



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. APPLICATION NO. 93 OF 2011 (O.S)

**IN THE MATTER OF: PACRCELS OF LAND NOS. MN/1/13483; MN/1/15351 AND
MN/1/15275**

**IN THE MATTER OF: ANK ACCOUNTS NUMBERS SV XXXXXXXX& TDYYYYYYYYY-FINA
BANK, MOMBASA, NKURUMAH ROAD BRANCH**

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

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

AND

JAMES MWATHETHE MULEWA.....1ST DEFENDANT

SHARKAT COMPANY LIMITED.....2ND DEFENDANT

JUDGMENT

1. By way of Originating Summons dated 8th April, 2011, the Plaintiff seeks determination of the following questions:

a. Whether the Defendant is in possession of “unexplained assets” pursuant to the provisions of the Anti-Corruption and Economic Crimes Act;

b. Whether the properties listed in paragraph 3 should be preserved pending the determination and or declaration on whether the said assets constitute unexplained assets pursuant to the provisions of Section 55 of the Anti-Corruption & Economic Crimes Act, No. 34 of 2003;

c. Whether a Declaration should issue that the following properties/money constitute unexplained assets pursuant to the provisions of Section 55 of the Anti-Corruption & Economic Crimes Act, No. 34 of 2003;

i. Parcel of Land Number MN/1/13483

ii. Parcel of Land Number MN/1/15351

iii. Parcel of Land Number MN/1/15275

iv. Kshs. 63, 683, 794/=

v. Funds in back account number SV XXXXXXXXX & TD YYYYYYYYY-Fina Bank, Mombasa, Nkrumah Road branch and bank account number[Particulars withheld] domiciled at Prime Bank, Mombasa Branch.

d. Whether the Defendant should be ordered by this honourable court to pay to the government of Kenya Kshs. 63, 683, 794.00 being the cumulative bank deposits made by the Defendant between 31st August 2008 and 20th May, 2010 and Kshs. 17, 000,000.00 being the value of the above landed properties both of which constitute unexplained assets or any other amount that this Honourable Court finds to constitute unexplained assets;

e. Who is to meet the costs of this suit?

The originating summons were supported by the affidavit of **JOSPHAT KARIUKI NDWIGAH** sworn on 8th April 2011.

2. The Plaintiff alleges that by virtue of Section 7 and 55 of the Anti-Corruption and Economic Crimes Act, No 3 of 2003 it is mandated 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 the person's known legitimate sources of income. It is in exercise of this mandate, the Plaintiff claims, that it commenced investigations against the 1st Defendant for corruption and possession of unexplained assets.

3. The Plaintiff claims that it investigated the 1st Defendant for the period that the 1st Defendant was the managing director of Kenya Ports Authority i.e. between 05/08/2008 to 20/05/2010 when he was terminated on allegations of irregularities in the recruitment of staff, involvement in corrupt practices in the management and award of tenders, and mismanagement of the authority's funds. During this period the Plaintiff claims that the 1st Defendant earned a gross salary of Kshs. 1, 050,000 per month.

4. It is the Plaintiff's contention that between August 2008 and May 2010, the 1st Defendant made deposits of Kshs. 41, 290, 000 in cash and Kshs. 24, 601, 274 in cheques totaling to Kshs. 65, 891, 274 in his various bank accounts excluding his salary. Further, the Plaintiff claims that the 1st Defendant during the aforementioned period also acquired the suit properties herein in his name and in the name of his son.

5. The Plaintiff alleges that its investigations found that the 1st Defendant had unexplained assets and in accordance with the law the Plaintiff issued the 1st Defendant with two statutory notices requiring the 1st Defendant to enumerate all his properties, times when they were acquired and how the properties were acquired.

6. The Plaintiff' claims that it was not satisfied with the explanation given by the 1st Defendant as there was a disproportion between the assets the subject of this suit and the 1st Defendant's known legitimate sources of income leading to the conclusion that the 1st Defendant was involved in corruption and/or economic crimes hence the institution of this suit.

7. The Plaintiff's case is that there is no documentary evidence to support Kshs. 80, 683, 794 worth of assets allegedly belonging to the 1st Defendant hence the said assets should be forfeited to the Government of Kenya.

Response

8. The 1st Defendant responded by way of a replying affidavit sworn on 9th December 2014, in which

the the 1st Defendant refuted the claims by the Plaintiff and suggested that even a mere ports authority employee can be wealthy. The 1st Defendant did not dispute that he owned various bank accounts but argued that some of the accounts were operated for his own use while others for the benefit of others in his capacity as the administrator of his father's estate.

9. The 1st Defendant alleged that during the period in question apart from being an employee of Kenya Ports Authority he was involved in the real estate business wherein he acquired some of the suit properties from as early as 1984 and also that he was involved in other small and medium sized enterprises including a business specializing in removal of sludge from ships.

10. The 1st Defendant further alleges that his wife operates several business stalls at Kongowea market and a guest house and also that he is the beneficiary of his father's late estate which includes a ranch that is over 300 acres.

11. The 1st Defendant alleges that the daily deposits made to his accounts were proceeds from sale of cattle at his family ranch at Viriko, Lango Baya in Kilifi County.

12. The 1st Defendant alleges that the Plaintiff issued him with a statutory notice to furnish statement of property on 21st October 2010 and that he did furnish the Plaintiff with a statement in which he detailed that some of the suit assets were owned by members of his family while others were inherited from his father.

13. The 1st Defendant's case is that failure to list or acknowledge ownership of some properties does not *ab initio* point to corruption. The 1st Defendant further claims that he has justified ownership and acquisition of properties in question herein thus the same cannot be forfeited to the government.

14. The 2nd Defendant did not respond to the originating summons as it was enjoined as a Defendant when these proceedings had already commenced. The 2nd Defendant only sought lifting of orders freezing account number [particulars withheld] held in its name at Prime Bank and directing the bank to release Kshs. 1,278,304.25. However, this prayer was abandoned vide a ruling dated 10th April 2015.

Hearing

15. The Originating summons dated 8th February 2011 came up for hearing on 15th March 2017. **Mr. Kagucia** appeared for the Plaintiff while **Mr. Gikandi** appeared for the 2nd Defendant. There was no appearance for the 1st Defendant nor was the 1st Defendant present in court. Mr. Kagucia prosecuted the Plaintiff's case while Mr. Gikandi claimed that the 2nd Defendant has only a peripheral interest in this matter.

16. Mr. Kagucia, learned counsel for the Plaintiff submitted that this suit was filed under Section 55 of the Anti-Corruption and Economic Crimes Act dealing with forfeiture of unexplained assets. Counsel argued that the Plaintiff investigated the 1st Defendant for the period of 31st August 2008 to 20th May 2010 when he was the managing director of the Kenya Ports Authority after receiving information that the 1st Defendant had assets well beyond his known legitimate sources of income. Counsel contended that during the aforementioned period apart from his salary the 1st Defendant had cash deposits totaling Kshs. 63, 683, 794 to his bank accounts and Kshs. 17,000,000 worth of immovable property. Counsel argued that these assets were in excess of the 1st Defendant's legitimate sources of income.

17. Mr. Kagucia submitted that there were allegations that the 1st Defendant had been involved in corruption specifically irregular procurement of cranes whose value was in excess of Kshs. 1 billion and also that the 1st Defendant was involved in abuse of office and irregular approval of travel allowances. Counsel stated that these allegations formed the basis of their investigations and that the 1st Defendant

was even charged with these allegations but was later acquitted.

18. Counsel contended that the 1st Defendant is expected to defend the aforementioned allegations and to satisfy this court that the said assets were acquired otherwise than as a result of corrupt conduct. Counsel argued that the 1st Defendant has only denied the allegations but has not provided any evidence to support his claim that he legitimately acquired the suit assets.

19. To support his assertion that the 1st Defendant has not adduced any evidence to show that the assets were legitimately acquired, counsel gave examples such as the income attributed to the sale of livestock which Counsel explained had no single document to support the alleged sale, and, secondly, income that is attributed to the 1st Defendant's wife which Counsel also explained had no document to support it.

20. Counsel stated that the assertion by the 1st Defendant that some of the income came from his wife is untenable since the 1st Defendant's wife did not swear any affidavit to claim ownership of some of the income.

21. Mr. Kagucia submitted that the 1st Defendant was afforded an opportunity to explain how he acquired the assets that are being pursued. Counsel stated that a statutory notice as provided under Section 20 of the Anti-Corruption and Economic Crimes Act was issued to the 1st Defendant prior to the filing of this suit. Counsel argued that the response given to the statutory notice was not satisfactory in regard to some properties where the 1st Defendant indicated that he had no details of the claim, or that he could not recall owning the property.

22. Mr. Kagucia submitted that the 1st Defendant had filled a wealth declaration form in 2009, during the period of investigation, and he had not declared his five bank accounts nor had he listed the immovable properties. Further, Counsel argued that in the said wealth declaration form the 1st Defendant's son, **Mulewa David Katana** is listed as a dependent under the age of 18 yet property known as MN/1/15351 is alleged to be owned by him. However, counsel stated that the purchase price of the said property was made by the 1st Defendant as the cheques were traced to him.

23. Mr. Kagucia submitted that the 1st Defendant was given another notice to explain the bank deposits but he failed to provide adequate information. Counsel argued that there were unexplained deposits of Kshs. 100,000 daily for 5 months into one account.

24. Mr. Kagucia argued that the 1st Defendant had five different bank accounts; two with StanChart, one with CBA, Fina Bank and Housing Finance Corporation which were all investigated. Counsel also stated that upon acquiring a search warrant, the 1st Defendant's premises were searched and a sum of Ksh. 500,000 found in his house and withheld by the Plaintiff.

25. In relation to the purported sale of livestock that yielded Kshs. 1,055,000, Mr. Kagucia submitted that one of the Plaintiff's officers had interrogated the 1st Defendant's foreman who had revealed that only about 20 cows were sold during the period between 2008 and 2010 yet the Defendant had claimed that 137 cows and 100 goats were sold during the same period.

26. Counsel submitted that the Plaintiff had established that the 1st Defendant had acquired property which he could not account for during the period he was a public officer, managing director of Kenya Ports Authority. Counsel urged this court to hold that the 1st Defendant is in possession of unexplained assets of money and land totaling Kshs. 80, 683, 794 and that the same should be forfeited to the government of Kenya.

Submissions

27. The Plaintiff filed its submissions on 13th April 2017 while the 1st Defendant filed its submission on

5th June 2017. The 2nd Defendant did not file any submissions. The submissions were highlighted in court on 7th June 2017.

28. Mr. Kagucia, learned counsel for the Plaintiff in his submissions reiterated his arguments during the hearing. Counsel submitted that the actions of the Plaintiff to investigate the 1st Defendant on allegations of acquiring assets through corruption are grounded on Article 252 which allows the commission to conduct investigations on its own initiative or on a complaint made by a member of public as well as Article 54 (1) (c) of the United Nations Convention Against Corruption that enjoins members states to take such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

29. Mr. Kagucia submitted that a claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct thus the Plaintiff herein is not required to prove that the 1st Defendant actually committed an act of corruption in order to invoke the provisions of Section 55 of the Anti-corruption and Economic Crimes Act. In support of this assertion, counsel cited the case of **Director of Assets Recovery Agency & Ors, R (on the application of) versus Green & Ors [2005] EWHC 3168** where the court stated that:

“In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”

30. Mr. Kagucia submitted that the 1st Defendant was a public official with known sources of income, who suddenly and inexplicably amassed great wealth within a relatively short period of time thus necessitating investigations to verify his unexplained assets. Counsel further submitted that the 1st Defendant was the only person who could explain his wealth and he was afforded this opportunity when he was issued with a statutory notice. Counsel referred the court to the case of **Christopher Ndarathi Murungaru versus Kenya Anti-Corruption Commission & Another [2006] eKLR** that affirmed the constitutionality of the statutory notice.

31. Mr. Kagucia emphasized that civil forfeiture was a fair remedy in this instance as it would serve to take away that which was never legitimately acquired. To emphasize the importance and/or value of civil forfeiture counsel referred the court to the case of **The Serious Organized Crime Agency (SOCA) versus Christopher Orumge Agidi & Another [2011] EWHC 175 (QB)**.

32. Mr. Kagucia emphasized that this suit was for civil forfeiture and not criminal forfeiture arguing that criminal forfeiture requires a criminal trial and conviction while a civil forfeiture is employed where the subject of inquiry has been acquitted of the underlying criminal offence whether as a result of lack of admissible evidence or a failure to discharge the burden of proof.

33. Mr. Kagucia submitted that the burden of proof may shift from one litigant to the other and that Section 55(5) of the Anti-corruption and Economic Crimes Act envisages a situation where if the Plaintiff satisfies the court, on a balance of probability, and in light of the evidence adduced, that the Defendant has unexplained assets, the court may require the Defendant to satisfy it that the assets were acquired otherwise than as a result of corrupt conduct. Counsel cited the case of **Ethics and Anti-Corruption Commission (The Legal Successor of Kenya Anti-Corruption Commission) versus Stanley Mombo Amuti [2015] eKLR** where the Court of Appeal held that:

“Anti-corruption and economic crimes Act provides that the burden of proof remained with EACC and it was the court to determine that it was discharged on a balance of probability. It is at that stage the burden would shift to the respondent if the court so ordered. In our view, this is not an alien process in civil litigation. It also happens in defamation cases where there is a defense of justification.”

34. Mr. Kagucia submitted that the Plaintiff has established that the 1st Defendant has unexplained assets and there is no evidence before this court that the said assets were not acquired through corruption. Counsel cited the case of **Pusey (Winston) versus Assets Recovery Agency. Neutral Citation: [2012]** where it was observed that:

“...if there is some evidence that property was obtained through unlawful conduct, consideration needs to be given to any untruthful explanation or lack of explanation where opportunity has been given to provide it. An untruthful explanation or a failure to offer an explanation may add strength to the arguability of the case.”

35. In relation to the 1st Defendant’s rights under Article 40 of the Constitution, Mr. Kagucia submitted that the rights under that Article did not extend to property that was found to have been unlawfully acquired. Counsel cited the case of **Gilligan versus Ireland, Attorney General, Criminal Assets Bureau and Others [2001] IESC 92** where it was held:

“accepted that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.”

36. Mr. Kagucia submitted that since the 1st Defendant had not adduced any evidence to dispute that the suit assets were acquired through corruption this suit should succeed and this court should make orders compelling the 1st Defendant to pay to the Government of Kenya Kshs. 63,683,794 being the cumulative bank deposits made by the 1st Defendant between 31st August 2008 and 20th May, 2010 and a forfeiture order requiring Kshs. 17,000,000 being the value of unmovable assets herein to be forfeited to the Government of Kenya.

37. **Mr. Mokaya**, learned counsel for the 1st Defendant submitted that prior to the 1st Defendant being appointed the MD of Kenya Ports Authority he was an employee of Kenya Ports Authority since 1981 holding different positions. Counsel submitted that during the period the 1st Defendant was the MD of the Kenya Ports Authority he earned a gross salary of Ksh. 1,050,000 every month.

38. Mr. Mokaya submitted that prior to the filing of this suit, the 1st Defendant was arraigned in court in connection to charges related to the investigations by the Plaintiff but was acquitted as there was no evidence to link the 1st Defendant to allegations of abuse of office, corruption, and/or irregular approval of travel allowances. Counsel submitted that Section 55 (2) of the Anti-Corruption and Economic Crimes Act, No. 2 of 2004 requires a person to be afforded the opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income. Counsel argued that 1st Defendant had provided various pay slips of his earnings from his employment and also bank statements to show transactions done between the year 2008 and 2010.

39. Mr. Mokaya submitted that the allegations by the Plaintiff are based on the misconceived notion that a mere employee of the ports authority cannot be wealthy and/or own more than what the Plaintiff imagines such an employee should own. Counsel stated that the 1st Defendant was earning good money, and was in possession of properties prior to August 2008.

40. Mr. Mokaya stated that the 1st Defendant was the administrator of his late father’s estate which is worth more than 3000 acres, that the 1st Defendant is involved in real estate and acquired property from as early as 1984 through the Kenya Ports Authority Mortgage Scheme and also that the 1st Defendant is involved in other small and medium sized enterprises including a business involved in removal of sludge from ships.

41. Counsel submitted that apart from the 1st Defendant’s income, the 1st Defendant’s wife has several business stalls at Kongowea and also operates a guest house among other profit making ventures.

42. Mr. Mokaya submitted that the allegation by the Plaintiff that the 1st Defendant had only sold about 20 cows at a price of Kshs. 17,000 each during the investigation period was false as what the ranch foreman stated in his statement was:

“...the approximate cost of a cow is unknown to me since I am not involved in the transactions...we started keeping animals in the farm a long time ago and can’t recall when...”.

43. Mr. Mokaya submitted that the allegations that the 1st Defendant had transferred money to his other accounts in order to conceal corruptly acquired money was unsubstantiated as the transfer of funds started much earlier than 2010 when the investigations were conducted.

44. Counsel submitted that the Plaintiff had not satisfied this court that the suit assets were obtained through illegitimate means. Counsel relied on the Ugandan case of **Col Dr. Bisgye Kiza versus Museveni Yoweri Kaguta, Election Petition No. 1 of 2001** that was quoted in the case of **The Ethics & Anti-Corruption Commission versus Stanley Mombo Amuti, COA Civil Appeal No. 213 of 2011** as follows:

“I do share the view that the expression “proved to the satisfaction of the court” connotes absence of reasonable doubt. Admittedly, the word “satisfied” is adoptable to the two different standards. It is not uncommon for a court to hold that it is “satisfied on a balance of probabilities”, or that “it is satisfied beyond reasonable doubt”. However, where the court holds that it is satisfied per se, that a matter has been proved, or that a matter has been proved to its satisfaction, without more, then to my mind there can be no room to suppose that the court harbors any reasonable doubt about the occurrence or existence of that matter. By requiring that the ground for annulment of an election be proved to the satisfaction of the court, the legislature laid down the minimum amount or standard of proof required. The amount of proof that produces the court’s satisfaction must be that which leaves the court without reasonable doubt.”

45. Mr. Mokaya further submitted that instituting these proceedings against the 1st Defendant with the aim of having the alleged unexplained property forfeited to the state without evidence that the property was acquired corruptly is akin to presuming the 1st Defendant “guilty until proven innocent” which is a breach of the fundamental rights of any citizen. Counsel submitted that the purported exercise of power by the Plaintiff to investigate and recover alleged unexplained and/or corruptly acquired property is an abuse of the court process as there is no evidence to prove that indeed the 1st Defendant acquired the property through corrupt means.

46. In urging this court to dismiss this suit, Mr. Mokaya concluded that Article 40 of the Constitution protects the right to acquire and own property and that this right cannot be arbitrarily taken away by the institution of vexatious and baseless proceedings that solely aimed at embarrassing the 1st Defendant.

Determination

47. Having carefully analysed the originating summons herein, the response thereto and the submissions by the parties, the issue that arises for determination is whether the 1st Defendant herein is in possession of “*unexplained assets*” being;

- i. Parcel of Land Number MN/1/13483
- ii. Parcel of Land Number MN/1/15351
- iii. Parcel of Land Number MN/1/15275
- iv. Kshs. 63, 683, 794/=

a. Funds in bank account number SV XXXXXXXX & TD YYYYYYYYYY-Fina Bank, Mombasa, Nkurumah Road branch and bank account number 0310411008 domiciled at Prime Bank, Mombasa Branch.

and if the answer to this question is in the affirmative, whether the aforementioned assets should be forfeited and/or paid to the Government of Kenya.

48. Section 55 of the Anti-Corruption and Economic Crime Act, No. 3 of 2003 provides for forfeiture of unexplained assets. At sub-sections (2), (3), (4), (5) and (6) it provides as follows:

(2) 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 not satisfied that an adequate explanation of that disproportion has been given.

(3) Proceedings under this section shall be commenced in the High Court by way of originating summons.

(4) In proceedings under this section-

a. The Commission shall adduce evidence that the person has unexplained assets; and

b. The person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a Defendant in civil proceedings.

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

(6) If after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as a result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is satisfied were acquired otherwise than as a result of corrupt conduct.

49. In this instant suit, the Plaintiff herein stated that it investigated the 1st Defendant for the period when he was the managing director of Kenya Ports Authority being between August, 2008 and May, 2010 and found that he had amassed wealth that was not proportionate to his legitimate sources of income. The Plaintiff argued that its investigations were based on the 1st Defendant being a public officer and upon suspicions that the 1st Defendant was involved in corruption or economic crimes.

50. Section 2 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 defines a Public Officers as:

“public officer” means an officer, employee or member of a public body, including one that is unpaid, part-time or temporary”

In this case the 1st Defendant was indeed a public officer as he was an employee of Kenya Ports Authority which is a public body.

51. The Plaintiff contends that upon completion of its investigations it found that the 1st Defendant had unexplained assets and consequently issued the 1st Defendant with a statutory notice as per Section 26 of the Anti-Corruption and Economic Crimes Act requiring him to explain how he acquired the suit assets.

52. Section 26 of the Anti-Corruption and Economic crimes Act provides as follows:

(1) If, in the course of investigation into any offence, the Director is satisfied that it could assist or expedite such investigation, the Director may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Director and with regard to such property-

a. Enumerating the suspected person's property and the times at which it was acquired; and

b. Stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some manner, and what consideration, if any, was given for the property.

The Plaintiff vide a letter dated 13th October, 2010 issued a statutory notice to the 1st Defendant (a copy of the said letter was attached at page 183 to the affidavit of **JOSPAT KARIUKI NDWIGAH** sworn on 8th April 2011. The letter details the assets for which the 1st Defendant was required to provide information on.

53. By a letter dated received by the Plaintiff on 29th October 2010, the 1st Defendant responded to the statutory notice. In relation to the cash deposits the 1st Defendant indicated that the same were proceeds of sale of livestock from the family ranch at Viriko Lango Baya in Kilifi County. The Plaintiff indicated that during the period in question he managed to sell 3000 cattle as a result of a severe draught experienced during that time.

In relation to the immovable property the 1st Defendant had the following to say-

a. MN/1/13483 Vacant Plot, Nyali valued at Ksh. 5,000,000- He did not own this property.

b. 3211/4/IV Three Bedroom house, Chaani valued at Ksh. 4,000,000- He stated that he had acquired the same at a cost of Kshs. 305, 160 in 1984 through a KPA mortgage scheme with HFCK AC NO. [Particulars withheld] and that he completed payment for that property through the salary check off system in 1996 and acquired title in 2000.

c. MN/1/9729- Four Bedroom House, Fahari Estate valued at Kshs. 3,500,000/=. He stated that he acquired the house at a cost of Ksh. 1.48M in 1999 from Kenya Building Society through a HFCK mortgage AC NO. [particulars withheld] (A) and that he serviced the loan through his salary and the sale of cows from the ranch.

d. MN/1/15351 Four Bedroom Maisonette Bandari Villa valued at Kshs. 6,000,000 – He had no details on this property as it was owned by a family member whom he assisted to identify as a good investment.

e. MN/1/15275 Four bedroom Maisonette Bandari Villas valued at Kshs. 6,000,000- He admitted ownership and indicated he paid 10% of the purchase price of Ksh. 4, 850, 000 and he is still making deposits towards the same.

f. MN/1/7822 Vacant Plot Nyali valued at Kshs. 35,000,000- he stated that this plot did not belong to him.

g. /1/7817 Three Storey Residence Nyali valued at Kshs. 40,000,000- he admitted ownership and stated that it was a residential house that he had purchased through a loan of Kshs. 4,000,000 from his employer the Kenya Ports Authority in 2002. He also attached details of the loan approval, bank deposits to this letter.

h. Double Storey Residence Jilore valued at Kshs. 1, 500, 000- he indicated that he inherited the property from his father.

i. Kwale/Shimoni/113 vacant plot valued at Kshs. 200,000- he indicated that he did not have details as files containing the details were taken by the Plaintiff. However, he stated that to his recollection the property was inherited by a family member from his father and his interest in the same is only as an administrator.

j. M/S Tiwi Beach/ 19-12 Acre Vacant Plot valued at Kshs 1, 800, 000- he indicated that this property was acquired by his late father.

The Plaintiff argued that the response by the 1st Defendant was not satisfactory thus it instituted this proceedings. It is important also to note that another statutory notice was issued by the Plaintiff to the 1st Defendant received by the 1st Defendant on 1st February 2011 requiring information on other assets not listed in the earlier statutory notice. However, the 1st Defendant did not respond to the second statutory notice.

54. It is therefore evident that the 1st Defendant was afforded a reasonable opportunity to explain the disproportion between the suit assets and his legitimate sources of income as required by Section 55 (2) (b) of the Anti-Corruption and Economic Crimes Act. The Plaintiff herein then proceeded to institute this proceedings. See the case of **Kenya Anti-Corruption Commission versus Stanley Mombo Amuti [2008] eKLR.**

55. On 15th March, 2017, the matter came up for hearing in court. The 1st Defendant was not in court nor was his counsel yet the 1st Defendant's counsel had been served with the hearing notice on 15th February 2017. The matter proceeded to hearing and thereafter the court ordered the parties to file written submissions. The 1st Defendant through his own fault was therefore not able to dispute and/or challenge the evidence adduced by the Plaintiff during the hearing. However, the 1st Defendant was afforded the opportunity to file submissions in line with the rules of natural justice and Article 50 of the Constitution of Kenya.

56. The question then is whether this court is satisfied that the suit assets are “unexplained assets” or whether the suit assets were acquired otherwise than as a result of corrupt conduct. Section 2 of the Anti-Corruption and Economic Crimes Act defines the term “unexplained assets” as-

a) acquired at or around the time the

person was reasonably suspected of corruption or economic crime; and

b) whose value is disproportionate to his

known sources of income at or around that time and or which there is no satisfactory explanation.

57. In this case the only explanation for the suit assets was given by the 1st Defendant in his letter in response to the first statutory notice. The response to the said statutory notice was enumerated above. The

burden of prove in civil matters is on a balance or probability. However, in this case the burden may shift to the Defendant as per Section 55 (5) where after the commission has adduced evidence that the 1st Defendant has unexplained assets and the court is satisfied, the person to whom the assets relate may be required to satisfy the court that the assets were acquired otherwise than through corruption. This matter did not get to the pint of shifting the burden of proof to the 1st Defendant as the 1st Defendant by his own fault was not present in court during the hearing. Further, the 1st Defendant's replying affidavit sworn on 9th December, 2014 was not enough to shift the burden of proof without he 1st Defendant's oral evidence at the hearing.

58. This court can therefore only make a determination based on the evidence adduced by the Plaintiff vis-a vie the explanation offered by the 1st Defendant in its letter signed on 26th October 2010 and on the aforesaid replying affidavit. In this regard the explanation offered by the 1st Defendant should be whether the property was acquired by purchase, gift, inheritance or in some manner, and what consideration, if any, was given for the property as provided by Section 26 of the Act. It should be noted that Section 55 of the Anti-Corruption and Economic Crimes Act does not provide on what basis the court can deem the evidence provided by either the Commission or the Defendant as satisfactory. However, applying the ratios decidendii of Bisgye Kiza case above, the amount of proof that produces the court's satisfaction must be that which leaves the court without reasonable doubt.

59. On the issue of the cash deposits, the Plaintiff alleged that the 1st Defendant was receiving various deposits including a sum of Kshs. 100,000 during the period under investigation. The explanation offered by the 1st Defendant was that the income was generated from the sale of nearly 3000 cattle. As the 1st Defendant did not respond to the second statutory notice received by him on 1st February 2011, this court has no option but to believe the evidence tendered by the Plaintiff in form of numerous bank statements attached to the affidavit of **JOSPHAT KARIUKI NDWIGAH** sworn on 8th April 2011.

60. On the issue of the immovable property various explanations were offered by the 1st Defendant as detailed at paragraph 57 of this Ruling. This court finds the explanation offered for property no. 3211/4/1V Three Bedroom House, Chaani valued at Kshs. 4,000,000, MN/1/9729 Four Bedroom House, Fahari Estate valued at Kshs. 3, 500,000, MN/1/15275 Four Bedroom Maisonette Bandari Villas valued at Kshs. 6,000,000, MN/1/7817 Three Storey Residence Nyali valued at Kshs. 40,000,000 and Double Storey Residence Jilore valued at Kshs. 1, 500,000 to be satisfactory. For these properties the 1st Defendant detailed how he acquired them; the purchase price paid and how the purchase price was obtained. For property Double Storey Residence Jilore valued at Kshs. 1, 500,000 the 1st Defendant indicated that the same was inherited from his late father and he even attached a copy of what can be said to be the will of his late father. The 1st Defendant also attached mortgage receipts as proof of payment for some of these properties. This court thus has no reason to doubt that the 1st Defendant acquired the aforementioned properties legitimately.

61. With regard to property No. MN/1/13483 Vacant Plot, Nyali valued at Kshs. 5,000,000, MN/1/15351 Four Bedroom Maisonette Bandari Villas valued at Kshs. 6,000,000, MN/ 1/ 7822 Vacant Plot Nyali valued at Kshs. 35,000,000, Kwale/Shimoni/113 vacant plot valued at Kshs. 200,000 and M/S Tiwi Beach/ 19-12 Acre vacant plot valued at Kshs. 1, 800,000, the 1st Defendant did not offer any explanation as to how he acquired these properties,. He only stated that some of the properties do not belong to him or that some belong to some of his family members thus the documentary evidence provided by the Plaintiff on these properties is undisputed. However, the Plaintiff has not made a prayer that these properties be declared unexplained properties.

62. In the final analysis the court is satisfied on a balance of probability that MN/1/13483 Vacant Plot, Nyali valued at Kshs. 5,000,000 and MN/1/15351 Four Bedroom Maisonette Bandari Villas valued at Kshs. 6,000,000/= fit into the term "*unexplained assets*". Being that these assets are unexplained, the value of these assets should be paid to the Government of Kenya as required by Section 55 (6) of the Anti-Corruption and Economic Crimes Act.

63. For the foregoing reasons, Judgment is hereby entered for the Plaintiff

against the Defendant and declarations made as follows:

a. That the following assets are declared as unexplained assets:

i. Kshs. 63, 683, 794

ii. Parcel of Land No. MN/1/13483

iii. Parcel of Land No. MN/1/15351

b. the 1st Defendant do pay the Government of Kenya Kshs. 63, 683,794 being the cumulative bank deposits made by the Defendant between 31st August, 2008 and 20th May, 2010 and Kshs. 11, 000,000 being the value of immovable properties both of which constitute immovable property.

c. Costs of this suit is to the Plaintiff.

Dated, Signed and Delivered in Mombasa this 18th day of September, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Wachenje holding brief Mokaya for 1st Defendant

M/s. Abdulrahim holding brief Kagucia for the Plaintiff

Mr. Kaunda Court Assistant