



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
HIGH COURT ACEC. NO. 1 OF 2016
(FORMERLY CIVIL SUIT NO. 33 OF 2016 (O.S))

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

-VERSUS-

JIMMY MUTUKU KIAMBA.....1ST DEFENDANT

TRACY MBINYA MUSAU.....2ND DEFENDANT

JIMBISE LIMITED.....3RD DEFENDANT

MUTHAIGA GREEN ACRES LTD.....4TH DEFENDANT

-AND-

EQUITY BANK LTD.....INTERESTED PARTY

JUDGMENT

1. The plaintiff commenced this suit vide an Originating Summons(O/S) dated 29/01/2016 and supported by the affidavit of James Kariuki sworn on the same day, his supplementary affidavit sworn on 02/03/2016, a supplementary affidavit sworn by Catherine Ngari on 05/07/2018, another supplementary affidavit sworn by James Kariuki on 11/10/2018 and a bundle of documents filed on 06/11/2018.

2. The Plaintiff seeks the forfeiture of the Defendants' assets worth Kshs.872,094,147/= which it considers unexplained and whose values, it avers, are disproportionate to the defendants' legitimate sources of income.

3. The Defendants opposed the suit and filed affidavits sworn by Jimmy Mutuku Kiamba on 23/06/2016, 28/06/2018, 16/10/2018, 13/11/2018, a replying affidavit sworn by Tracy Mbinya Musau on 28/06/2018 and a list of documents dated 10/12/2018.

4. After the preliminaries, the suit was eventually slated for hearing by way of *viva voce* evidence.

The plaintiff's case

5. **PW1** was **James Kariuki**, an investigator with Ethics & Anti-Corruption Commission (EACC). He testified that he has worked with EACC for five years and prior to that, he was a chief inspector with the Kenya Police and in charge of investigations at various stations. That he has a bachelors degree from Moi University and a masters of science in procurement and logistics from Jomo Kenyatta University of Agriculture and Technology. That he has been trained in financial investigations, fraud and fraud detections from within and outside Kenya.

6. Further, he testified that he was familiar with the 1st and 2nd Defendants as well as the 3rd and 4th Defendants which are associated with the 1st and 2nd Defendants. That the case was allocated to him for investigations on 05/11/2014. He was to investigate the 1st Defendant (Jimmy) who was a chief finance officer at Nairobi city county hence a public officer. Jimmy was making huge cash deposits into his bank accounts and the sources could neither be explained nor verified.

7. The intelligence report gave them specific accounts at various banks and they applied for warrants to investigate them. The warrants are marked JKK 1-12. The accounts are held in 8 bank accounts but are 11 in total. They were able to get the bank statements for those accounts as well as the account opening documents and the same are marked JKK4. Their period of investigation was August 2009 - January 2015.

8. Pw1 analyzed the bank statements and checked on the credits (deposits), debits and narrative (*description*) of the transactions. They tabulated the key transactions (*pg 11-61*) within the given period at Kshs.,570,915, 456/=. He also enumerated the amount in each account (*par 10 of affidavit*) and his opinion was that the deposits were way above Jimmy's legitimate known income (salary) and there was need to investigate.

9. They also obtained Jimmy's declaration of income, assets & liabilities from public service commission (PSC) for the period between January 2007 and December 2007 (*marked as JKK3 @ pg 70*). It indicates the 2nd Defendant (*Tracy*) as a wife and was signed on 17/01/2008. Salary is indicated as the only source of income thus annual salary is Kshs.831,840/=. Assets are indicated as a plot in Athi River valued at Kshs.400,000/= and a car worth Kshs.600,000/= thus a total of Ksh.1 million in 2007. The declaration was issued by PSC (*pg 70*) and it received it on 28/07/2008. According to PW1, the declaration is helpful to indicate the irregularities in amassing of wealth.

10. JKK5 (*pg 247*) is another declaration for the period between 01/11/2007 to 31/10/2009. The declared income is Jimmy's gross salary of Kshs.1,090,800/= and 2-year rental income of kshs.600,000/=. The assets were indicated as rental flats in Athi River valued at Kshs.2,700,000/= and a Toyota Rav 4 valued at kshs.1.2 million. A loan of Ksh.50,000/= from Co-operative bank is indicated as the liability. The declaration was made on 24/12/2009 and was received from PSC on 13/01/2015. According to Pw1, it falls within the period of interest.

11. JKK5 (b) is another declaration for the period between 01/1/2011-31/10/2013. The income is indicated as a salary of Kshs.3.6 million, rental income-95 million, business/sale of fuel-60 million making a total of Ksh.160 million. The assets are land, cash deposits and landed properties.

12. Further, he testified that in 2007, 2009 and 2013, Jimmy's net worth was Kshs.1,757,840/=: Kshs.4,840,800/= and Kshs.401,650,000/= respectively and that the notice he issued to Jimmy referred to a figure of Kshs.1,057,915,456/=:

13. He testified that the following deposits were made by Jimmy's juniors.

Name of the depositor	Amount - Kshs.
1. Head of budget, Nairobi city county	1.5 million
2. Ambrose Mwanja Musau – clerk at the Nairobi city county	3.5 million
3. Joseph Mwaura Njoroge – Jimmy's driver	1.3 million
4. Barnabas Oigo – Jimmy's bodyguard	66,886,000/=
5. Stephen Ogaga – head of county treasury and Jimmy's deputy	4.1 million
6. Nancy Waithera – Nairobi city county security department	990,000/=
7. Barnabas Oigo on 2/9/2014	1,480,000/=
8. Barnabas Oigo on 3/9/2014	770,000/=
9. Unknown depositor on 5/9/2014	6 million
10. Jimmy 16/10/2014	7,400,000/=

14. PW1 testified that the notice dated 13/03/2015 was issued pursuant to section 26 & 55(2) of the Anti-Corruption & Economic Crimes Act 2003 (ACECA) as read with section 13 of Ethics & Anti-Corruption Commission Act (EACCA)-2011. That at the date of the notice, Jimmy was the chief officer finance Nairobi City County. The notice also enumerates all the positions and places he had submitted on 10/11/2014 to the County Public Service Board (Nairobi city county).

15. Further deposits to CFC Stanbic, harambee avenue A/c No.....677 are as follows: -

Date	Depositor	Amount Kshs.
2 / 2 / 2 0 1 3	P a u l W a m b u a	3. 7 m i l l i o n
2 1 / 1 1 / 2 0 1 3	P a u l W a m b u a	3 m i l l i o n
2 5 / 1 1 / 2 0 1 3	P a u l W a m b u a	1 m i l l i o n

16. Pw1 tabulated (pg 14) the known legitimate income of Jimmy and his gross salary between August 2009 and February 2015 as Kshs.8.5 million. He also said that the declaration marked JKK5 (b) is unreliable as it was done in haste for the sole purpose of declaration. That he declared a loan of Kshs.180,000/= in 2013 yet he had no such loan. The loan he had was for Kshs.180 million and was acquired in 2014 as indicated in the documents from Equity Bank (pg 337). He noted that the difference between JKK 5(a) and (b) is about Kshs.150 million in terms of income. With regard to assets, the difference is Kshs.410 million, he said.

17. Pw1 also highlighted various properties acquired by the defendants and stated that a total of 13 properties were acquired during his period of interest. He stated that the firm of Kiarie Kariuki & Githii Advocates acted for the defendants and a total of Kshs.251,000,000/= was transferred to that firm. That the law firm declined to give details on how the money was spent. That the plaintiff filed ACEC No. 14/2016 (formerly HCC 487/2016) whose purpose was to compel the firm to explain why it received the money. The Plaintiff's counsel requested the court to call for the file because the matter had been determined but the application was opposed. The court ruled that the plaintiff was at liberty to make a formal application.

18. Pw1 proceeded to testify that after analysis of all financial documents, they found that the disparity between Jimmy's known income and assets was Kshs.872,094,147/=. Initially, Pw1 had talked about Ksh.1B and he explained that the difference came in after doing away with the listed liability of Kshs.180,000,000/= and deducting the net salary income of the given period i.e Kshs.5,821,309/=.

19. Further, he testified that the notice was responded to (pg 347-355) in a letter to the CEO of EACC (JKK9) which they considered but the explanation was not convincing. He added that the loan of Kshs.180M was excluded from their calculations as it did not form a basis as capital/deposits and was acquired in 2014-outside their period of interest. With regard to fixed deposits, he said that what was rolled over as deposits was never considered as income and that the issue was dealt with by their expert who was a witness.

20. On income, he said that Jimmy did not provide any documentary evidence showing the specific amounts he obtained as rental income or even the rental properties. That all the properties were acquired during the period in question except the one in Athi River and as such, any rent from them was irregular. Further, he said that no evidence was produced in respect of farming activities.

21. He testified that they responded to Jimmy's explanation (JKK10) and requested for additional information, which was not forthcoming forcing them to file the suit. That Jimmy responded to the suit vide the pleadings of 29/06/2018 but nothing has been provided to make Pw1 change his mind about his findings.

22. He also referred to bribery in his supplementary affidavit sworn on 02/03/2016 where he deposed about a cheque of Kshs.9,000,000/= which was paid to K. Mboya & Co. Advocates whereas Jimmy and P.T Odongo were the signatories. JKK5 is the bank statement of the said firm. He further testified that the cheque (JKK16) hit the firm's account on 26/02/2013 and on the same day, an amount of Kshs.3M was sent to Jimmy's account at Co-operative bank which amount, according to Pw1, was deliberately made to induce Jimmy. A notice was sent to Jimmy with regard to the Kshs.3M but there was no satisfactory explanation.

23. He asked the court to forfeit the listed properties and money preserved in the banks. He said that there was Ksh.126M in the bank accounts at the time of going to court and he was not given any evidence of taxes paid with respect to the properties. That they consulted KRA which preserved the matter. He said that the motor vehicles had since been transferred.

24. On cross examination, he said that the period of interest was the period when Jimmy was exposed as a public servant. That if a property was acquired before the period of interest but developed with irregularly acquired money, then it becomes a property of interest.

25. With regard to properties listed in paragraph 15 of his affidavit to the O.S, he said that property (n) is not included because they did not get any document relating to it. He confirmed that the sale agreement dated 18/05/2007 is not under their period of interest. He agreed that the property marked JKK6 was different and that they did not have a sale agreement to support their version. He dared Jimmy to prove that Kshs.3M was not a kick back. He said that he did not know anything about the sale agreement dated 18/02/2013 in favour of Sylvester Muema and that the cheque of 3M was done before the sale agreement was entered into.

26. He stated that on 15/02/2013, the balance in K. Mboya's account was zero. He agreed that internal transfers and earned interest can't be income. That the swift payment of Kshs.1,500,000/= was not computed, while fixed deposit interest of Kshs.3,967,103/= on 14/12/2010 should not have been computed since the interest from fixed accounts is treated as income. He also said that whether the deposit is legally or illegally acquired, the interest is treated as income and is included in the Kshs.1billion since it was irregular. That the principal sum is what he was to explain.

27. On further cross examination, PW1 agreed that properties a, d,e,f,& g were all acquired before their period of interest (*paragraph 16 of the affidavit @ pg 63*). He also agreed that only one property in his list is registered in Jimmy's name. Further, he agreed that if Jimmy earned Kshs.1.1M per month from rent, it was possible for him to buy property worth 23M. He agreed that property (g) should be removed as it is the same as (a) and property (f) should also be removed as it is the same as (b). He confirmed that he had not checked the record to see if Jimmy had transferred any money to the 2nd Defendant.

28. He explained that the 1st defendant only transferred money in form of deposits to the 3rd defendant. The deposits were made on the following dates: -

- 02/03/2012
- 30/03/2012
- 02/06/2012
- 04/04/2014
- 15/04/2014
- 23/10/2014
- 27/08/2014

He confirmed that besides the money the 1st Defendant did not transfer any assets to the other Defendants.

29. Further, he said that paragraph 32 of his affidavit reveals that the properties were held in trust because the 2nd Defendant (Tracy) was depositing money in her account and was using it to buy properties. That some are in her name and others in joint names. He however agreed that he had no evidence in writing to prove any trust. Further, he stated that the properties registered in the 3rd Defendant's name were bought by Jimmy as he was the one who gave out the money. That companies raise money through their members and directors of the 3rd Defendant are Jimmy and Tracy.

30. He also confirmed that they obtained warrants to investigate the bank accounts and one cannot access a bank account without a warrant of search.

31. On wealth declarations, he said that the one for 2011 was not availed despite having asked for it. He believed that the documents are

fraudulent and the contents are not genuine. That they started their investigations in 2014 after receiving intelligence information. He declined to reveal the source of the information and stated that the EACC has the mandate to investigate even on its own motion. He was not aware of any conviction against Jimmy in related matters.

32. In reference to paragraph 35 of the O.S (page 66) the witness stated that the summary of his case is that there is a disproportion in the deposits into Jimmy's accounts and his known income. He suspected the declaration forms Jimmy filed and found them to contain illegalities, irregularities and forgery. All these remained unexplained.

33. He said that there was a valuation at page 245 of Jimmy's affidavit and the value is shown as Kshs.18,500,000/= at page 251 and he didn't know when it was acquired. That the value of property (d) is Kshs.4M (pg 237), property (e) is Kshs.4M (pg 221), property (a) is Kshs.15M (pg 289), property (L) is Kshs.50M (pg 215). That all these properties were bought before 2009 and the value is Kshs.91M.

34. He said the Plaintiff requested for the declarations forms but according to section 30-31 of the Public Officers Ethics Act, it was the PSC which was to contact Jimmy and give him an opportunity to explain the declarations. Pw1 agreed that there was an omission in the declaration forms of 2009 and that Jimmy acquired only one property listed as (i) whose value is shown as Kshs.90M. He was shown a sale agreement for the property at page 372 and agreed that the purchase price was Kshs.23M.

35. He was referred to the declaration for 2013 (pg 251 of OS) and agreed that it has a mortgage facility of Kshs.180M. He was not aware as to whether Jimmy was given a chance to make representations, to the PSC. That before the period of interest, Jimmy had Kshs.8,867,353/= in his accounts and by the close of investigations, he had about Kshs.126M. He confirmed that the properties owned by Jimmy were charged to the bank.

36. In re-examination, he explained that he factored the issue of the mortgage in his calculations and found that there had been transactions of over Kshs.1billion. That paragraph 12(a) of Jimmy's affidavit shows what he transacted, and therefore the wealth declaration of 2013 is a forgery, since he included the properties acquired prior to 2009 in case of a favourable decree.

He declared a rental income of Ksh.64M then after two years, he declared Kshs.95M.

37. He also stated that the sale of the property in Muthaiga was in excess of Kshs.250M and was one of the properties they had preserved. That their case is not about the current valuations as the difference in value is over Kshs.126M. The witness stated that Jimmy did not offer any satisfactory answer in respect to the bribery allegations.

38. PW2 was Catherine Wanderi Ngari, a financial forensic investigator with EACC since 2013. She testified that she is an accountant by profession and swore an affidavit on 05/07/2018 in respect of this case. That there were issues raised about the figures claimed by EACC (872,094,147/=) and she therefore did a financial analysis and arrived at Kshs.575,121,611/=. After looking at the statements from Jimmy's accountant, she saw inter account transfers, sale of two motor vehicles and a double counted transaction.

39. She pointed out that on 14/12/2011, there was an inter-account transfer for Kshs.20M. She referred to JMK1 in Jimmy's supplementary affidavit sworn on 13/11/2018 and concurred with the 1st, 2nd, 4th, 5th, 6th, 7th, 9th, 10th, 12th, 16th, 17th, 18th, 19th, 20th and 21st items. She did not agree with the rest. That it was summation which brought them to the lesser figure of Kshs.575,121,611/= which is what they are claiming from Jimmy.

40. Upon cross examination, she said that the figure of Ksh.575,121,611/= is with respect to deposits. In regard to transaction No. 3 (pg 243, OS) they did not see the account from which the Kshs.13M came from. She was shown the Kshs.13M at page 105 and she agreed that it should have been conceded, which she did.

41. She was referred to page 243 (O.S) where Kshs.18M was transferred on 23/10/2014 but said she had to see a credit and debit before making any concession. She said that Kshs.3,967,000/= (22/03/2014) at page 153 was a fixed deposit repayment which won't be counted if it did not move. That Kshs.3.9M (14/12/2010) was a fixed deposit repayment which did not move. She conceded to the last statement (26/5) which showed a deposit of Kshs.75M from 440M.

42. She said that the figure of Kshs.1,200,364.80/= was interest earned on all the money they are claiming and not a deposit by any of the defendants. She also conceded to the figure of Kshs.18M at page 106 (23/10/2014). She said that she had highlighted various transactions (pg 35-36) and that her analysis was limited to the ones disputed.

43. In re-examination, she said that Kshs.3.7M and Ksh.3.9M are fixed deposit roll overs and that they had not seen the money flowing out. That they captured all the money coming into the account.

The Defendants Case

44. DW1 was Jimmy Mutuku Kiamba the 1st Defendant and he adopted the averments in his affidavits as his testimony. His 1st affidavit was sworn on 23/06/2016, a further affidavit on 28/06/2018, a supplementary affidavit on 16/10/2018 and another supplementary affidavit on 13/11/2018. He testified that he has a degree in accounting from United States International University, masters in finance from University of Nairobi, member No. 3407 of Certified Public Accountants and a CPA (K) holder. He therefore considers himself an expert in finance and accounting matters.

45. He cited the period of interest as being August 2009 – February 2015 and that he looked at the statements of those accounts and did reconciliation. That he adjusted the figure of Kshs.872,094,147/= based on;

- a. Inter account transfers,**
- b. Money in fixed deposit accounts upon maturity is not an inflow.**
- c. Accrued interest is not an inflow but money earned on a basic deposit.**
- d. Figures which were included in the claim without supporting documents.**
- e. Proceeds of sale are not income since it's his property being sold.**

46. He testified that the transaction of 22/03/2011 at pg 23 of the plaintiff's supporting affidavit (Kshs.3,732,418/=) is a fixed deposit principal repayment and cannot be an inflow as it is the same amount being returned to the original account. The transaction of 14/12/2010 at page 117 (Kshs.3,967,103/=) was also fixed deposit principal repayment and therefore not an income. The transaction of 11/09/2014 (Kshs.1,202,054.80/=) was a credit interest on the money that the bank was holding for him therefore not an inflow.

49. That if the Court agrees with him, the total adjustments would be Kshs.416,802,350/= + Kshs.10,170,000/= and he split them because one is for unsupported transactions. That the net deposit is Kshs.448,721,802/= (inflow) and was not as a result of his employment. He therefore stated that the difference of about Kshs.3.5M is an error.

48. Further, he testified that as a businessman he had kept books of account and financial statements (*JMK1, pg 19-94 of the further affidavit*). That page 95-154 is in respect of Tracy and Jimbise Ltd. He however confirmed that the books of account were signed by him. He added that there was an accountants report at page 22 of JMK1, an income statement at page 23 and a balance sheet at page 24. He explained that assets are financed by several activities and non-current assets go beyond 12 months and are like fixed assets. That the cost is what one pays for the item at the time of acquiring it and market value is the present value irrespective of when it was bought.

49. He referred to a sale agreement at page 372 and disputed the use of the current value instead of the historical value. That the cash flow statement at page 25 shows what the plaintiff says was in his account. That the sources of income are shown at page 26, while page 27 shows the clarification of the expenditure and pages 28,29,30,31 and 32 are explanatory notes. Page 33 is the statement of tax computation which is paid in installments. That he only paid the first installment of Kshs.121,792/= and did that for all the defendants (*produced receipt*).

50. He referred to his analysis for the period of interest (*JMM2 @ pg 11 of further affidavit*) and said that his income from rent was as follows;

- a. 2010 Kshs.18,560,000/=**
- b. 2011 Ksh.26,500,000/=**
- c. 2012 Ksh.25,620,000/=**
- d. 2013 Kshs.42,651,000/=**
- e. 2014 Kshs51,100,000/=**

51. With regard to Tracy, the income from rent was as follows;

- a. 2010 nil**
- b. 2011 Ksh.1,050,000/=**
- c. 2012 Ksh.1,200,000/=**
- d. 2013 Kshs1,200,000/=**
- e. 2014 Kshs.1,400,000/=**
- f. Beauty parlor**

52. With regard to Jimbise Ltd, the income from rent was as follows;

- 2010 -2012 nil**
- 2013 Kshs.1,100,000/=**
- 2014 Kshs.1,250,000/=**

On summation of rent he maintained that his figures were correct.

53. Further, he stated that Jimbise Ltd was incorporated in 2010 and derives its capital from members' contributions which are recouped and can be termed as consideration. He admitted that the Defendants had properties as listed in the O.S and tenants were paying rent. He annexed tenancy agreements which he signed (pg 379-406, 521-525, 537-540, 542-544).

54. He testified that he has a transport and quarry business dealing with delivery of building and quarry materials respectively. He said he would source and hire vehicles (canters, lorries and pickups) from business partners like Japawa and Augustine. The cost for hiring was Kshs.5,000/= as shown at (pages 407 – 409). He made mention of Masaku bus permit (pg 410) permit for puffs agencies (pg411, payment in favour of puffs (pg 412) costs were also incurred through payment of cess money to the county.

55. With regard to **hotel and restaurant business**, he testified that he had 3 bars in Mombasa and referred to a lease agreement at page 503, a single business permit for 2011 (pg 505), a business permit for 2012 (pg 506), a permit for 2013 (pg 507), an alcoholic drinks license issued to his business partner who later became his employee (pg 508) business license for 'kadogo bar' (pg 510), similar licences (pg 511-512). He also said he had two bars in

Machakos and referred to an agreement between him and another at page 513. He added that the business was still operational.

56. On the water business, he said that he sunk a borehole and sells water to those with water bowsers. That he has a borehole certificate and water permits but they were taken by the EACC. He referred to an inventory of what was obtained from them by EACC (*TMM4 in Tracy's affidavit of 28/06/2018*).

57. In respect to farming, he said that he is engaged in four types of farming i.e maize farming in Machakos, wheat farming and cattle rearing in Narok. He referred to receipts for payment on delivery of building materials (pg 429 of further affidavit), receipts for payment of casuals in various places in respect of farming and cattle rearing (pg 451-502). That his general cash flow for the entire business besides rent is Kshs.200M with people who assist him run the business.

58. He acknowledged receiving Kshs.3M on 26/03/2013 from a firm of Advocates and explained that it was a 10% deposit for land that he sold to Sylvester Mwema for Kshs.40M (*agreement at pg 260 of further affidavit*). He said that Kwanga Mboya Advocate acted for the purchaser in the transaction. He knew that the deposit was from the purchaser and did not ask Mr. Kwanga where he got the money from.

59. Further, he testified that payments to Advocates are approved by the legal department, town clerk and then taken to accounts for execution where 3 signatures are required i.e him and 2 other officers. He stated that he did not approve it because he was not in the legal department and was not the town clerk. That for any cheque to go through, it has to be signed by any 2 of the 3. He was not aware as to whether Mr. Kwanga had been summoned by the EACC over the Kshs.3M.

60. He was aware of the declarations in the matter but denied ever being asked to make any presentation on them before the suit was filed. That the declaration of 2009 (pg 247 O.S) was not reflective of all his assets as he only declared what he thought was as a result of his income. That in the declaration form at pg 254 he declared a lot of assets because his new boss told him that he had to declare all his assets including those of his spouse.

61. With regard to the mortgage of Kshs.180M he said he had recorded it in the declarations after CFC bank assured him of giving him the facility only to disappoint him later. He had to turn to Equity bank in 2014. He lamented that his account including his minor daughter's account were frozen yet she is not a party to the proceedings. He felt this matter had been managed in a malicious manner and prayed for the court's protection.

62. It was his evidence that no deposit was proved to be corrupt and it was not shown that any property had been acquired unlawfully. He denied transferring any money to the 2nd Defendant. He added that she owned property even before the period of interest and she transferred money for buying property to his account and vice versa. He referred to JMM2 at page 12 of the supplementary affidavit of 16/10/2018 which was an illustration of her banking into his account. That the amount of Kshs.17,015,000/= was a saving which she gave him to buy property.

63. Further, he testified that there was no property registered in the name of Jimbise Ltd which he bought without consideration. That Jimbise Ltd was registered in 2010 and there was rent from its investments which they recouped. He denied any fraudulent acquisition of property by Jimbise Ltd and said that he owned 50% shares of the 4th defendant. He produced the four affidavits and annexures as his exhibits 1-4. Exhibit 5 was receipt No. 215487 dated 30/06/2014 for Kshs.121, 792 /= in favour of KRA.

64. In cross examination, he was referred to page 22 of the affidavit of 28/06/2018 and said that Alexander Grant & Associates are his accountants and he had given them books of account. He agreed that in order to place money in a fixed deposit account, it must come from somewhere. He also agreed that there were two notices issued to him in March and May 2015. That he responded to the 1st one but the 2nd one was served on him in court and was challenged by his advocate leading to a ruling by the court. He therefore did not respond to the notice. He admitted that it took him two years to file his response but denied that it was an afterthought.

65. He identified sales receipts in the name of Puff agencies but said that the certificate for the business was not in court. That he did not give the original receipts to EACC as he was doing the business in his Narok farm which he had leased. He identified the lease agreement and he agreed he had not produced it before the court.

66. On transport, he said that he hired trucks but owned one. He had no agreements for hiring the trucks. He said the receipts at page 429 in the name of Puff agencies show that he used to transport ballast and building stones. That he owned 26 acres of land in Machakos where he grew maize but agreed that the land was not in the declaration forms. Further the land in Narok where he grew wheat was leased but he had not been asked for the lease. He confirmed having a borehole and a permit for trading in water but he didn't have the WaRMA document as it had been taken by EACC. He said he made 20,000/= per day and had the receipts for water (pg 431, 432).

67. On borrowings, he said that he purchased the Runda property at Kshs.17M, which was reflected page 373 as Kshs.23M as per the agreement. He put Kshs.32M under historical cost as he improved the said property. On cash deposits, he agreed that his body guard Barnabas made some deposits which he said were proceeds from his businesses. He however could not recall the total amount that had been deposited. He maintained that the Kshs.3M from Kwanga Mboya Advocate was a deposit for a parcel of land which he had sold and that the purchaser has paid about 35M out of the purchase price of 37M.

68. He said that the 4th Defendant was sold and the shares were 50:50. He referred to an agreement at page 582 for the sale of the company at Kshs.275M. He referred to a letter from the Registrar of companies to EACC (pg 361 O.S) showing that as at 03/06/2015, the 4th Defendant had been transferred and payment received.

69. On casual labourers, he stated that the payments were made by him though the receipts do not show who was paying. His accountant passed away. There are permits for 'kadogo bar & restaurant' and the sales are in the bank statements. He maintained that his defence was not an afterthought and that he had not transacted beyond Kshs.1B in the period in question as claimed. That the Kshs.1B was before reconciliation was done.

70. In re-examination, he said that a financial statement is considered in terms of what one earns or pays and that EACC has no issue with the way he did his books of accounts. That the sale of the 4th Defendant is genuine and it takes some days for the transfer to take effect.

71. He insisted that when he was paid the Kshs.3M, he was not aware that it was part of what city council paid Kwanga Mboya. That he is the owner of Puff agencies and the receipts at page 429 were issued by him. He claimed to have the original receipt books with him and the receipts before court are about 10% of the total receipts issued. He said he held a leasehold interest in the land at Narok and he had produced the lease for Narok/CIS Mara/Majimoto/1990/1991 as Exhibit 6.

72. He stated that he did not respond to the 2nd notice because the court had already ruled on the matter. Further that he had asked for more time to respond as per his letter dated 03/06/2015 (pg 358 O.S) but EACC filed the case before he could respond. He explained that it was not possible to make agreements for hiring trucks as they hired them on a need by need basis.

73. DW2 was **Tracy Mbinya Musau** the 2nd Defendant. She testified that she is a business lady and adopted her affidavit dated 28/06/2018 as her evidence. She was issued with a notice by EACC in 2015 and responded to it but they never got back to her on whether they were satisfied, or not. She is accused of holding property on behalf of Jimmy which she denied. She admitted having two properties in her name, B & M and one property (A) in their joint names which was acquired in 2007. That Jimmy was receiving the rent from the joint property. She said property B was acquired with money which she was depositing in Jimmy's account and the rents he was receiving.

74. Further, she testified that she bought property M from proceeds of her salon in Kiambu and Lunathi house as well as interior design. She stated that her account at standard bank confirms that she received money from Airtel Kenya after doing work for her at Lilian Towers. That she works from home since her work is mainly referral. She referred to TMM4 being the inventory of the items taken by EACC including a laptop, invoice for her work (Ksh.112,266/=), invoice for materials (Ksh.88,750/=), quotation for work to be done (Kshs.2,477,836/=), invoice for rates (Kshs.1,569,132/=), handwritten list of electric materials worth (Kshs.267,900/=), invoice for materials (Kshs.250,880/=), receipt classic décor (198,430/=), Timsales ltd receipts (Kshs.252,000/=)

75. She also testified that pg 35-42 of her replying affidavit shows the receipts of her works and they all give the picture of her earnings. She agreed with the summaries of Jimmy and proceeded to say that she had properties before getting married to him. She referred to her statement (TNM7 @ pg 43-47) and said that her account used to have a standing order of Kshs.10,000/= for her daughter and that they still deposit the money. She lamented that the matter had given them a bad name as a family and individuals.

76. On cross examination, she was referred to the receipt TMM5 and she said that this payment plus all other payments were made in cash, and some of them are reflected on the bank statements. She however banked some in Jimmy's account. She confirmed that her business is registered.

77. Further she stated that she had employees and she had called PW1 to tell him that she needed the documents. TMM6 is connected with her business and some invoices have her name. She was the one who purchased the materials and her name is on the invoices. It was her evidence that payments of rent went to Jimmy's account and Charles Kimani was her employee. She said she had sub-let part of her business and was therefore receiving rent, and was a supplier of human hair.

78. She insisted that the cash deposits were from her business as per the financial statements shown to the Plaintiff. That she had no agreement in court and had no issue with the analysis.

79. In re-examination, she said that the cash sales never show which work has been done and that this matter is not about taxes which are handled by KRA. That the receipts and invoices are for several enterprises/businesses and her financial statements show what she got and for what. That the borehole and WaRMA document is not in Jimmy's affidavit as it is in the inventory of what was taken by EACC.

Plaintiff's Submissions

80. **Mr. Kagucia** filed submissions dated 29th January 2019 on behalf of the Plaintiff. The same were highlighted on 28/5/2019. He gave a background of the happenings in this matter before the suit was filed. He submitted that the 1st Defendant had by virtue of his office as city treasurer, city council of Mombasa (2009 – 2011) and city council of Nairobi (2011-2013), and chief officer finance Nairobi city county used the position to improperly confer benefits to himself or others contrary to Section 46 of the ACECA. He submitted that by virtue of his office the 1st Defendant is a public officer in terms of Section 2 of the Public Officer Ethics Act No. 4 of 2003 managing public resources in a position of public trust.

81. In reference to the wealth declaration forms he particularly referred to the one for the period of 1st November, 2011 – 31st October 2013, where the 1st Defendant grossly overstated his salary, rental income, business income, with a mortgage of Kshs.180M under liabilities. The said Kshs.180M was not in existence until 31/10/2014. To him this was a clear case of deception employed to conceal ill-gotten gains. Counsel referred to the case of **Muneka –v- Commissioner of Customs & Excise (2005) EWHC** to buttress his argument that lies and untruthfulness serve the purpose of concealing something.

82. Counsel referred to the transactions where Jimmy's juniors and himself deposited huge sums of money into his accounts. The sources of these moneys have not been disclosed. He also referred to the several landed properties acquired during the period of interest by Jimmy. Counsel submitted that Jimmy had applied his knowledge as an accountant to the analysis of transactions in his various bank accounts and those of the Defendants.

83. In spite of all that there are gross deposits of over Kshs.1billion and this figure should be juxtaposed against his salary over the same period in the sum of Kshs.5,821,309.00. He wondered why with a turnover of Kshs.16,856,635/25 per month from businesses one would remain in a public service job with a modest salary of Kshs.145,326/60 per month. (Ref. salary account no. 0101967767700 Standard chartered Machakos branch).

84. He referred the court to the sale agreement dated 18/2/2013 between Muema Muindi in respect to LR 20152/13 Machakos whose original documents were never availed to the Plaintiff for interrogation. The payment of Kshs.3M to Jimmy by Kwanga Mboya was never explained. On this he referred to the case of **Asset Recovery Agency –v- Fisher, Rohan & Miller Delones etal (2012) JMSC Civil No. 16 (supreme Court of Judicature of Jamaica)**. He further submitted that Jimmy evaded paying taxes to KRA.

85. Mr. Kagucia outlined the legal framework under which recovery of assets is made. These are: -

- **Part (iv) of ACECA – Section 55(2).**
- **Ethics and Anti-Corruption Commission Act, 2011(EACCA) Section11(i-j).**
- **Article 252 of the constitution of Kenya.**
- **United Nations convention against corruption (UNCAC) – Article 2 (g) 54 (1) (c).**

86. On the concept of civil forfeiture which is non-conviction based counsel referred to the cases of: -

i. Director of assets recovery agency & others, R (on the application of) V Green & Others (2005) ENHC 3168.

ii. National director of public prosecutions NDPP –v- R. O Cook properties (pty) Ltd – cases 260/03, 666/02 & 111/03.

On the rationale behind civil forfeiture he referred to the case of the **Serious Organized Crime Agency (SOCA) –v- Christopher Orumbe Oguchi & Anor (2011) EWHC 175**

(QB) where it was observed that the proposed civil forfeiture was to provide both a reparative measure and a preventative measure to any illegitimately acquired assets and those intended for use in committing crime. Civil forfeiture is therefore not wholly dependent on a criminal trial and conviction.

87. Mr. Kagucia submitted on the meaning of Section 55(5) of ACECA and referred to the case of EACC **The legal successor of Kenya anti-corruption –vs- Stanely Mombo Amuti (2015) eKLR** where the Court of Appeal held that ACECA:

“provides that the burden of proof remained with EACC and it was the court to determine that it was discharged on a balance of probability. It is at that stage that the burden would shift to the Respondent if the court so ordered. In our view this is not an alien process in civil litigation. It also happens in defamation cases where there is a defence of justification”.

88. It was his final submission that the Plaintiff had proved its case against the Defendants to the required standard to make the court order for forfeiture of Kshs.575,121,611/00 to the Government of Kenya. That Jimmy has been prosecuted for corruption vide **Acc No.7/15 and Acc No.32/18.**

Defendants' Submissions

89. The firm of Prof. Tom Ojienda & Associates filed the submissions dated 26/02/2019 on behalf of the defendants. A background to the happenings before the suit was filed was given and the said submissions were highlighted by Mr. Makokha on 28/05/2019. He stated that corruption and economic crime related offences and impugned benefits must be proved in a case of this nature. He referred to the first **Amuti case namely EACC vs- Stanely Mumbo Amuti (2015) eKLR** saying the key word is **“abuse of office”**.

90. It was his submission that the Plaintiff was only suspicious of the incident of Kwanga Mboya advocates and the Kshs.3m and nothing more. The Plaintiff vide Misc. Civil Application No. 804/2014 was granted preservative orders which were in place for six (6) months after which its application to extend the same was disallowed by Mbogholi J. That the case should have ended there. He pointed out that if this court makes a different verdict, it will be sitting on appeal in the ruling of 25/6/2015.

91. That the only other evidence after 25/6/2015 is that of Kshs.3M. Mr. Makokha while referring to the notices by the Plaintiff to Jimmy submitted that the 1st notice never called for documents save for an explanation which was given. When they next asked for documents Jimmy's counsel asked them to give them 30 days to avail them. Before complying, the present suit was filed. Counsel submitted that all

along the Plaintiff had a predetermined mind in this matter hence its failure to properly investigate after being served with the explanation and documents.

92. On the Kshs.3M alleged kickback counsel argued that the subject cheque (JMK16) was never paid to Jimmy and his bank statements speak to that. He referred to the sale of property by Jimmy to Kwanga's client, making it difficult for him to get any documents to support his claim.

93. Counsel further submitted that one can't use a deposit to talk of an unexplained asset. On the other hand, withdrawals must also be taken into account through an analysis. That in the present case the withdrawals were never explained. Referring to the Amuti initial case which was upheld by the Court of Appeal he submitted that the court dismissed the analysis presented by EACC. He argued that Pw1 and Pw2 did not assist the court in their attempted analysis, of the transactions.

94. On the deposits allegedly made by Jimmy's colleagues into his accounts counsel argued that it had not been shown what role the colleagues played in this matter. Further that there was no evidence to show that the money deposited into Jimmy's accounts by colleagues mostly by his body guard Mr. Barnabas Oigo was corruptly acquired or there was conspiracy of some kind. He stated that these allegations were never pleaded in the O/S to enable Jimmy adequately respond to them.

95. On the wealth declaration forms counsel contended that if there was anything that required an explanation the relevant body should have sought for the same from Jimmy and nobody did so. He referred to the response in cross examination by the 1st

Defendant where he said he had thought that the said forms were only in respect to income earned in the course of employment. He also admitted there being an error in including the Kshs.180M mortgaged facility in his wealth declaration of 2013, since he had not received the money.

96. In respect to the plaintiff's claim against 2nd, 3rd and 4th Defendants, counsel submitted that there was no evidence adduced to the effect that the properties registered in the names of the 2nd Defendant (Tracy) and 3rd Defendants are held in trust of the 1st Defendant (Jimmy). He pointed out that Tracy was Jimmy's wife and both of them hold shares in the 3rd Defendant. Further that there is no evidence of property previously owned by Jimmy being transferred to the 2nd or 3rd Defendants. This did not therefore fall under Section 55(7) of ACECA.

97. It was therefore counsel's submission that for the Plaintiff to succeed under Section 55 of ACECA it must not only demonstrate that the Defendant's assets are disproportionate to his legitimate source of income, and the explanation on how the 1st Defendant acquired such assets acquired the rest of their assets are unsatisfactory, but also prove that such assets were acquired through corrupt conduct. This to him has not been proved. To support his submission he referred to the cases of:-

i. The director of assets recovery agency and others –v-Jeffrey David Green and others (2005) EWHC 3168 (Administrator)

ii. National director of public prosecutions VRO Coor properties (supra).

98. He therefore finally submitted that the Defendants had adequately explained how the assets they were in possession of were acquired.

Analysis and Determination

99. Having considered the pleadings, evidence on record and the rival submissions, I find the main issue falling for determination to be whether the Defendants are in possession of unexplained assets.

100. At the conclusion of the hearing, the parties agreed that the orders of injunction in respect of the following properties be discharged, which was done.

a. Maisonette No. 6 on L.R No. 209/12736, South C, Nairobi.

b. Mavoko Municipality Block 6/831.

c. Machakos/Kiandani/4260.

d. Machakos/Kiandani/3749.

e. Motor vehicles

KBT 454X

KBP 255V

KBS 454G

KBD 978K

KBK 888S

KBG 079F

KBZ 298X

101. After eliminating the above properties from those listed in the O.S, the following remain as the landed properties requiring a explanation;

- a. Maisonette No.15 on L.R No. 209/12742, South C, Nairobi.
- b. Land reference No. 209/19522 (original No. 209/12742/40) I.R 129284.
- c. Land reference No. 209/18417 (original No. 209/127336/17) I.R 111252, Bandari Villas Phase 1Estate, South C, Nairobi.
- d. Apartment No. B1 Block B in Pritt Lane Court erected on Land Reference No.2/699 Lease No. 127012/1.
- e. Land reference No. 7785/605(Original No. 7785/10/430, I.R 56556 Runda Water Estate, Nairobi City County.
- f. Apartment No. B5 Block B in Pritt Lane Court 3 erected on Land Reference No.330/1310 Lease No. I.R 136088/1.
- g. Apartment No. A8 Block A in Pritt Lane Court 3 erected on Land Reference No.330/1310 Lease No. I.R 136089/1.
- h. Town House No.2 erected on Land Reference No. 209/19582 (I.R 132743) Kileleshwa Estate, Nairobi City County.
- i. Skyrock Apartment, Block B, Unit 11, 4th Floor LR No. 330/317, Nairobi.
- j. LR No. 7785/818 (Original No. 7785/10/557).
- k. LR No. 214/211 off Naivasha Avenue, Naivasha Lane in Old Muthaiga Estate, Nairobi County.

102. In the course of the proceedings an analysis and reconciliation of the deposits was conducted by the defendants and Pw2 and the Plaintiff's claim was adjusted to Kshs.575,121,611/=. This Court has been called upon to determine whether this amount and the landed properties constitute 'unexplained assets'. **Section 2** of the Anti-Corruption and Economic Crimes Act of 2003 (the Act) defines 'unexplained asset' to mean;

“assets of a person-

- a. acquired at or around the time the person was reasonably suspected of corruption or economic crime; and**
- b. whose value is disproportionate to his known sources of income at around that time and for which there is no satisfactory explanation?”**

103. The suit is hinged *inter alia* on **section 55** of the Act. **Section 55(2)** provides as follows;

The Commission may commence proceedings under this section against a person if;

- a. after an investigation, the Commission is satisfied that the person has unexplained assets; and**
- b. the person has in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the commission is not satisfied that an adequate explanation of that disproportion has been given.**

104. In **Nairobi Civil Appeal No. 184 of 2018; Stanley Mombo Amuti –vs Kenya Anti-Corruption Commission**, the Court of Appeal was of the view that a reading of section 2 and 55 (2) of the Act establishes the threshold for existence of unexplained assets to be;

- a. There must be set time period for the investigation of a person.
- b. The person must be reasonably suspected of corruption or economic crime.
- c. The person must have assets whose value is disproportionate to his known sources of income at or around the period of investigation and

d. There is no satisfactory explanation for the disproportionate asset.

105. I will adopt the above criteria to determine on whether the defendants are in possession of unexplained assets or not.

106. The Defendants have been of the view that in hearing this case, this court will be sitting on appeal of the ruling dated 25/06/2015 delivered by Justice Mbogholi in **Nairobi Misc.Civil Application No. 804 of 2014**. The ruling was in respect of an application by the Plaintiff to extend preservation orders in respect to landed properties and motor vehicles listed herein.

107. What is before this court is not an application seeking preservation orders under Section 56 of ACECA. The suit here is a recovery suit premised on Section 55 of ACECA. The ruling of 25/6/15 did not bar the Plaintiff from filing an asset recovery suit. I therefore find no merit in that line of argument.

Period of interest

108. According to JKK2, the investigations were confined to the period between August 2009 and January 2015. There is clear evidence that investigations were conducted and notices issued to the Defendants. I find Section 55(2) ACECA to have been complied with.

Reasonable Suspicion of Corruption or Economic Crime

109. It is not in dispute that the 1st Defendant (Jimmy) was a public servant during the period of interest. His highest salary in his position as at January, 2015 was Kshs.145,326/60. From the bank statements and list of landed properties presented in the court, the 1st Defendant's wealth was slightly above Kshs.1 billion. This was a state of affairs that required an explanation. I am therefore convinced from the totality of the evidence that the Plaintiff's suspicion of corruption or economic crime having been committed by the 1st Defendant was reasonable hence the investigation.

110. The 1st Defendant (Jimmy) was by law bound to give a satisfactory explanation for the source of the cash and properties. The other Defendants came into the picture by virtue of his association with them and the flow of the cash under investigation.

111. During the hearing and in particular the testimony of Pw2, it was noted that inter transfers, sale of two motor vehicles, double counted transactions had been included in the summation of the total claim which should not have been the case. Therefore upon proper analysis the Plaintiff reduced the claim from **Kshs.872,094,147/=** to **Kshs.575,121,611/=**.

112. The transactions that were considered for removal were as follows: -

Transaction	
Interbank transfer	
Fixed deposit	
Sale KBK 888S	
Sale KBK 888S	
Sale KBK 888S	
Double counting	
Sale KBG 079F	
Inter account transfer	
Inter account transfer	
Inter account transfer	
Inter account transfer	

Inter account transfer	
Inter account transfer	
Fixed deposit	
Inter counter transfer	42,000,000.00
<i>(Transactions involving Kshs.13M, Kshs.18M, Kshs.3.9M and Kshs.75M were conceded to by Pw2 in cross examination).</i>	

This adjusted the claim to Kshs.575,121,611.00/= according to the Plaintiff.

Possession of assets whose value is disproportionate to known sources of income at around the period of interest.

113. The Defendants have indicated that the accepted figure by both parties after reconciliation was Kshs.448,721,802.00/= save for two transactions worth Kshs.5,169,159.00. this is not correct because when Pw2 testified she made it clear that their claim is Kshs.575,121,611.00 and nothing less.

114. The Defendants at para 42 of their submissions state as follows:-

“We shall revert on how this net deposit of Kshs.448,721,802/= in the Defendant’s accounts was legitimately earned ...”

115. Accordingly, it is evident that the defendants do not dispute being in possession of the amount. They also do not dispute ownership of the landed properties whose approximate value is Ksh.167,100,000/= as per JKK2 (pg 56). Their claim is that it was legitimately earned.

116. Further, the plaintiff avers that the only justifiable/legitimate source of income is Jimmy’s salary and the total net salary for the period of interest is indicated as Kshs.5,821,309/=.

117. It is therefore evident that the defendants are in possession of assets whose value is disproportionate to their known sources of income. A satisfactory explanation must therefore be given.

Explanation for the disproportionate assets.

118. The 1st Defendant (Jimmy) gave an explanation of what he called perceived disproportion via his letter to EACC dated 30/03/2015 and his oral evidence in Court which was by and large a reproduction of the said letter.

119. With regard to the **admitted net deposit** in the various bank accounts, Jimmy explained that he owned several businesses apart from employment. He produced audited books of accounts for the period of interest without any objection from EACC and further did an analysis showing that he earned Kshs.52,116,348/=, Kshs.81,542,736/=, Kshs.60,660,661/=, Kshs.141,749,711/= and Kshs.186,137, 395/= for the 2010-2014 financial years. The total is Kshs.522,206,851/=.

120. The other businesses were said to be farming (*cattle rearing, wheat and maize*), hotel business, transport and quarry business, rental income, water business, while interior design and beauty parlor were his wife’s (Tracy) the 2nd Defendant.

121. As for the **cattle and wheat business**, he explained that he conducted them on a 100 acre piece of land which he leased from Kitilal Ole Ntutu over land title Narok/Cis Mara/Maji Moto/190/191 at the cost of Kshs.500,000/= per year. He produced a lease agreement as exhibit 6. He also attached a bundle of receipts as evidence of payments to the casual labourers who worked on the farm.

122. The lease agreement was executed on 27/07/2012 for a period of 15 years with effect from 01/08/2012. On the other hand, the financial analysis produced by him shows that he started earning revenue from cattle and wheat in 2010 which in my view is incredible because by that time, the piece of land in Narok had not been leased and he did not tell the Court that he had an alternative piece of land from where he carried out cattle and wheat business. There is no evidence of the particular sales.

123. This anomaly casts doubt on the existence of the cattle and wheat business and it is my finding that the indicated revenue from the said businesses constitutes unexplained deposits. The total revenue from cattle as per JMM2 is 21,971,810/= and the total revenue from wheat is 17,094,610/=.

124. As for the **maize business**, he explained that he did not annex any lease agreement because he was practicing it on his father’s land which he did not require to lease. My finding is that owing to the kind of revenue generated by this business, it was imperative for him to demonstrate the existence of the land and the acreage. He should have attached the title documents in his father’s name and proof of

relationship between him and the registered owner. There is also no evidence of the huge sales of maize.

125. As for the **hotel business**, he explained that he operated a hotel under the name and style of 'Kadongo Bar and Restaurant' in Mishomoroni, Mombasa county and another one under the name and style of 'Austers Pub & Barber shop' in Machakos county. He attached a lease executed on 23/06/2005 between him and Boniface Allan Oloo with regard to 'all that property on Plot No. 82 SEC11/MN known as Kadongo bar & restaurant'. He also attached single business permits, alcoholic drink licenses as well as licenses from the music copyright society of Kenya. In my view, the existence of this business was sufficiently demonstrated.

126. With regard to Austers bar, he attached an undated agreement between him and Augustine Mafikira Bahati. It indicated that Jimmy was a sleeping partner in the business pursuant to an agreement dated 26/09/2005 which was however not exhibited. The genuineness of this agreement is doubtful but unfortunately, the revenue from Austers bar was not separated from that of Kadongo bar. Furthermore, if the agreement is true it falls outside the period of interest, and cannot therefore explain the bar earnings.

127. As for the **transport and quarry business**, he explained that he conducted most of it under the name and style of Puffs agencies. That the business involved hiring of lorries & trucks as well as sourcing and delivery of building materials. He said that he hired the trucks from Japawa Investments and attached some bank slips showing some cash deposits to the account of Japawa Investments. He also attached a bundle of receipts from Puffs agencies to customers for the building materials.

128. The ownership of Puffs agencies by the 1st Defendant (Jimmy) was contested by the plaintiff which argued that Jimmy did not establish a link between him and the business. He submitted that he filed and served an affidavit in June 2018 swearing that Puffs agencies was his business and hearing of the case was in December 2018. According to the 1st Defendant, the burden of disproving that fact shifted to the plaintiff.

129. Indeed, there was no documentary evidence to establish a link between Puffs Agencies and Jimmy and I do not agree that there was a shift in the burden of proof. He was called upon to offer an explanation and it was upon him to conclusively do so. I do not see why he would go to great lengths to attach all those receipts from Puffs Agencies and omit a simple 'business name certificate'. Why would some receipts be issued in his name and others in his business name if they referred to the same business?

130. Further, it was his explanation that there was no formal lease agreement between him and Japawa Investments because the nature of the business was that the trucks were required on a need basis and some would develop mechanical problems when needed. I find that the 1st Defendant should have at least attached registration documents to show that the trucks were owned by Japawa Investments, and evidence from Japawa investments confirming their special relationship.

131. The totality of my analysis is that the explanation of the transport and quarry business was not sufficient and as such, the revenue of Kshs.228,103,753/= from the said business constitutes unexplained assets.

132. In respect to the **rental income**, it is no longer in dispute that the 1st Defendant owned some landed properties prior to the period of interest. There are those that were discharged as indicated in paragraph 98 above and he attached a bundle of tenancy agreements between him and tenants with regard to those properties. There was no evidence adduced to counter those tenancy agreements. I find the revenue from rental income to have been sufficiently proved.

133. As for the water business, Jimmy explained that he owned a borehole from which he sold water and demonstrated that a borehole completion record pamphlet for him and WaRMA had been taken from his house by EACC. The Plaintiff did not rebut this. In my view, the existence of the water business and revenue therefrom was sufficiently explained.

134. Coming to the interior design and beauty parlor business operated by 2nd Defendant (Tracy), she explained that all the documents and computers in respect of the business were taken by EACC officers when they raided their house on 02/12/2014. This wasn't rebutted by the Plaintiff. She attached a bundle of receipts from 'Tracey's Interior Designs' which I have perused and it is evident that she used to make tidy sums from the business. It is therefore my considered view that the income from this business has been sufficiently explained.

135. The explanation the 1st Defendant gave for receipt of Kshs.3M soon after Kwanga advocates had just been paid by the Nairobi city county is not satisfactory. There was nothing that stopped him from getting a confirmation of what he was saying and what the money was for from the said law firm.

The landed properties

(i) Land reference No. 209/18417 (original No. 209/127336/17) I.R 111252, Bandari Villas Phase 1 Estate, South C, Nairobi.

136. This is property (vii) in the O.S which Jimmy explained is the same as property (a) i.e (Maisonette No. 6 on L.R No. 209/12736, South C, Nairobi) which is jointly owned by him and Tracy. Property (a) was excluded from explanation by virtue of having been acquired before the period of interest. The question of repetition is not disputed by EACC. Accordingly, this property should also be excluded.

(ii) Land reference No. 209/19522 (original No. 209/12742/40) I.R 129284.

137. This is property (vi) in the O.S and is similar to property (b) i.e

Maisonette No.15 on L.R No. 209/12742, South C, Nairobi. The similarity is discernible even from the numbers. 1st Defendant explained that he acquired it for Tracy using proceeds of rent from the joint house and other businesses. This property was acquired in 2010 at the price

of Kshs.10.5 Million and it is my considered view that this amount was within 1st Defendant's means.

(iii) Skyrock Apartment, Block B, Unit 11, 4th Floor LR No. 330/317, Nairobi.

138. This is property (xiii) in the O.S and was acquired in 2012 for kshs 25M. Jimmy explained that he acquired it for Tracy using proceeds of rent from the above properties (*par 117 &118*) as well as proceeds of sale of her motor vehicle KBZ 298X which she sold in 2015 and deposited the proceeds in his account as a refund. In my view, this explanation is plausible as it has been demonstrated that the other properties were already generating rental income.

(iv) Jimbise Ltd

139. The following landed properties are owned by Jimbise Ltd;

- a. Apartment No. B1 Block B in Pritt Lane Court erected on Land Reference No.2/699 Lease No. 127012/1 (*property (viii) in the O/S*)
- b. Apartment No. B5 Block B in Pritt Lane Court 3 erected on Land Reference No.330/1310 Lease No. I.R 136088/1(*property (x) in the O/S*).
- c. Apartment No. A8 Block A in Pritt Lane Court 3 erected on Land Reference No.330/1310 Lease No. I.R 136089/1 (*property (xi) in the O/S*).
- d. LR No. 7785/818 (Original No. 7785/10/557) (*property (xiv) in the O/S*)

140. 1st Defendant explained that property (viii) Apartment No. B1 Block B in Pritt lane court erected on L.R. No. 2/699, lease no. was purchased in October 2010 at Kshs.14m through members' contributions and proceeds from other businesses. Property (xi) was purchased in May 2011 with proceeds of rent from property (viii), a loan facility of Kshs.5m from Messrs Wilde view Traders Ltd and further members' contribution from proceeds of the other businesses. Property (x) was acquired using proceeds of rent from (viii) and (xi), members' contributions and proceeds from other businesses. The relevant purchase agreement, rent agreements and loan agreement were exhibited and I find that acquisition of those 3 properties was sufficiently explained.

141. As for property (xiv) in the O.S which was acquired in 2013 at a cost of Kshs.35m, part of the purchase price is said to be from the transport business which I have already impugned and since it's impossible to know how much was injected from the alleged transportation business, my view is that the entire asset falls under the category of unexplained assets.

(v)LR No. 214/211 off Naivasha Avenue, Naivasha Lane in Old Muthaiga Estate, Nairobi County Property (xv)

142. It has sufficiently been demonstrated that this property was acquired through a loan facility of Kshs.180M from Equity bank.

(vi)LR.No. 7785/605 (original Number 7785/10/430, I.R.56556 Runda Water Estate, Nairobi City County Property (i)

143. In his further affidavit sworn on 28/6/18 and filed on the same day the 1st Defendant deponed that he bought the above property which was transferred to him on 18/7/2011 at the cost of Kshs.23m though valued at kshs.90m in 2014. He annexed the purchase agreement (JMK 11). He used income from various properties he owned which were paying in terms of rent. (JMK 12). The Plaintiff has not dislodged the explanation, which I find to be satisfactory.

144. The upshot of my analysis is that the Plaintiff has established on a balance of probability that the cash deposits which the 1st Defendant tried to explain through the revenue collection below constitutes unexplained assets as defined under Section 2 of ACECA and should be forfeited to the State.

- a. Kshs.21,971,810/= cattle revenue
- b. Kshs.17,094,610/= wheat revenue
- c. Kshs.12,478, 430/= maize revenue
- d. Kshs.228,103,754/= transport & quarry revenue
- e. Kshs.35,000,000/= landed property (i)
- f. Kshs.3000,000/= from Kwanga Mboya advocates

Total 317,648,604/=

145. I therefore declare the total sum of the money indicated above to be unexplained assets, and order that:

i. The sum of Kshs.282,648,604/= be paid to the Government of Kenya by the 1st Defendant (Jimmy).

ii. The sum of Kshs.35,000,000/= be paid to the Government of Kenya by the 1st Defendant in default the property (xiv) – LR.No.7785/605(original Number 7785/10/430, I.R 56556 Runda Water Estate, Nairobi city county be forfeited to the Government of Kenya.

iii. Each party to bear its own costs.

DATED THIS 22ND DAY OF JULY, 2019 AT MAKUENI HIGH COURT.

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H. I. ONG’UDI

JUDGE

DELIVERED ON 24TH DAY OF JULY 2019 AT NAIROBI HIGH COURT BY

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JUDGE