



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC NO. 63 OF 2017 (O.S)

IN THE MATTER OF: BANK ACCOUNTS NUMBERS EQUITY BANK 0960195564643, 1550161806043 AND 0190101390586

IN THE MATTER OF: PARCELS OF LAND NOS. THIKA MUNICIPALITY BLOCK 24/485

-AND-

IN THE MATTER OF: THE ANTI-CORRUPTION & ECONOMIC CRIMES ACT, NO.3 OF 2003

BETWEEN

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

AND

JAMAL BARE MOHAMED.....DEFENDANT

RULING

1. The Plaintiff Commission filed an application by way of a Notice of Motion dated 6th October 2017 brought under **Section 1A, 1B, 3A, Order 40(1) and Order 51(1) of the Civil Procedure Act and Rules.**
2. The Plaintiff sought orders of a temporary injunction against the Defendant by himself, his agents, servants and or employees or any other person whosoever to be restrained from alienating, selling, charging, leasing, developing, sub-dividing, wasting, transferring, disposing or in any other way dealing with the parcel of land known as Thika Municipality Block 24/485, or dealing with funds held in account numbers [particulars withheld], [particulars withheld] and [particulars withheld] in Equity Bank Limited Thika Supreme Branch, or dealing with the motor vehicle registration number [particulars withheld] Toyota Station Wagon.
3. The application is supported by an affidavit of Paul Mugwe a forensic investigator with the Commission, dated 6th October 2017. The application is premised on the grounds that the Applicant has been investigating allegations of corruption and possession of unexplained assets involving the Defendant. The Plaintiff's investigations have established that the Defendant has unexplained assets to the tune of **Kshs. 47,535,585.63.**
4. The Plaintiff submits that the Defendant was furnished with a statutory notice requiring him to enumerate his property and how it was acquired. That the Defendant failed to give a satisfactory explanation about the disparity between his assets and his known legitimate sources of income, hence the application.
5. It is the Plaintiff's submission that it is reasonably apprehensive that unless an order of temporary injunction is issued against the Defendant, his agents, servants and or any other persons from transferring, disposing or otherwise dealing with the suit property pending the hearing and determination of the Summons filed to obviate dissipation of the assets, the proceedings will be rendered nugatory.
6. The Plaintiff submits that it has established a Prima Facie case with a probability of success against the Defendant, that the Defendant will not suffer any prejudice by the grant of the orders sought and that the balance of convenience tilts in favour of granting the orders.
7. The Defendant has opposed the application through a Replying Affidavit dated 10th November 2017, on grounds that the proceeds in his accounts are from legitimate undertakings. He submits that he is the sole custodian of his late father's wealth, acting as trustee on behalf of his family and relatives. That after his father's death, he took up the role of managing the inheritance after seeking the wise counsel of the rest of the family and relatives while adhering to Islamic law.

8. The Defendant states that he, together with his family, have engaged in livestock trade using the livestock inherited from his father for a period of more than 20 years, from the year 1995 to 2016. He avers that this business attracted good returns. He attributes the proceeds under scrutiny to the success of the livestock business.

9. The prayers sought by the Defendant are that the application be dismissed. That in the event that it is allowed, the uncontested assets be made available to him and that he be allowed access to a reasonable provision for his legal fees and for personal and his family's sustenance.

10. The Plaintiff filed a further affidavit sworn by Paul Mugwe and dated 18th December 2017 in which the Plaintiff reiterated the contents of the Supporting affidavit dated 6th October 2017 and stated that the Defendant's prayer seeking access to the assets he terms as uncontested ought to have been made in a separate application wherein parties can be allowed to respond accordingly.

11. At the hearing of this application, learned counsel M/s Kihuria for the Plaintiff in her submissions relied on the grounds in the application and the supporting and further affidavits of Paul Mugwe. She relied on the bundle of authorities dated 25th January 2018 and filed on the 26th January 2018. Counsel argued that the Plaintiff had met the principles for granting an injunction as outlined in the well-known case of **Giella v Cassman Brown & Co Ltd [1973] EA 358**.

12. Counsel submitted that the Plaintiff on receiving complaints that the Defendant was soliciting bribes along Thika Road, commenced investigations and obtained warrants to investigate the Defendant's accounts. The investigation revealed that the Defendant had unexplained assets to the tune of Kshs. 47 Million and the Defendant's explanation as to the source of his wealth was unsatisfactory.

13. Ms. Kihuria asserts that the Plaintiff had established a *prima facie* case by illustrating that it has a case against the Defendant with a probability of success. She has urged that if the orders sought are not granted, the Government of Kenya and the general public shall suffer irreparable harm.

14. To buttress its case the Plaintiff relied on the following cases:

a. Ethics and Anti-Corruption Commission vs Jimmy Mutuku Kiamba and 4 Others [2016] eKLR.

b. Kenya Anti-Corruption Commission vs Stanley Mombo Amuti [2011] eKLR where the Court of Appeal stated that an order of forfeiture can only be made if the property was still available for such forfeiture and it follows therefore that if there was no conservatory order, the property may well have ceased to exist rendering the success of the appeal pyrrhic.

c. Shivabhai Nathabhai Patel vs Manibhai Hathibhai Patel [1959] E.A 907 where the Court held that it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so.

d. Counsel also relied on the case of **Ethics and Anti-Corruption Commission vs Kanyi Joseph Karanja ACEC No. 16 of 2017** (unreported). Counsel submitted that if the orders are not granted the Defendant may dispose of or transfer the properties stated on the face of the application and in turn render the application nugatory.

15. Mr. Adano, learned counsel for the Defendant relied on the Replying affidavit of the Defendant Jamal Bare Mohammed dated 10th November 2017. He added that upon being served with a statutory notice, the Defendant filed a response explaining how he acquired the property which is the subject of this application. That at no given time did the Plaintiff request for further information or clarification.

16. Mr. Adano contended that the Defendant was the custodian of his family's wealth inherited from his late father and that he acted as trustee for the family and relatives. That under **section 32 of the Law of Succession Act** the Defendant had authority to manage the family inheritance and that he also engaged in livestock trade which generated large sums of money.

The Determination

17. I have considered the application, the responses thereto and the rival oral submissions by the parties herein. The issue for determination is whether sufficient basis has been laid by the Plaintiff, to warrant the grant of a temporary injunction against the Defendant's property cited on the face of this application.

18. The conditions for grant of an interlocutory injunction were finally settled in the case of **Giella v Cassman Brown & Co Ltd [1973] EA 358**. The principles are that: First, an applicant must show a *prima facie* case with a probability of success. Secondly, the injunction will normally not be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience. – See **Adalja v Hilton International (K) Ltd & another [1987] KLR**.

19. On whether the plaintiff has made out a *prima facie* case with a probability of success, the Plaintiff has explained that upon forming the opinion that the Defendant has unexplained assets within the meaning of the **Anti-corruption and Economic Crimes Act**, it issued a statutory notice to the Defendant as required by **Section 26** of the Act. The Defendant had the obligation of furnishing the Plaintiff with a written statement enumerating his property and the manner in which he acquired all such property.

20. The definition of unexplained assets is to be found in the **Anti-corruption and Economic Crimes Act** which provides in **section 2** that:

“unexplained assets means assets of a person-

a. acquired at or around the time the person was reasonable suspected of corruption or economic crime; and

b. whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.”

21. In the ruling of Odunga J in **Ethics and Anti-Corruption Commission vs Ministry of Medical Services & Another [2012] eKLR**, he captured the purpose of preservation orders under **Section 56(1) ACECA**, which reasoning can also apply to **Section 82(1) and (2) POCAMLA**. The judge stated thus:

“However, it is in my view that for the court to grant the orders under Section 56(1) a prima facie case must be presented before court that the property in question has been the subject of some corrupt dealings. It is not enough for the commission to simply walk into court with a request and expect the said orders to be granted. Where the said orders are granted and it turns out that either the court was misled or no prima facie case existed that the property was acquired as a result of corrupt conduct, the court would be perfectly entitled to vacate the orders. It is therefore not correct for the commission to submit that by granting the orders sought by the 2nd respondent herein, the court will be stopping the commission from conducting investigations. The commission is free to conduct its investigations but in a lawful manner. If the conduct of the investigations infringes upon the rights of an individual, the individual is entitled to complain and if the complaint is valid, the court is empowered to bar the commission from improper use of the powers vested in the commission. The Commission’s power is meant for the good of the public and not for the purposes for example, of settling personal scores.”

22. At this point however the court must consider this matter with a lot of circumspection. What is before the court are the Affidavits sworn by Paul Mugwe, the Plaintiff’s forensic investigator outlining the variance in the accounts of the Defendant, as measured against his known sources of income. The court cannot at this point make a finding that the property in issue is proceeds of crime.

23. In the supporting affidavit sworn by Paul Mugwe on 6th October 2017 he deposes that an analysis of the bank statements of the Defendant revealed that the Defendant deposited a total of Kshs.14,645,998.00 in account No. [particulars withheld] and a total of Kshs.136,000 in account No.[particulars withheld] respectively in the period running from January 2010 to 30th October, 2013. The Defendant further deposited a total of Kshs.28,668,037.00 in account No. [particulars withheld], the period covering 1st January 2013 to 14th October, 2016. All the accounts are in Equity Bank Thika Supreme Branch.

24. The Defendant had also deposited a total of Kshs.2,727,005.00 in his Mpesa account No. [particulars withheld] after legitimate transactions had been excluded. In the same period the Defendant purchased a parcel of land known as Thika Municipality Block 24/485 worth Kshs.3 million, although the Defendant himself put the value at Kshs.1.5 million. He also owns a car registration Number [particulars withheld] Toyota Station Wagon valued at Kshs.790,000/-.

25. It is also curious that the deposits in account No. [particulars withheld], Thika Supreme Branch indicate that they were made in tranches of between Kshs.200,000/= and Kshs.500,000/= weekly. At the material time the Defendant was attached to the Thika Patrol Base as a rider.

26. The Defendant’s known earnings were through his gross salary which stood at between Kshs.33,050/= and Kshs.38,630/= per month in the period under investigation. In his statutory declaration of Income, Assets and liabilities under the Public Officer Ethics Act of 2003 for the period under investigation, the Defendant declared total earnings of salary and allowances of Kshs.948,120, Kshs.4,300,00 from farming and rental income of Kshs.180,000 per year. Obviously therefore the Defendant’s assets are not commensurate with his income as a Police Constable.

27. The Defendant was given a chance to explain the sources of his wealth as required by law. The Defendant claims he rightfully acquired the large sums of money by engaging in livestock trade with the livestock inherited from his father. He asserts that he and his family engaged in livestock trade for a period of more than 20 years, from the year 1995 to 2016, and that this business attracted good returns. He attributes the proceeds under scrutiny to the success of the livestock business.

28. I note however that he has not produced any records of the inheritance, nor has he produced any evidence of the businesses alluded to. If indeed the money comes from a livestock business it is curious that there is no evidence of withdrawal of cash to purchase the livestock required for sale in the period from April 2015 to December, 2015. In light of the foregoing, I find that the Plaintiff has established a prima facie case with a probability of success.

29. On whether the Applicant will suffer irreparable loss if the orders sought do not issue, the words of Sergon J in **Ethics and Anti-Corruption Commission v Jimmy Mutuku Kiamba and Others [2016] eKLR** commend themselves to the circumstances of this case. In the above cited case Sergon J rendered himself thus:

“In my humble assessment of the competing arguments, I am of the view that the Applicant has shown that unless the order is granted, the Applicant will suffer irreparable loss in that the Defendants/Respondents will be at liberty to deal with the mentioned properties in the manner stated on the face of the motion. This will mean that the Applicant will have nothing to recover in furtherance of its statutory mandate. This in my view is irreparable loss which cannot be compensated in monetary terms.”

30. The balance of convenience too tilts in favour of the Plaintiff commission which will be inconvenienced if the orders sought are not granted. It is the commission which will have to expend resources to trace and recover the money if successful in their application and the costs would be borne by the tax payers. The Defendant’s salary account at Equity Bank to which he was allowed access by a consent adopted as an order of the court on 29th November 2017 is available to him.

31. Under **section 11** of the **Ethics & Anti-Corruption Commission Act** and **section 55** of the **Anti-Corruption and Economic Crimes Act, No. 3 of 2003** the Commission has the mandate to undertake investigations into allegations of corruption or economic crimes, and in appropriate cases, to institute civil proceedings against any person for the recovery of assets, whose value is disproportionate to his known legitimate sources of income.

32. It is therefore in the interest of justice that the Commission be allowed to exercise its mandate to determine whether the sum of money held by the Defendant was rightfully acquired or whether the Defendant is culpable of any economic crime. This can only be determined once the Originating Summons dated 7th August 2017 is heard and determined.

33. The Plaintiff has the mandate of recovering unexplained assets as provided under **Section 55** of the **Anti-corruption and Economic Crimes Act** and such proceedings have been commenced by way of Originating Summons dated 7th August, 2017. In the event that the property named in the face of this application ceases to exist and the proceedings are successful, the orders granted by the court will be rendered nugatory. It is the duty of the court to ensure that it preserves property in issue, to ensure that its proceedings and consequent orders are not in vain and can be enforced– See the decision in the case of **Shivabhai Nathabhai Patel vs Manibhai Hathibhai Patel [1959] E.A 907**.

34. After a careful consideration of the rival averments and submissions the application dated 6th October 2017 is found to have merit and is allowed with exemption to the funds held in the Defendant’s salary account in Equity Bank account number [particulars withheld]. There are no orders as to costs.

SIGNED DATED and **DELIVERED** in open court this **14th** day of **March, 2018**.

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L. A. ACHODE

JUDGE

In the presence of:.....for the Plaintiff

In the presence of:.....for the Defendant