



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI**

**ACEC CIVIL SUIT NO. 32 OF 2018**

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

**VERSUS**

**JARED PETER ODOYO OLUOCH KWANGA.....1<sup>ST</sup> DEFENDANT**

**CHRISTINE AKINYI OCHOLA & 21 OTHERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Vide a Chamber Summons dated 6<sup>th</sup> September 2019 and filed on 10<sup>th</sup> September 2019, the 8<sup>th</sup> – 23<sup>rd</sup> defendants/applicants herein sought to have the County Government of Migori enjoined as an interested party or defendant in this suit. The application which is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 1 Rule 10 (2) and 25 of the Civil Procedure rules is supported by grounds on the face of it and an affidavit sworn by Jared Peter Oduyo Oluoch Kwanga the Director of the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants.

2. It is the applicants' claim that the plaintiff having filed a suit seeking a determination whether Kshs.1,971,179,180/= paid from the County Government of Migori to the defendants constitute unexplained assets, it is necessary that the County Government of Migori as the entity alleged to have paid for fictitious contracts be enjoined as a co-defendant or as an interested party. Further, that the plaintiff having alleged that the 1<sup>st</sup> – 7<sup>th</sup> defendants are members of one family and that they registered the 8<sup>th</sup> – 23<sup>rd</sup> defendants (companies) for purposes of fraudulent acquisition of public funds through fictitious procurement contracts and exclusively received Kshs.1,971,179,180/= from the County Government of Migori for the period between 2013 – 017, it is necessary that the County Government of Migori be enjoined either as a co-defendant or as an interested party.

3. It was further deposed that, the 8<sup>th</sup> – 23<sup>rd</sup> defendants procedurally; applied for various tenders with the County Government of Migori; were competitively evaluated and awarded contracts; performed the contract as required and, got paid lawfully as per the contractual terms by the County Government of Migori

4. It is on that basis that the applicants seek to enjoin the County Government of Migori as a necessary party who raised the contract documents, processed the same and paid the 8<sup>th</sup> – 23<sup>rd</sup> defendants. That the omission of the County Government of Migori from these proceedings was deliberate with the sole intention of obscuring a just determination of the real issues in controversy.

5. In submission, Mr. Sagana for the applicants basically reiterated the averments contained in the affidavit in support of the application. Counsel asserted that the joinder of the County Government was necessary and for the benefit of all parties.

6. Counsel further submitted that payments received from Migori County Government as a result of contracts awarded and services duly rendered cannot constitute unexplained assets. He urged the court to find that if the County Government awarded and paid for fictitious contracts, then they have an interest in the suit as custodians of all the tender documents which gave rise to the alleged fictitious contracts.

7. In support of their application, Mr. Sagana referred the court to the decision in the case of **Victor Ndegwa Mburu and another v Rachael Wanjiru Kamatu and another (2018) eKLR** where the court while quoting the decision in the case of **Macadamia Nuts Dealers v Horticultural Crops Development Authority and another (2014) eKLR** held that:

**“An interested party is a party who has a stake /inherent directly in the matter before the court though he is not a party to the case. He must be a party who is likely or who will be affected by a decision of the court and he or she is of the view that unless he or she is enjoined (sic) in the matter his or her interest will not be well articulated or protected unless she or he is made a party to ventilate his or her case”.**

8. Mr.Nyaanga for the 1<sup>st</sup> – 7<sup>th</sup> defendants supported the application and associated himself with the submissions of Mr.Sagana. Equally, Mr.Muriithi for the interested parties associated himself with the submissions of his colleagues.

9. In response, the respondent opposed the application vide a replying affidavit sworn on 30<sup>th</sup> September 2019 by Anne Murigih an investigator working with the EACC. It was deponed that the application was defective for lack of specificity. She averred that the suit herein is brought under Section 55 of the ACECA which specifically provides for recovery of unexplained assets which are disproportionate to the respondents' known legitimate sources of income.

10. She therefore stated that the County Government of Migori does not have a legitimate interest in the forfeiture proceedings and that the applicants have not demonstrated that the forfeiture proceedings will affect the County Government directly.

11. It was further argued that the commission has no cause of action against the County Government and that the County Government has no legitimate interest in the outcome of the suit. She further averred that the commission has instituted the suit in public interest for purposes of recovery or protection of public property to wit Kshs.1,971,179,180/= for and on behalf of the County Government of Migori hence there is no need to waste resources in terms of legal fees as their interest is taken care of by the commission/(plaintiff).

12. In submission, M/s Kibogy reiterated the averments contained in the replying affidavit. She opined that the plaintiff has no claim against the County Government and that there is no recovery sought against them. She further submitted that the proceedings herein are instituted for and on behalf of the County Government and therefore it cannot be sued or be enjoined.

13. I have considered the application herein and the response thereto. I have also considered parties' rival oral submissions. The only issue for determination is whether the applicants have met the threshold for joinder of the County Government of Migori as a co-defendant or an interested party.

14. The application herein is brought under orders 1 rule 10(2) and 25 of the Civil Procedure rules. Order 1 rule 10(2) provides:

**“the court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.**

15. From the wording of the above provision, the court is clothed with wide discretionary powers to determine on the necessity to enjoin a party to proceedings. Such powers can apply if the intended joinder will facilitate a just determination of the issues in controversy and that nobody will suffer prejudice by nonjoinder or joinder of the intended defendant or interested party. In this case, the applicants have framed their prayers in the alternative. Firstly, they are seeking for the County Government of Migori to be enjoined as a defendant or as an interested party.

16. There is no dispute that the originating summons filed before this court is seeking recovery of over 1.9 Billion from the defendants being monies alleged to have been obtained from Migori County Government through fictitious contracts hence unexplained wealth subject to forfeiture proceedings under Section 55 of ACECA. Section 55 (2) of ACECA thus provide that:

**“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 satisfied that an adequate explanation of that disproportion has been given”.**

17. According to the respondent/plaintiff, the suit is specifically targeting recovery of unexplained and illegally acquired property against the applicants and the interested parties. In their view, they have no claim against the County Government.

18. Who is to be enjoined as a defendant in a suit? Order 1 rule 3 provides that:

**“all persons may be joined as defendants against whom any right to a relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise”.**

19. The power to choose on who to sue or not to sue as a defendant is a discretionary issue which purely lies with the plaintiff. In any event, Order 1 rule 9 cushions the plaintiff by stating that no suit shall be defeated for nonjoinder or misjoinder of a party for good reason.

20. The plaintiff for good reason chose not to sue the County Government on the understanding that they were representing their interest. The claim is specifically targeting recovery of unexplained assets or illegally acquired assets pursuant to Section 55A (2) of the ACECA. There is no prayer or relief sought against the County Government of Migori. The plaintiff has expressed its position that they have no cause of action against the County Government in so far as this suit is concern.

21. The plaintiff is not seeking to recover any unexplained assets or property from the County Government hence had no business suing them as defendants. Even if it is not enjoined as a co-defendant, it will not suffer any prejudice as the orders against the defendants will not affect it in any way.

22. The applicants have not demonstrated that the absence or lack of participation of the County Government of Migori in these proceedings as a co-defendant is likely to hinder the court from effectively and completely adjudicating upon the questions involved.

23. The fact that the plaintiff has mentioned some element of involvement in fictitious contracts by the the County Government and the defendants, it does not automatically call for the County Government to be made a co -defendant. The defendants and interested parties will under Section 55 (3) of ACECA have an opportunity to explain their position that the contracts were awarded legally and services rendered as per the contractual terms. They will be at liberty to call any County Government officials who awarded the contracts as witnesses to corroborate their evidence and justify the legitimacy of those contracts and the money paid.

24. It is not the duty of the court to choose parties to be sued or enjoined in a suit. The role of the court is to facilitate a fair legal process to achieve a just determination. It will be prejudicial to force the plaintiff to manufacture a cause of action against a party sought by the defendants to be enjoined as a co-defendant. Unlike third party proceedings, courts must act with extreme caution and restraint before allowing an application from a defendant seeking somebody else to be enjoined as a co-defendant.

25. Had the application emanated from the plaintiff, the position would have been different. I am in agreement with the sentiments expressed by the court in **Joseph Leboo and 2 others v Director Kenya Forest Services and Another (2013) eKLR** where it was held that:

**“I think courts need to be careful before making an order for a person to be joined as a defendant where the application for that joinder is not emanating from the plaintiff. This is so as to avoid thrusting upon the plaintiff a party against whom the plaintiff does not intend to sue or the plaintiff sees he has no cause of action against or even if he does, has opted not to pursue the action ...”.**

26. In my view, to force a defendant against a plaintiff against whom the plaintiff has no claim will be akin to compelling the plaintiff to spend unnecessary costs on litigation. Who will bear the costs to the intended defendant if joined and the suit ends up being dismissed? It will be difficult to force the plaintiff to pay such costs to a litigant he or she never sued and had no claim against. In the circumstances of this case, there is no ground to enjoin the County Government of Migori as a co-defendant.

27. Concerning joinder as an interested party, there is no express provision governing joinder of parties as interested parties. However, Order 1 rule 10 (2) of the Civil Procedure Rules when interpreted purposively serves the purpose.

28. It is trite that for a party to be enjoined as an interested party in a suit, the applicant must prove that he or she is likely to be affected by the decision of the court and that unless enjoined in the matter, his or her interest will not be well articulated or protected unless made a party (**See Macadamia Nuts Dealers v Horticultural Crops Development Authority and others (Supra)**).

29. Similar position was held in the case of **Communication Commission of Kenya and 4 Others v Royal Media Services and 7 others (2014) eKLR** where the Supreme Court pronounced itself as follows:

**“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this court’s decision in the Mumo Matemo case where the court (at paragraph 14 and 18) held:**

**‘An interested party is one who has a stake in the proceedings, though he or she was not a party to the case abnitio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly, in the case of Meme v R (2014) 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:**

**(i) joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;**

**(ii) joinder to provide protection for the rights of a party or would otherwise be adversely affected in law;**

**(iii) joinder to prevent a likely cause of proliferated litigation. We ask ourselves the following questions: (a) what is the intended party’s state and relevance in the proceeding and (b) will the intended interested party suffer any prejudice if denied joinder”.**

30. In this case, the County Government of Migori has not sought leave to be enjoined as an interested party. It is the defendants who are seeking their joinder. It is incumbent upon the defendants to prove that the issues in controversy cannot effectively and completely be adjudicated upon without the participation of the intended interested party (**See Victor NdegwaMburu and Another v Rachael Wanjiru Kimatu and Another (2018) eKLR**). The onus lies with the applicant to prove that in the event of an order or decree, the same cannot be enforced without the intended interested party’s presence.

31. The applicants have not demonstrated to the court that they are likely to suffer prejudice if the County Government of Migori is not made a party. The suit herein revolves around firstly, unexplained wealth owned by the defendants which is a personal issue and that the

County Government has nothing to do with them. Secondly, that the properties in question are products of fictitious contracts by the County Government of Migori. These are matters of evidence in which the defendants/applicants will have an opportunity to prove the existence of legal contracts and the legitimacy of their sources of income in acquiring the impugned properties. They do not need the County Government of Migori to prove that fact on their behalf. If they need them, they will be at liberty to call any official from the County Government to testify on their side to vindicate their assertion that the impugned contracts were indeed legal.

32. I do not find any prejudice or miscarriage of justice likely to be suffered on the defendants or interested party's part by not enjoining the County Government. In any event, the money sought to be recovered will be surrendered to the County Government of Migori if the suit succeeds. Should the County Government of Migori feel aggrieved with any adverse remarks or sentiments expressed against them, they are at liberty to make necessary application for joinder but not through the defendants.

33. Accordingly, it is my finding that the applicants have not met the threshold for grant of the reliefs sought. To that extent I do hold that the application is not merited and the same is dismissed with costs to the respondent/plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF OCTOBER, 2019.**

**J.N. ONYIEGO**

**JUDGE**