



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC SUIT NO. 14 OF 2018 (O.S)

IN THE MATTER OF: ACCOUNT NUMBER [...] IN NATIONAL BANK LIMITED, HILL PLAZA BRANCH IN THE NAME OF JOSEPH CHEGE GIKONYO, ACCOUNT NUMBER [...] IN BARCLAYS BANK LIMITED, 065- KAREN BRANCH IN THE NAME OF GICHE LIMITED, ACCOUNT NUMBER [...] BARCLAYS BANK LIMITED, 082- HAILE SELASSIE AVENUE BRANCH IN THE NAME OF JOSEPH CHEGE GIKONYO, ACCOUNT NUMBER [...], 0164695824, [...] ALL IN BARCLAYS BANK LIMITED, 016- NKRUMAH BRANCH IN THE NAME OF JOSEPH CHEGE GIKONYO

IN THE MATTER OF: PROPERTIES

(A) LR. NO MN/1/13698, CR., NO 39366

LOCATED IN SHANZU MOMBASA COUNT

(B) LR. NO. MN/1/17641, CR NO. 56649 LOCATED IN

NYALI

(C) KILIFI/MTWAPA.1560, A FARM HOUSE IN KILIFI

COUNTY

(D) MOMBASA/BLOCK/XVII/1408, A HOUSE IN

KIKOWANI

(E) CR. NO 22568, LR NO IMN/7182 HOUSE IN VESCON

ESTATE NO 107

(F) HOUSE IN UMOJA 1 HOUSE NO. L 147

(G) A BLOCK OF FLATS IN UMOJA INNERCORE V 149

(H) LR NO. 9122/21 CR NO 40130 MTWAPA KILIFI

(I) 5025/1251 CR NO 66317 IN KILIFI DISTRICT

(J) 11606/II/MN CR NO 51997 IN MOMBASA COUNTY

(K) 11607/II/MN CR NO 51999

(L) KWLE/MWANGUNDA/932 IN KWLE COUNTY

(M) NAIROBI/BLOCK 82/8759 HOUSE IN GREENSPAN

NAIROBI HSE NO 321

(i) LR NO 15400/254,

i. LR NO 15400/255,

ii. LR NO 15400/284,

iii. LR NO 154/285

iv. LR NO15400/286

v. LR NO15400/287

vi. LR NO15400/288

vii. LR NO15400/289

viii. LR NO15400/290

ix. LR NO15400/293

x. LR NO15400/294

xi. LR NO15400/577 AND LR. NO LR NO15400/578 SITUATE IN SOSIAN ESTATE NAIROBI

IN THE MATER OF: SHARES AND INSURANCE POLICIES

(i) SAFARICOM LTD SHARES

(ii) EQUITY BANK LTD SHARES

(iii) KENYA REINSURANCE CORPORATION

(iv) KENYA ELECTRICITY GENERATING COMPANY (KEN GEN)

(v) MADISON INSURANCE CO. KENYA LTD

AND

IN THE MATTER OF: THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

BETWEEN

ETHICS & ANTI CORRUPTION COMMISSION.....PLAINTIFF

AND

JOSEPH CHEGE GIKONYO.....1ST DEFENDANT

LUCY KANGAI STEPHEN.....2ND DEFENDANT

GICHE LIMITED.....3RD DEFENDANT

FRANCIS IRUNGU THUITA.....INTERESTED PARTY

RULING

1 The Plaintiff/Respondent has filed this suit under section 55 of the Anti Corruption and Economic Crimes Act No. 3 of 2003 (ACECA) and Order 37 Rule 14 Civil Procedure Rules seeking orders that

(i) The listed properties be declared unexplained assets.

(ii) An injunction do issue prohibiting any transactions on the said properties.

2 Together with the suit was filed a Notice of Motion dated 20th July 2018 under section 1A, 1B Civil Procedure Act and Order 40(1), 51(1) Civil Procedure Act and Rules section 56A of ACECA seeking temporary orders of injunction to prohibit any transactions on these properties.

3 Before the said Notice of Motion could be heard the defendants filed a notice of Preliminary Objection dated 30th July 2018 on the following grounds:

(i) *The Plaintiff's suit offends the provisions of section 7 of the Civil Procedure Act and is res judicata considering that the issues raised in this suit were substantially and materially determined by this court in **Misc. Application no. 98 of 2016 – EACC vs Joseph Chege Gikonyo & Anor.***

(ii) *The Plaintiff's suit is an abuse of the court process and a collateral attack on the final determination issued by this court in **Misc. Civil Application no. 98 of 2016 – EACC v Joseph Chege Gikonyo.***

(iii) *The following properties and bank accounts submitted by the Plaintiff ought to be struck off the record for being res judicata and a collateral attack on the final determination made in **Mis. Application No. 98 of 2016 – EACC v Joseph Chege Gikonyo.***

- a. Bank account no 0124303155100 held at National Bank of Kenya Ltd.
- b. Bank account no. 0161379611 held at Barclays Bank Limited
- c. Bank account no.0824716420 held at Barclays Bank Limited
- d. Bank account no.0164820416 held at Barclays Bank Limited
- e. Bank account no.0164695824 held at Barclays Bank Limited
- f. Bank account no.0164821188 held at Barclays Bank Limited
- g. LR no MN/1/13698, CR No 39366 Shanzu Mombasa county
- h. LR no MN/1/17641 CR No 56649 Mombasa county (Original MN/Section 1/3166)
- i. Plot No Mombasa/Block XVII/1408
- j. LR No Kilifi/Mtwapa/1560
- k. Plot No L47 Umoja, Nairobi

4 At the same time the Interested Party filed a Notice of Motion dated 20th August 2018 seeking the following orders:

(i) *spent*

(ii) *Pending the hearing and determination of this application inter partes, an order be issued joining Francis Irungu Thuita as an Interested Party in these proceedings.*

(iii) *Pending the hearing and determination of this application inter partes the Plaintiff be restrained from summoning and or interrogating the Interested Party in relation to any question surrounding the Plaintiff's acquisition of LR no. 17641/Section 1/MN (Original No. 3166), CR NO. 56649.*

(iv) *Pending the hearing and determination of this suit, the Plaintiff be restrained from summoning and or interrogating the Interested Party in relation to any question surrounding the Plaintiff's acquisition of LR No. 17641/Section1/MN (Original No. 3166), CR No. 56649.*

(v) *An order be issued setting aside, varying and or completely discharging the order granted by this Hon. Court on 20th July, 2018 restraining the Defendants from alienating, selling, charging, subdividing or transferring LR No. 17641/Section1/MN (Original No. 3166), CR No. 56649.*

(vi) *An order be issued directing the Land registrar, Mombasa to cancel entry no. 6 being the court order issued on 20th July 2018 against the title deed to property known as LR No. 17641/Section 1/MN Original No. 3166) CR No 56649.*

(vii) *The costs of this application be provided for.*

5 The same is supported by the grounds on its face and the affidavit of Francis Irungu Thuita. His main issue is that matters relating to the property known as LR No 17641/section 1/MN (original No. 3166), CR No 56649 (the suit property) were determined vide **High Court Misc. Application No. 98 of 2016 – EACC v Joseph Chege Gikonyo & Anor** by Justice Serгон.

Directions were given to the effect that the Preliminary Objection and the Notice of Motion dated 20th August 2018 be heard simultaneously.

6 The 1st Defendant filed a replying affidavit supporting the application by the Interested Party. He averred that he had entered into a sale agreement with the Interested Party for sale of the Land LR No MN/1/17641, CR NO 56649. Later they amended the payment schedule due to the financial difficulties the Interested Party had found himself in. He said he continues to collect the rental money from the property and still holds onto the property title.

7 Mr James Kamau Kariuki an investigator with the EACC said he was part of the team investigating the acquisition of this property by the Interested Party. He averred that the property changed hands soon after a notice to explain how the 1st Defendant had acquired the said property was issued. He deponed that the Interested Party not having been a party to the Civil Misc. application No 98 of 2016 (supra) cannot aver to facts in that matter.

8 He further averred that at the time the Misc Application No 98 of 2016 was heard the plaintiff could not disclose much as the matter was still under investigations. It was his view that the 1st Defendant and Interested Party were colluding to defeat the efforts by the Plaintiff to recover the suit property. He also suspected the addendum to the sale agreement since through it the 1st Defendant still collects rents from the premises.

9 He pointed out that the collateral given by the Interested Party was properly situated in Maragua, Murang'a County purchased at Kshs 200,000/- while the suit property is valued at Kshs 125M. He also averred that the payment of stamp duty was contrary to the regulations. The sale was therefore illegal, null and void as the consent of the Commissioner for Lands was never sought. He deponed that the temporary injunction should remain in force to enable the court deal with the pressing issues in this matter.

10 In a supplementary affidavit the 1st Defendant averred that the property was transferred to the Interested Party more than 1.5 years after being served with the letter to explain the acquisition of the property. He dismissed the Plaintiff's replying affidavit as being unreliable and that the sale agreement had been agreed on by him and the Interested Party.

11 On the value of the collateral property he said its value was much higher than claimed by the Plaintiff and in any event it was him who had accepted it. The Interested Party filed a further affidavit in which he averred that the sale agreement was based on mutual trust between them. That they complied with all requirements under the relevant provisions of the law.

12 James Kamau Kariuki in his further affidavit reiterated what he had stated in his replying affidavit. He averred that the matter in Misc. Application No 98/2016 (supra) was an application for preservation and the application under section 56 (4) ACECA could not have turned it into a hearing. He said the 1st Defendant still had a beneficial interest in the suit property and the same should therefore continue being preserved.

13 He deponed further that the conduct of the 1st Defendant and Interested Party was very suspicious. That there was no valid contract between them.

14 When the preliminary objection and notice of motion came for hearing Mr. Ishmael for the Defendants submitted that the issue was whether issues determined under section 56 (1) ACECA can form the basis of an application under section 55 by the EACC. He submitted that in Misc 98/16 the orders freezing the Defendants properties were challenged under section 56(4) ACECA and the Court discharged the orders under section 56(5) ACECA vide the Ruling delivered on 9th September 2016. The Ruling cleared the 1st Defendant he submitted.

15 He contended that section 55 of ACECA was about unexplained assets and the Plaintiff has no evidence of corruption against the Defendants. He submitted that since the Defendants were cleared, what is before the court was an abuse of the process. The matter is *res judicata* and an attack on the Ruling of Seron J. He referred to section 7 Civil Procedure Act arguing that the plaintiff never appealed against the ruling by Justice Seron.

16 He accused the Plaintiff/Respondent of not disclosing material facts to the court in Misc. 98/16. Had they done so the court would have taken a different approach.

17 On the Notice of Motion by the Interested Party counsel submitted in support of the application. He said the suit property was sold a year after the discharge and so there was no mischief, collusion, or illegality.

18 Mr Wachira for the Interested Party submitted that their interest was in property No LR MN/1/17641 only. He said the Interested Party bought the property and is registered as the owner. He has availed all the relevant documents and was not a party to the previous proceedings.

19 Mrs Shamalla for the Plaintiff/Respondent relying on the case of **Mukhisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd [1969] E.A 696**, submitted that a preliminary objection should only raise matters of law. The issues in civil Misc. No 98/16 and the current case are so different. Whereas the Misc. 98/16 was under section 56 (1) ACECA for preservation orders, the present case is under section 55 ACECA for forfeiture of unexplained assets. The ruling she said outlines section 56 ACECA and is very clear.

20 At that time she argues that an analysis was on going and no decision had been reached. There was no trial and therefore no judgment. She referred to the case of **Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General and 4 Others [2017] eKLR** which is a Court of Appeal decision on *res judicata* which says that it must be shown that the matter in both cases is the same. That since the matter in Misc. 98/16 was interlocutory it cannot bind this court as it was not a judgment.

21 She went further to submit that in the Misc application they were dealing with 11 properties but the originating summons has 15

properties including shares. She argued that the Defendants want the court to strike out the originating summons yet they have not followed the procedure under Order 3 Civil Procedure Rules.

22 She opposed the Interested Party's application saying they had reservations about the sale agreement, as the suit property was transferred before payment and the dates on the transfer document are so contradictory. She contended that the Interested Party is not in possession and neither has he got title, and the 1st defendant is still collecting rent.

23 It was her submission that when counsel for the 1st defendant wrote them a letter dated 28th May 2018 he never mentioned anything about sale of the property. Further the collateral given by the Interested Party is a small piece of land valued at Kshs 200,000/-. Referring to the **Lawrence P. Mukiri case** (supra) she said the Interested Party is not a *bonafide* purchaser. To her this suit property is held in trust for the 1st defendant and it will still be investigated (section 55(7) ACECA). She urged the court to dismiss the preliminary objection and the notice of motion.

24 In a rejoinder Mr. Ismael submitted that there were letters in the Misc. No 98/16 by the Applicant seeking explanations from the Defendants. He wondered what then they were still investigating. He contended that the Defendants were not asking for the entire suit to be struck out. That the preliminary objection was in respect to what had been raised in the grounds only.

25 Mr Wachira for the Interested Party added that as at the time of the purchase of the property there was no encumbrance, and there was a *bonafide* purchaser. That the consideration is executory and the Interested Party is not holding the property in trust.

Determination

26 I have duly considered the preliminary objection and the application, affidavits, and submissions and the authorities cited. The issue for determination is whether this suit is *res judicata* as far as the following properties are concerned.

- a. Bank account no 0124303155100 held at National Bank of Kenya Ltd.
- b. Bank account no. 0161379611 held at Barclays Bank Limited
- c. Bank account no.0824716420 held at Barclays Bank Limited
- d. Bank account no.0164820416 held at Barclays Bank Limited
- e. Bank account no.0164695824 held at Barclays Bank Limited
- f. Bank account no.0164821188 held at Barclays Bank Limited
- g. LR no MN/1/13698, CR No 39366 Shanzu Mombasa county
- h. LR no MN/1/17641 CR No 56649 Mombasa county (Original MN/Section 1/3166)
- i. Plot No Mombasa/Block XVII/1408
- j. LR No Kilifi/Mtwapa/1560
- k. Plot No L47 Umoja, Nairobi

27 It is the defendant's contention that the issues raised in this suit were substantially and materially determined by this court in **Misc application No. 98 of 2016 EACC vs Joseph Chege Gikonyo & Anor.** He raised this issue by way of a preliminary objection.

28 What then is a preliminary objection? The Court of Appeal in the case of **Godfrey Kinuu Maingi and 4 Others v Nthimbiri Farmers Co-operative Society [2014] eKLR** had this to say of what a preliminary objection is:-

The law and principles applicable to preliminary objections were set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd – Vs – West End Distributors Ltd (1969) EA 696** by Law J.A. that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point may dispose of the suit.”

Sir Charles Newbold P in the same case had this to say:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Jackton J.B. Ojwang (sic) in Oraro – Vs – Mbajja (2005) eKLR held that:

“I think the principle is abundantly clear. A preliminary objection, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

From the above principles, it is clear that a legal point or ground for objection of a suit or an application is limited to the test set in Mukisa Biscuit case and therefore any issue that would require probing for it to be proved is not a preliminary objection. In addition, the preliminary objection raised must be capable of disposing of the entire application, to avoid unnecessarily increasing costs and confusing of issues.”

29 The main issue raised by the 1st Defendant and the Interested Party is that this suit offends the provisions of section 7 of the Civil Procedure Act as it is *res judicata*. This is a clear point of law which does not require any evidence to be adduced to have it argued. It squarely falls within the definition of a preliminary objection as explained above.

30 When, then can a matter be said to be res judicata?

Res Judicata is a doctrine of law founded on public policy and aimed at ensuring two objectives, namely: there must be a finality to litigation and that parties who have gone through litigation should not be subjected to the same tests. Section 7 of the Civil Procedure Act provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

31 In explaining this doctrine the Court of Appeal in the case of Kenya Hotel Properties Limited vs Willsden Investments Limited and 6 Others [2013] eKLR had this to say”

16. This doctrine has been explained by the Court of Appeal in a number of cases. See the case of James Katabazi and 21 Others v The Attorney General of the Republic Of Uganda EACJ where the Court stated that for the doctrine to apply:-

- . the matter must be ‘directly and substantially’ in issue in the two suits,
- . the parties must be the same or parties under whom any of them claim, litigating under the same title; and

The matter must have been finally decided in the previous suit (See also the case of Wille Versus Michuki & 2 others (2004) KLR 357 wherein the court reiterated the afore set out principles and stressed that for the doctrine of Res judicata to apply three basic conditions must be satisfied namely that there was a former or proceeding in which the same parties as in the subsequent suit; litigated the matter in issue in the latter suit must have been directly and substantially in issue in the former suit and lastly that a court competent to try it had heard and finally decided the matter in controversy between the parties in the former suit.

We agree with the aforesaid construction that the doctrine of *res judicata* is aimed at achieving firstly finality to litigation and secondly that an individual should not be harassed on account of the same litigation more than once.”

32 In Misc Application No 98 of 2016, the application dated 11th March 2016 therein was filed by the Applicant/Respondent under section

56 (1) ACECA seeking preservative orders in respect to some of the properties/assets mentioned in the Originating summons. The Preservation orders sought were granted. The Respondent filed an application dated 31st March 2016 under section 56(4) ACECA seeking the variation or discharge of the preservative orders. The application was heard and a Ruling delivered, setting aside the orders preserving the properties.

33 It is the Applicant/Respondent’s submissions that the said Ruling was an interlocutory one and would not have determined the issues raised in this originating summons since there was no hearing nor judgment.

34 The record shows that the application dated 31st March 2016 in Misc. 98 of 2016 was heard *inter partes*. Before making the final orders the Court in the Ruling dated 9th September 2016 found as follows:

“In seeking to discharge the exparte freezing orders, the 1st Respondent has by his averments and annexures demonstrated how he started his investments in real estate and establishment of a spares business which enabled him to gain profits which he used to develop real estate business. The 1st Respondent was able to also show that the profits from the aforesaid ventures were used to expand horticulture and animal farming as well as the sale and supply of building and construction materials. The 1st Respondent has further demonstrated that the cash deposits made into the 2nd Respondent’s bank account is income

derived from the above mentioned sources i.e farming proceeds and rental incomes. The 1st Respondent has given a detailed summary of the loans taken from various financial institutions and used to acquire and develop various plots. I have carefully perused the replying affidavit filed by the Applicant/Respondent and it is apparent that EACC did not attempt to rebut any of the documents and averments submitted by the Respondents. The Applicant/Respondent's answer to those averments and documents are basically speculative. No credible evidence was submitted of corrupt conduct against the 1st respondent. A reading of the replying affidavit of James Kamau Kariuki shows that EACC relied on undisclosed sources and beliefs without stating the grounds on which the belief is held. What has come out clearly from the replying affidavit is that the 1st Respondent is being accused of making false declarations in his wealth declaration forms. It is pointed out that in his declaration forms for 2007-2009 and 2011-2013, it is alleged that the 1st respondent did not disclose his rental income and some properties therefore this amounts to knowingly making false declarations. I have looked at the provisions of section 28 of the Public Officers Ethics Act, 2003, and it is apparent that the Act contemplates that a public officer may inadvertently omit certain information in the wealth declaration and accordingly gives leeway to the commission to seek clarifications within 6 months from the date of the declaration by the public officer. There is no evidence that the 1st Respondent was ever required to make any clarifications relating to any of his wealth declarations. Through the current motion, the 1st respondent has stated that the omissions EACC has pointed out relating to his wealth declarations were inadvertent and not intended to be false nor to mislead. In any case section 31 of the aforesaid Act envisages a judicial process where a public officer is subjected to criminal charges for knowingly making false and misleading declarations which is not the case here. In my humble appreciation of the Applicant/Respondent's response to the Respondent's/Applicants' motion, EACC has not displaced the averments made by the Respondent's nor has EACC tendered credible evidence to demonstrate, specify and particularise the allegations of corruption against the 1st Respondent. In other words there is no serious attempt on the part of the Applicant/Respondent to carry out investigations to link the Respondent with the act of corruption. It is clear from the pleadings and the submissions that the Applicant/Respondent is heavily relying on inferences to form the opinion that the 1st respondent acquired and developed the properties mentioned herein by corrupt conduct. In my view, though these proceedings are civil in nature, the allegation levelled against the 1st respondent is the commission of corruption, which is a serious offence. The threshold is therefore high and the Applicant/Respondent cannot solely rely on inferences to establish such an offence.

35 The findings and orders by Hon Justice Serگون are very clear. The same were made under section 56 (5) ACECA which provides:

“The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.”

Though made under an interlocutory application the fact remains that the orders were made and they determined the issues being raised in this originating summons in respect to the specifically mentioned properties/assets.

36 The Ruling of 9th September 2016 has not been challenged and this Court being a court of equal status with the Court that rendered the said decision cannot overrule it as that would amount to sitting on appeal over a matter of a Court of equal status.

37 The Notice of motion dated 20th August 2018 filed by the Interested Party concerns a property known as LR No 17641/section 1/MN (original No 3166), CR No 56649. This property is one of those that was the subject of the Ruling of 9th September 2016 and appears under prayer No. 2 (h) which was granted. The Interested Party's application is therefore swallowed and covered by the preliminary objection raised herein.

38 After due consideration of the material before me, I find that the preliminary objection dated 30th July 2018 and the notice of motion dated 20th August 2018 have merit and I allow them.

39 The properties/assets whose issues were determined vide the Ruling dated 9th September 2016 in Misc. Application No 98 of 2016 should therefore not be part of the claim in this originating summons. The properties are as listed below:

- (a) Bank account no 0124303155100 held at National Bank of Kenya Ltd.
- (b) Bank account no. 0161379611 held at Barclays Bank Limited
- (c) Bank account no.0824716420 held at Barclays Bank Limited
- (d) Bank account no.0164820416 held at Barclays Bank Limited
- (e) Bank account no.0164695824 held at Barclays Bank Limited
- (f) Bank account no.0164821188 held at Barclays Bank Limited
- (g) LR no MN/1/13698, CR No 39366 Shanzu Mombasa county
- (h) LR no MN/1/17641 CR No 56649 Mombasa county (Original MN/Section 1/3166)
- (i) Plot No Mombasa/Block XVII/1408

(j) LR No Kilifi/Mtwapa/1560

(k) Plot NO L47 Umoja, Nairobi

40 The order issued on 20th July 2018 in respect to the above named properties/assets is vacated.

Costs in cause.

Orders accordingly.

Dated signed and delivered this 23rd day of November 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE