



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CIVIL SUIT NUMBER 20 OF 2018(O.S)

IN THE MATTER OF: ACCOUNT NUMBERS: 1300012747/1000256249 NIC BANK KISUMU BRANCH HELD IN THE NAME OF STEPHEN OGAGA OSIRO,

0100003684428 CFC STANBIC BANK LIMITED HELD IN THE NAME OF STEPHEN OGAGA OSIRO, 01100012561901 COOPERATIVE BANK LIMITED KISUMU BRANCH HELD IN THE NAME OF STEPHEN OGAGA OSIRO,

01105014046100 COOPERATIVE BANK LIMITED KISUMU BRANCH HELD IN THE NAME OF LOUIS ODHIAMBO OSIRO C/O STEPHEN OGAGA OSIRO, 0100003267541 CFC STANBIC BANK LIMITED KISUMU BRANCH HELD IN THE NAME OF STEPHEN OGAGA OSIRO,

0100001463033 CFC STANBIC BANK LIMITED KISUMU BRANCH HELD IN THE NAME OF CAROLINE ADHIAMBO OBWA

IN THE MATTER OF: PROPERTIES

- i. PLOT NUMBER L.R NO. 7785/532-RUNDA REGISTERED IN THE NAME OF CAROLINE ODHIAMBO OBWA**
- ii. FLAT NO. B1 –BLOCK B ON LR NO 209/8875 REGISTERED IN THE NAME OF CAROLINE ODHIAMBO OBWA;**
- iii. APARTMENT NO. B2 ON LR NO.330/1211 REGISTERED IN THE NAME OF STEPHEN OGAGA OSIRO**
- iv. APARTMENT NO SPG/12/L4/015 OF TYPE LNYX 4(38 SQM) ON LR NO 209/6705/6 REGISTRED IN THE NAME OF STEPHEN OGAGA OSIRO**
- v. FLAT NO. A1 ON LR NO.209/9684 REGISTERED IN THE NAME OF CAROLINE ODHIAMBO OBWA**
- vi. APARTMENT NO. 3 ON BLOCK C ON RIARA APARTMENT ON LR NO. 330/140 NAIROBI**
- vii. KISUMU/MUNICIPALITY/BLOCK 14/250**
- viii. KISUMU/MUNICIPALITY/BLOCK 14/251**
- ix. KISUMU/MUNICIPALITY/BLOCK 14/269**
- x. KISUMU/MUNICIPALITY/BLOCK 12/217 UNIT NO. 13 AND 625**
- xi. KISUMU/WEST AGORO/2546**
- xii. KISUMU/WEST AGORO/1700**
- xiii. 6072/WAWIDHI A1/NYANDO**
- xiv. PLOT NO. 6267 WAWIDHI A1 ADJ SECTION**
- xv. 6268 WAWIDHI A1 ADJ SECTION**

xvi. KISUMU/MUNICIPALITY/BLOCK 5/699

xvii. 10 ACRES LR NO. 6046/1 MUHORONI TOWNSHIP

xviii. KJD/KITENGELA/72600

xix. KJD/KITENGELA/25322/432

IN THE MATTER OF: MOTOR VEHICLE REGISTRATION NUMBER

i. KBZ 474 F, TOYOTA PRADO AND

ii. KCE 716E DBA-GRX120- TOYOTA MARK

AND

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

BETWEEN

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

-VERSUS-

STEPHEN OGAGA OSIRO.....1ST DEFENDANT

CAROLINE ADHIAMBO OBWA.....2ND DEFENDANT

RULING

1 The Applicant a body corporate established under section 3 of the Ethics & Anti-Corruption Commission Act 2011 ("EACC Act") whose mandate under section 11(1)(j) of the EACC Act is to institute and conduct proceedings in court for the purpose of the recovery or protection of public property filed an originating summons dated 22nd August 2018 against the Respondents seeking recovery of public property belonging to the Government of Kenya to the tune of Kshs. 293,842,338.60,US\$110,375,Kshs.21,295,000/and Kshs.9,850,00/= . Simultaneously with the originating summons, the Applicant also filed a Notice of Motion dated under Order 40(1) and Order 51(1) of the Civil Procedure rules in which they seek the following orders as against the respondents.

1-3 Spent

4 A permanent injunction do issue against the Defendants by themselves, their agents, servants and/or employees or whosoever restraining them from any other person whosoever restraining them from alienating, selling, charging or further charging, asting transferring, disposing or in any other way dealing with the following properties pending inter parties hearing and determination of this suit;

- i. Plot Number L.R No. 7785/532-Runda registered in the name of Caroline Adhiambo Obwa**
- ii. Flat No. B1 –Block B On L.R No. 209/8875 registered in the name of Caroline Adhiambo Obwa**
- iii. Apartment No. B2 On L.R No.330/1211 registered in the name of Stephen Ogaga Osiro**
- iv. Apartment No. SPG/12/L4/015 Of Type Lnyx 4(38 Sqm) On L.R No. 209/6705/6 Registered in the name of Stephen Ogaga Osiro**
- v. Flat No. A1 On L.R No.209/9684 registered in the name of Caroline Adhiambo Obwa**
- vi. Apartment No. 3 On Block C On Riara Apartment On L.R No. 330/140**
- vii. Kisumu/Municipality/Block 14/250**
- viii. Kisumu/Municipality/Block 14/251**
- ix. Kisumu/Municipality/Block 14/269**
- x. Kisumu/Municipality/Block 12/217 Unit No. 13 and 625**

- xi. **Kisumu/West Agoro/2546**
- xii. **Kisumu/West Agoro/1700**
- xiii. **6072/Wawidhi A1/Nyando**
- xiv. **Plot No. 6267 Wawidhi A1 Adj Section**
- xv. **6268 Wawidhi A1 Adj Section**
- xvi. **Kisumu/Municipality/Block 5/699**
- xvii. **10 Acres LR No. 6046/1 Muhoroni Township**
- xviii. **Kjd/Kitengela/72600**
- xix. **Kjd/Kitengela/25322/432**
- xx. **KBZ 474 F-Toyota Prado registered in the name of Caroline Adhiambo Obwa and**
- xxi. **KCE 716E DBA-GRX120- Toyota Mark**

5 The costs of this application be provided for.

2 The application is premised on the grounds on its face and supported by the supporting and further affidavit of **Andrew Lekamparshi** and a further supporting affidavit of **Paul Mugwe** dated 22nd August 2018 who are investigators with the EACC. Their investigation established that at all material times, the 1st Defendant was working as treasurer at the Kisumu Municipal and Nairobi County respectively thus, putting him at a position of influence and as a result, he acquired unexplained assets. Furthermore, that the 2nd Defendant is the legal wife of the 1st Defendant and is a house wife with no known legitimate source of income.

3 Andrew Lekamparshi and Paul Mugure have averred that they carried

out intense investigations which revealed that the 1st Defendant engaged in corruption as a result of which he acquired several properties as enumerated in the application. That in order to conceal the true identity of the real owner, he registered some of them in the 2nd defendant's names. That between the periods of January 2011 and April 2016 the Defendants acquired unexplained assets comprising of cash Kshs 318,637,338/60, and U.S \$110,335; plus property purchased at Kshs 21,295,000/- which sum of assets was not linked to the deposits and a motor vehicle valued at approximately Kshs 3,500,000/-. They further acquired unexplained assets in form of cash amounting to Kshs 293,842,338/60 and US\$ 110,375.

4 They were issued with statutory notices under section 26 and 55 of ACECA but the explanations given were not satisfactory. The reason being that the 1st Defendant's known legitimate sources of income generated is approximately Ksh 7,006,029/- during the period of interest while the total value of the accumulated cash was found to be Kshs 239,956,019/60 and US \$ 110,375.

5 The 2nd Defendant failed to explain her legitimate sources of cash deposited in her account totaling Kshs 53,886,319/- and cash used to purchase some of the immoveable properties.

6 That the defendants had used Kshs 116,525,100/- to purchase the following properties:

- (i) Apartment No. B2 on LR No. 330/1211 registered in the name of Stephen Ogaga Osiro**
- (ii) Apartment No. SPG/12/L4/015 of Type LNYX 5 on LR No 209/6705/6 registered in the name of Stephen Ogaga Osiro.**
- (iii) L.R NO. 7785/532;**
- (iv) Flat No. B1 –BLOCK B on LR. NO 209/8875;**
- (v) Apartment No. 3 on BLOCK C in Riara Apartments on LR NO. 330/140 ;**
- (vi) Kisumu Municipality/Block 12/217-units no. 13 and 625;**
- (vii) 10 Acres L.R. No. 6064/1 Muhoroni Township and**
- (vii) Motor Vehicle Registration Number KBZ 474 F**

7 That the Defendants assets are as set out in the set out in the schedule below:

| Item No. | Description | Amount (US Dollars) | Amount (Kshs.) |
|--------------|---|---------------------|-----------------------|
| i. | Total Cash | 110,375 | 293, 842, 338.60 |
| ii. | Total purchase value of immovable properties (not linked to deposits) | | 21,295,000 |
| iii. | Motor vehicle-KCE 716E Toyota Mark X (approximate value) | | 3,500,000 |
| Total | | 110,375 | 318,637,338.60 |

8 The Plaintiff/Applicant is therefore apprehensive that if not

safeguarded the above properties will most likely be disposed of by the Defendants to frustrate any decree or order that may be made against them. The Plaintiff filed a supplementary affidavit in response to the replying affidavits explaining the actions by the Plaintiff. He reiterated his earlier averments.

9 Mrs Shamalla submitted that the main application before this court is for forfeiture of unexplained assets. She further submitted that the replying affidavit does not contain any document to show the 1st Defendants sources of income. The 2nd Defendant was a house wife who was not carrying out any business since she pays no taxes. Further that the 2nd defendant has annexed some invoices with Kshs 1M only with no further explanation.

10 It was Counsel's submission that in the event of a decree they did not know of any other asset of Defendants that would be attached. In reference to the Defendant's contention that they are financially crippled and would want to sell the properties she submitted that the balance of probability tilts in favour of the plaintiff who will lose in the event that the injunction is not granted and the claim is successful.

The defendants/Respondents case

11 The application was opposed by both Defendant's who filed replying

affidavits. The 1st Defendant in his affidavit dated 24th October 2018 explained that his name was in the list of shame tabled in Parliament in March 2015. He was thereafter charged vide Nairobi Chief Magistrate's Criminal Case No 7 of 2015 **Republic vs Regina Chepkemoi & 4 others**. The charges were related to Economic crimes. He was severally summoned by the EACC investigators during the subsistence of the criminal case. The criminal case was finalized and he was acquitted on 11th January 2018.

12 In spite of the acquittal he was still followed by the EACC investigators and issued with notices. His bank account had been severally investigated and various documents seized. Restrictions were placed on some of his properties as stated in the affidavit of Andrew Lekamparish. This was before this suit was lodged. He has averred that he has been subjected to in humane, demeaning and degrading treatment by the Plaintiff/Applicant.

13 He has given a long history of his career in the public service. He averred that his profession as an accountant helped him to grow financially and business wise. He has denied operating any USD account nor the accounts displayed by the Plaintiff/Applicant. He has explained how he has been financially handicapped by virtue of the Plaintiff's actions yet he has financial commitments to make including fees for his children.

14 The 2nd Defendant in her replying affidavit has averred that she is a business woman and a graduate in business administration. She has operated a hair and beauty salon and a shop and other businesses in Nairobi. That she purchased some of the listed properties using the proceeds from these business ventures. She has been under investigation since 2015 by the Plaintiff. During the investigations her documents were taken away.

15 She averred that Kshs 53,886,319/- in her account is her accumulative savings from her business dealings. Further that the Kshs 18,270,000/- deposited by the 1st defendant were monies from various other legitimate sources as a result of her business dealings.

16 Mr Mutange for the Defendants in opposing the application submitted that before the Plaintiff filed the present suit they had placed restrictions on the Defendant's properties. He said some properties were not bought with funds of interest to the Plaintiff. Further that since there was no inventory of items taken from the 2nd Defendant she was unable to defend herself in the face of the allegations raised.

17 He raised issue with Mr. Paul Mugure's financial report where some figures had been discounted (US\$ 11,000) and that the 1st defendant never operated any dollar account. He submitted that the Plaintiff was being vague and ambushed the parties while acting in bad faith. He asked the court to release the properties where the plaintiff had no interest.

18 In a rejoinder Mrs Shamalla submitted that the restrictions were placed on the properties in line with the law. She said the Defendants were still operating and receiving rent since their accounts had not been frozen. On the issue of the Dollar account counsel submitted that there was evidence of opening and closing the Dollar account.

Determination

19 I have considered the application by the applicant dated 22nd August, 2018, the affidavits, annexures, submissions. The only issue which falls for determination is whether the Plaintiff has satisfied the conditions for granting an injunction.

20 The principles for granting an injunction are well enumerated in the case of the case of *Giella –vs- Cassman Brown Co. Ltd & another (1973) EA 358*. In the said case, it was held that for one to succeed in an application for an injunction, one must demonstrate:

- (i) the existence of a *prima facie* case with a probability of success at the hearing;
- (ii) damages are not an adequate remedy
- (iii) when in doubt the court to decide the matter on a balance of convenience.

21 It is not in dispute that the Defendants herein are husband and wife.

The 1st Defendant was working as a Treasurer at the Kisumu Municipal and Nairobi City County respectively thus putting him in a position of influence. It is claimed by the Plaintiff/Applicant that as a result of this position he acquired assets which according to the Plaintiff are unexplained.

22 According to the investigations carried out by the Plaintiff in respect to the alleged acquisition of unexplained assets by the Defendants, between the period of January 2011 and April 2016, the Defendants acquired unexplained assets worth Kshs.318,637,338.60 and US \$110,375. The unexplained assets comprise of cash Kshs. 293,842,338.60 and US \$110,375; immovable property purchased at Kshs.21,295,000(total purchase sum of assets not linked to deposits) and a motor vehicle valued at approximately Kshs. 3,500,000.

23 In addition to this, there are allegations that in the period between January 2011 and April 2016, the 1st Defendant alone acquired assets in the form of cash amounting to Kshs, 239,956,019.60 and US \$ 110,375 which amounts were deposited in his various bank accounts held in different banks. Furthermore, the 2nd Defendant acquired unexplained assets in form of cash deposited in her account totaling to Kshs. 53,886,319.00.

24 The Defendants were afforded opportunity by the Plaintiff to explain their sources of income and according to the Plaintiff/Applicant the 1st Defendant's explanation only accounted for about Kshs. 7,006,029 as against Kshs. 239,956,019.60 and US\$110,375 during the period of interest. The 2nd Defendant is said not to have offered any explanation relating to unexplained cash deposited in her account totaling to Kshs. 53,896,319.00/-

25 The Defendants have vehemently denied being involved in any corrupt activities saying that the listed properties were lawfully acquired. They do not deny having had the said cash amounts in their bank accounts. They have also not denied owning the listed properties. What they deny is the allegation that the properties were unlawfully acquired.

26 Upon considering the affidavits by both parties it is clear that this court must consider relevant evidence to determine which properties are of interest to the Applicant and which ones are not. It has to consider any evidence that will be availed to determine whether there is a legitimate source of the funds deposited and also used to purchase these properties. These are pertinent issues which cannot be determined at an interlocutory stage.

27 I do note that the Plaintiff/Applicant has sought an injunction against the Defendants' landed properties only and not the bank accounts. It has been submitted that the Defendants continue to receive rents from these properties. They have not disputed that which means it is true. They cannot therefore claim to be destitute by any standard. The 1st defendant has averred that their motor vehicle KCE 716E DBA-GRX 120 Toyota was involved in an accident and is grounded at Lari police station vide OB No 32/9/8/2018. The said vehicle is listed among the defendants' properties.

28 The above being the position it is only fair and just that the current status quo be maintained as the parties prepare for the full hearing where the issues in contest will be heard and determined by this court. The same cannot be determined at this interlocutory stage.

29 The Plaintiff's fear is therefore justified to the effect that if the properties herein are not preserved, they could be disposed off before the matter is determined.

30 I am therefore satisfied that the Plaintiff has made out a prima facie case to warrant the issuance of an injunction in terms of prayer No. 4 of the Notice of Motion dated 22nd August 2018 in respect of all named landed properties. This order will not however affect M/v Reg no KBZ 474 F – Toyota Prado registered in the name of the 2nd Defendant Caroline Adhiambo Obwa. The reason for this is that the landed properties are sufficient to cover whatever claims the Plaintiff/Applicant has in case of a decree in its favour.

Costs shall be in the 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