsequently transferred to the Environment and Land Court (ELC) following its establishment pursuant to Article 162(2)(b) of the Constitution.

2. The record indicates that when the matter came up for pre-trial directions on 2nd December 2016, the court (Gitumbi J) observed that:

“Before an order to recover those parcels of land can be issued, the court will need to determine the ownership of those parcels. The jurisdiction to determine the issue of title to land is vested exclusively in the ELC. Accordingly, this court is the only one with jurisdiction to determine this suit.”

3. An application dated 5th January 2017 for review of that ruling was then filed by the plaintiff/respondent. Upon hearing the application, by a ruling dated 22nd May 2019, Komingoi J ruled that the matter related to recovery of unexplained assets and is an anti-corruption case, and directed that it should be transferred to this court. The matter was duly transferred, leading to the present application by the defendants.

4. The application is dated 26th June 2019 and is expressed to be brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The applicants seek the following orders:

1. (spent).

2. That this Honourable Court be pleased to issue an order staying all proceedings in this matter pending hearing and final determination of this application

3. That this honorable court be pleased to issue an order staying all proceedings in this matter pending hearing and final determination of the applicant's' intended appeal and

4. Costs of this application be provided for

5. The application is supported by an affidavit sworn on 24th May 2019 by Patrick Ochieno Abachi and is based on the grounds that the applicants are dissatisfied with the order of the Environment and Land Court made on 22nd May 2019 transferring the matter to this court. They intend to file an appeal to the Court of Appeal against the ruling and they have an arguable appeal with a high likelihood of success. They assert that the respondent will not suffer any prejudice if the application is allowed, and that it is in the interests of justice and fair hearing that the court grants the orders of stay that they seek.

6. In his affidavit in support of the application, Mr. Abachi, the 1st applicant, avers that the respondent instituted this suit against them by an Originating Summons dated 18th September 2008 in High Court Civil Suit No. 423 of 2008. In the suit, the plaintiff sought a declaration that the properties listed in prayer 4 of the Originating Summons be declared as unexplained assets and be forfeited to the Government of Kenya. An order was also made by the High Court on 20th December 2007 in Misc. Civil Application No. ELC 100 of 2007 (OM) through which it prohibited the applicants from transferring or disposing or otherwise dealing in any manner whatsoever for a period of 6 months from the date of that order with several properties belonging to them. These orders have been extended on numerous occasions in the course of High Court Civil Suit No. 423 of 2008. Mr. Abachi deposes that following the promulgation of the Constitution in 2010 and establishment of the Environment and Land Court, the suit was transferred to that court.

7. Mr. Abachi avers that the respondent had thereafter sought directions from the ELC for transfer of the suit from the Environment and Land Court to the High Court, Anti-Corruption and Economic Crimes Division. By an order dated 2nd December 2016, the ELC had determined that it had jurisdiction to determine the issues raised in the suit and the suit was therefore properly before it.

8. Mr. Abachi deposes that the respondent had filed an application dated 5th January 2017 in the Environment and Land Court seeking, among others, an order for review of the court's order made on 2nd December 2016 and a transfer of the suit to this Division of the High Court. The application had been allowed in the ruling dated 22nd May 2019 in which the Court directed that the case be transferred as prayed.

9. Mr. Abachi avers that the order of the Court was made on the wrong premises of the law since the plaintiff's application dated 5th January 2017 did not meet the criteria for review of the court order made on 2nd December 2016. He contends that the order is unconstitutional to the extent that it purports to oust the jurisdiction of the Environment and Land Court to hear and determine disputes relating to land granted under Article 162 (2) (b) of the Constitution and section 13 (2) of the Environment and Land Court Act.

10. In his submissions at the hearing of the application, Mr. Njenga, Learned Counsel for the applicants, submitted that in considering an application for stay pending appeal, the court exercises its discretion based on various factors. These are whether it is in the interests of justice to grant the orders, whether the intended appeal is an arguable one, and whether the application has been brought timeously. Counsel relied on the decision in **Global Tours and Travel Ltd Winding Up Cause No 43 of 2000** for this submission. He submitted that the applicants had filed a Notice of Appeal on 27th May 2019, a copy of which was attached to the application. They had also attached a draft Memorandum of Appeal setting out the grounds on which the intended appeal is premised. Their grounds included a contention that no grounds for review of the order made on 2nd December 2016 were established.

11. It was also their submission that their application had been brought promptly, considering that the court file was transferred from the ELC to this court and administrative processes had to be followed for a new number to be assigned to the case. It was their case that they have a right to a fair hearing, and it is only fair that they be allowed to air their grievance against the order of 22nd May 2019 before the Court of Appeal. Further, that the interests of justice will be served if the appeal is heard before further proceedings in the matter are taken.

12. Ms. Kibogy for the plaintiff/respondent made oral submissions in opposition to the application. It was her submission that the applicants' appeal as set out in the draft Memorandum of Appeal is not arguable. The respondents had set out the grounds for the application for review before the ELC, which grounds were evident on the face of the record. The basis of the application for review was that the judge who issued the order of 2nd December 2016 had made an error that there was an issue or dispute as to the ownership of the property while there was no such issue. It was also her submission that the issue raised in the application was the jurisdiction of the ELC whose jurisdiction is limited to the use, occupation of and title to land.

13. According to Ms. Kibogy, the plaintiff's case relates to unexplained assets and the manner of acquisition of the assets. It does not raise an issue relating to the use, occupation of or title to the assets.

14. Counsel for the respondent further submitted that the applicants had not brought their application timeously. It was, in the respondent's view, an afterthought brought to delay the hearing of the matter. Counsel observed that the application has been filed over 30 days after the ruling, and there was no cogent reason for filing the application after 30 days.

15. With regard to the question of where the interests of justice lay, Counsel submitted that if the application is granted, it will be extremely prejudicial to the public interest as the matter has been pending since 2008 when it was filed. In her view, an order of stay of proceedings will go against the principle of expeditious hearing and disposal of cases.

16. The respondent's final submission was that the transfer of this matter to this court was in line with the Practice Directions issued by the

Chief Justice for purposes of expeditious disposal of anti-corruption and economic crimes matters. The respondent urged the court not to exercise its discretion in favor of the applicants but to dismiss the application with costs.

17. In his submissions in reply, Mr Njenga for the applicants argued that the order in respect of which the applicants seek to appeal was not made pursuant to an application to transfer. Rather, it was made pursuant to an application to review, and the applicants therefore had an arguable appeal.

18. I have read and considered the application in this matter, as well as the affidavit in support. I have also considered the submissions made by the parties' respective Counsel. The crux of the application before me is that the ELC erred by transferring this matter to this court while it has jurisdiction to determine the matter. Further, that the court erred in that the order to transfer was made on an application for review of the orders of 2nd December 2016, while the grounds for review had not been established.

19. I note that in the application for review, the plaintiff/respondent had argued that there was an error on the record and the court erred in issuing the orders of 2nd December 2016 as there was no dispute as to the use, occupation or title to the properties in contention.

20. I further note that this matter has been pending since it was first filed in the High Court in 2008. It is a matter lodged under the Anti-Corruption and Economic Crimes Act seeking forfeiture of some 12 real properties, motor vehicles and funds held in various bank accounts, believed to be unexplained assets under section 2 and 55 of the **Anti-corruption and Economic Crimes Act (ACECA)**.

21. In their application for review of the orders of 2nd December 2016, the respondent raises the grounds for review as including an error apparent on the face of the record in that the court misapprehended the nature of the claim before it which is not a land matter, and that there was no dispute about the ownership of the 12 parcels of land the subject of the suit. In her ruling dated 22nd May 2019, Komingoi J noted that hearing the matter in the Environment and Land Court would be an exercise in futility as there is no dispute about the ownership of the property, the matter being one relating to unexplained assets under section 55 of ACECA.

22. Three questions require responses in determining whether this court should grant an order of stay pending appeal. The first is whether the applicants have demonstrated that they have an arguable appeal and therefore merit an order of stay. Essentially, their appeal revolves around the question whether the court erred in allowing the application for review and transferring this matter to this court. A second related issue would be whether the court failed to appreciate the jurisdiction of the Environment and Land Court and therefore erred in transferring this matter to this court.

23. Article 162(2) (b) sets out the jurisdiction of the court as being to hear disputes relating to occupation, use and title to land. The applicants are not contending, I believe, that there is a dispute as to their title to the land. Their argument seems to be simply that since the matter involves land, it must fall within the jurisdiction of the Environment and Land Court.

24. Having perused the ruling sought to be appealed against as well as the Originating Summons against the applicants, I am not satisfied that there is an arguable appeal, let alone one with a probability of success. The plaintiff's case is that the real properties, motor vehicles and funds in several bank accounts are the unexplained assets obtained from corruption. They are therefore liable to forfeiture under ACECA. I did not hear the applicants or their Counsel to dispute that matters under ACECA fall within the jurisdiction of the Anti-Corruption and Economic Crimes Division of the High Court. The first principle for determining whether or not to grant a stay of proceedings pending appeal must therefore be determined against the applicants.

25. The second relates to the time within which the application is lodged. The ruling was delivered on 22nd May 2019, and the present application lodged on 26th June 2019. I find that the period between the ruling and the date of the application is reasonable, but given my finding on the question of an arguable appeal, this finding is of no avail to the applicants.

26. The third issue relates to the question whether the interests of justice would require exercise of discretion in favour of the applicants. The matter before this court relates to corruption. The applicants are alleged to have acquired assets worth in excess of Kshs 80,000,000 some 15 years ago from public funds. The present suit, instituted 11 years ago, seeks recovery of the public funds through forfeiture of the unexplained assets. In my view, the interests of justice demand that this matter be dealt with once and for all. It would be against the public interest in expeditious disposal of cases, particularly cases involving misappropriation of public funds, to allow a stay of proceedings in this matter pending what in my view does not amount to an arguable appeal.

29. I accordingly find no merit in the application dated 26th June 2019. It is hereby dismissed with costs to the respondent.

28. The parties are hereby directed to take dates for the hearing of the matter before this court.

Dated, Delivered and Signed at Nairobi this 24th day of July 2019

MUMBI NGUGI

JUDGE