



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**CIVIL SUIT NO. 1 OF 2018**

ETHICS & ANTI CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

ESTAMA INVESTMENT LTD.....1<sup>ST</sup> DEFENDANT

BUSINESS CAPITAL ACCESS LTD.....2<sup>ND</sup> DEFENDANT

DIVERSITY DISTRIBUTORS LTD.....3<sup>RD</sup> DEFENDANT

MEDAFRICA LTD.....4<sup>TH</sup> DEFENDANT

NJAGE MAKANGA.....5<sup>TH</sup> DEFENDANT

DR. NICHOLAS MURAGURI.....6<sup>TH</sup> DEFENDANT

EPHANTUS MAINA THIGA.....7<sup>TH</sup> DEFENDANT

BENN KHADIAGALA.....8<sup>TH</sup> DEFENDANT

MAMO UMURO.....9<sup>TH</sup> DEFENDANT

PETER GACHENGE.....10<sup>TH</sup> DEFENDANT

ELKANA ONGUTI.....11<sup>TH</sup> DEFENDANT

SUSAN OTIENO.....12<sup>TH</sup> DEFENDANT

DR. OMBACHO KEPHA MOGERE.....13<sup>TH</sup> DEFENDANT

KARIUKI IRERI NJAGI.....14<sup>TH</sup> DEFENDANT

AND

KENYA GOOD LAND INVESTMENT.....1<sup>ST</sup> INTERESTED PARTY

EDMAR ENTERPRISES LTD.....2<sup>ND</sup> INTERESTED PARTY

**RULING**

1 The 2<sup>nd</sup> interested party who is the Applicant in the application dated 9<sup>th</sup> August 2018 is seeking the following orders:

(b) That the ex-parte injunction orders obtained by the plaintiff on the 16<sup>th</sup> day of January 2018 and thereafter extended

*by consent between the advocates of the plaintiff and M/s Waweru & Co. Advocates for the 1<sup>st</sup> to the 5<sup>th</sup> defendant/respondents be set aside or varied in as far as they affect and prejudice the 2<sup>nd</sup> interested party.*

*(c) That the 2<sup>nd</sup> interested party, EDMAR ENTERPRISES limited be permitted to withdraw a sum of Kshs 6,288,917/- deposited into account No. 0130295032062 Equity Bank of Kenya, Gate House Branch in Nakuru and any other money that procedurally and lawfully may be paid or deposited into that account presently and in the future.*

*(d) That the plaintiff/respondent be ordered to serve the summons and all the pleadings regarding this matter to the 2<sup>nd</sup> interested party.*

*(e) That the costs and incidental to this application be provided for in favour of the 2<sup>nd</sup> interested party.*

2 The application is supported by the grounds on its face and an affidavit by one Edward Njogorio Muchiri one of the directors of the 2<sup>nd</sup> interested party company.

3 The application has been opposed by the Plaintiff/Respondent which has filed a replying affidavit through Paul Mugwe a forensic investigator with the Plaintiff/Respondent.

4 Both counsel made oral submissions in favour of and against the application. The 2<sup>nd</sup> interested party/application has indirectly accused the court of injustices he believes have been done to him and I believe it's the duty of this court to set the record straight.

5 There is an initial ACEC Misc application no 27 of 2017 which was filed against the current 1<sup>st</sup>, 2<sup>nd</sup>, and 5<sup>th</sup> defendants and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. It was filed under section 56 of the ACECA seeking preservation orders in respect to funds in the bank accounts mentioned herein. This was done when the EACC was investigating this matter.

6 Upon completion of the investigations the EACC filed this suit ACEC No 1 of 2018 for recovery of some funds. In the Misc. Application the current 2<sup>nd</sup> interested party was represented by the firm of Waweru Gatonye. When the current suit was filed the Misc Application No. 27 of 2017 was closed as it had served its purpose and the two files could not run simultaneously.

7 The Plaintiff filed the plaint herein on 3<sup>rd</sup> January 2018 together with a notice of motion of even date. On 16<sup>th</sup> January 2018 this court granted interim orders in terms of prayer no 2 of the Notice of Motion which was to the effect that:

**Pending interpartes hearing and determination of the notice of motion the Defendant/Respondents and all others named were restrained from dealing with money in the following accounts.**

**(i) A/C No 0150270856370 held at Equity bank in the name of the 2<sup>nd</sup> Defendant.**

**(ii) A/C No 0150371108352 held at Equity bank in the name of the 2<sup>nd</sup> defendant.**

**(iii) A/C Nos. 1202807267 and 1634228664 held at Kenya Commercial Bank Ltd in the name of the 2<sup>nd</sup> defendant.**

**(iv) A/C No 0130295032062 in the name of Edmar Enterprises Ltd held at Equity Bank.**

**(v) A/C No 1470263984328 in the name of Kenya Goodland Investments held in Equity Bank.**

8 The 2<sup>nd</sup> interested party was enjoined as a party to the proceedings by an order of this court dated 31<sup>st</sup> January 2018. There is evidence that M/s Waweru Gatonye's office were served with the pleadings related to these proceedings on behalf of the 2<sup>nd</sup> interested party. All along a Mr Muchiri from Waweru Gatonye's firm appeared for the 1<sup>st</sup>-5<sup>th</sup> defendants and the 2<sup>nd</sup> interested party, in this matter and the court was under the belief that the firm had instructions to act for the 2<sup>nd</sup> interested party in this matter.

9 I have however perused the entire record and there is no Notice of Appointment of Advocates filed by Waweru Gatonye advocates in respect to the 2<sup>nd</sup> interested party. The said firm only filed a Memorandum of Appearance in respect of the 1<sup>st</sup>-5<sup>th</sup> defendants on 22<sup>nd</sup> January 2018.

10 On 13<sup>th</sup> March and 30<sup>th</sup> May 2018 Mr Muchiri from Waweru Gatonye's firm continued to appear for the 2<sup>nd</sup> interested party when directions were taken in respect of ongoing negotiations and interim orders were extended.

11 The negotiations have gone on and it is only on 9<sup>th</sup> August 2018 when the 2<sup>nd</sup> interested party filed the present application raising various claims. One thing is clear that this court has not heard the plaintiff's notice of motion application dated 3<sup>rd</sup> January 2018 for injunctive orders. The 2<sup>nd</sup> interested party cannot therefore claim to have been condemned unheard and discriminated against by the court when on the face of the record the firm of Waweru Gatonye had been served and was appearing for him.

#### **Determination**

12 I have considered the application, the affidavits and the oral submissions by counsel. The prayers for discharge of the orders of the court dated 31<sup>st</sup> January 2018 cannot be varied at this juncture since they have been extended by the parties by consent.

13 Most important is the fact that the court has not heard the application *interpartes*. In the circumstances, the application by the 2<sup>nd</sup> interested party is disallowed to pave room for the main application dated 3<sup>rd</sup> January 2018 to be heard. The following orders are made:

- (i) The plaintiff to serve the 2<sup>nd</sup> interested party with all its pleadings.
- (ii) The 2<sup>nd</sup> interested party to file and serve its defence and response to the notice of motion dated 3<sup>rd</sup> January 2018 within 14 days from date of service.
- (iii) The 2<sup>nd</sup> interested party to file and serve its submissions to the notice of motion within the same 14 days.
- (iv) The rest of the parties are expected to have complied with the directions given by Justice Achode on 31/1/18 in respect of filing submissions. If they have not, they too should file their submissions within 14 days.
- (v) Mention on 19<sup>th</sup> November 2018 9 am to confirm compliance and take a date for highlighting of submissions.

Orders accordingly.

**Signed, dated and delivered this 31<sup>st</sup> day of October 2018 in open court at Nairobi.**

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**HEDWIG I. ONG'UDI**

**JUDGE**