



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ANTI-CORRUPTION & ECONOMIC CRIMES COURT MISC. 5 OF 2016

FORMERLY HIGH COURT CIVIL SUIT NO. 448 OF 2008 (OS)

**IN THE MATTER OF HOUSE NUMBER A-18 SECTOR III, HOUSE NO. B35 –UMOJA
INNERCORE,**

PLOT NO. C 3, SECTION 1-UMOJA INNECORE, NONG/ NGONG/26632,

NONG/ NGONG 38889, NGONG/ NGONG/ 38890

IN THE MATTER OF ACCOUNT NUMBERS [PARTICULARS WITHHELD] BARCLAYS

**BANK OF KENYA, ENTERPRISE ROAD, ACCOUNT NUMBERS [PARTICULARS
WITHHELD]**

STANDARD CHARTERED BANK, HARAMBEE AVENUE AND ACCOUNT

NUMBER [PARTICULARS WITHHELD] ,NWB PLC-60-15

IN THE MATTER OF MOTOR VEHICLE NOS KBB059T, KBB537T, KAR 843M & KAH 233F

AND

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

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

STANELY MOMBO AMUTI.....DEFENDANT

JUDGMENT

1. The Plaintiff herein is a commission established under Article 248 of the Constitution of Kenya, 2010 as well as Section 3(1) of the Ethics and Anti-Corruption Commission Act No. 22 OF 2011 with the mandate to combat and prevent corruption and economic crime in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and

anti-corruption.

2. On 12th of July 2008, the Plaintiff acting on information received, wrote to the Defendant informing him that his various assets located in different parts of the country were estimated to be worth millions of shillings and were disproportionate to his salary. Their reasoning was that the defendant in his declaration forms had indicated that salary was his only source of income. The Plaintiff also noted that the Defendant was a long serving civil servant who had worked in various ministries and departments for over 25 years.

3. The Notice required the Defendant to provide a written statement explaining the enumerated properties that he had acquired between 1992 and 2008 which included landed properties, motor vehicles and cash, cheque deposits and bank account balances as enumerated below;

- a. Residential houses on L.R No. Nairobi/ Block121/86,
- b. Residential house No. 231 on L.R. No. 77/256 Buruburu phase V extension,
- c. Residential houses on L.R No A. 18 Umoja innercore,
- d. Residential houses on L.R No B. 35 Umoja innercore,
- e. Plot NO. C 37 sector 1 Umoja innercore,
- f. L.R No. KJD/ Ngong/Ngong/28662,
- g. Uholo/ Magoya540,
- h. Uholo/Magoya1068,
- i. Uholo/Ugunja1327,
- j. Uholo/Ugunja1500,
- k. Jua Kali plots No.s650,651,652 and 692 Kakamega town,
- l. Toyota pickup registration number KBB059T,
- m. Toyota land cruiser station wagon registration number KBB537T,
- n. Toyota Pickup registration KAR 843M,
- o. Peugeot 504 Registration Number KAH 223F,
- p. Barclays Bank of Kenya Enterprise Road Branch A/C No.[Particulars withheld],
- q. Barclays Bank of Kenya Enterprise Road Branch [Particulars withheld],
- r. Barclays Bank of Kenya Rahimtulla Branch A/C No[Particulars withheld],
- s. Barclays Bank of Kenya NIC Hse- Masaba Road Branch A/C No [Particulars withheld],
- t. Standard Chartered Bank, Harambee Avenue Branch A/C No. [Particulars withheld],
- u. Standard Chartered Bank, Yaya Center branch A/C No [Particulars withheld],
- v. Standard Chartered Bank, Harambee Avenue Branch A/C No.[Particulars withheld],

w. HFCK Chiromo Branch, A/C No. [Particulars withheld]

x. CFC A/C No. 102191773,

y. Cooperative Bank Of Kenya, Haile-Selassie Branch A/C No. [Particulars withheld]

z. National Westminster Bank PLC- London Branch 60-15-49 A/C [Particulars withheld]

3. The Defendant was also asked to offer an explanation relating to cash **Kshs. 310,000/=** (Three Hundred and Ten thousand shillings), recovered from his office and **Kshs. 3,998,000/=** (Three million, nine hundred Ninety eight thousand) recovered from his house, standard chartered bank bankers Cheque No. 993604 of **Kshs. 4,300,000/=** (Four Million Three Hundred Thousand Shillings) and Barclays Bank of Kenya bankers Cheque no. 564369 worth **Kshs. 13,000,000/=** (Thirteen Million Shillings). He was also required to explain the sources.

4. Finally, the Defendant was required to explain the sources of cash deposits to his various accounts as follows;

a) Standard Chartered Bank, Yaya Branch, Kshs. 100,000/= (One Hundred Thousands only) on 2nd November 2007 and Kshs. 300,000/= (Three Hundred Thousands Only) on 13th February, 2008,

b) Standard chartered bank, Harambee Avenue Branch, account number 0101775027800, Kshs. 1,591,000/= (One Million, Five Hundred and Ninety One Thousands only) on 12th May 2008 and Kshs. 700,000/= Seven Hundred Thousands only) on 13th May 2008,

c) Standard chartered bank, Harambee Avenue Branch, account number 0100275027800 Kshs. 1,000,000/= (one Million Shillings) on 1st February 2008 and kshs.100, 000/= (One Hundred Thousand Only) on 13th February, 2008.

d) Barclays Bank of Kenya Enterprise Road Branch account number 8240656 Kshs. 900,000/=(Nine Hundred Thousands shillings) on 1st February, 2008 and Kshs. 400,000/= (Four Hundred Thousand shillings on 13th February, 2008,

e) The sources of Kshs. 7,295,488/=(Seven Million, four hundred and Eighty Eight Thousands) paid to various merchants and dealers between November 2007 and May 2008,

f) Dates and particulars of acquisition of properties mentioned in paragraph 2 above together with the dates and development costs on any of the aforementioned properties.

5. The defendant replied to the Plaintiffs letter via his dated 17th July, 2008 stating that the Plaintiff's agents had searched his house and taken away his personal files, cheques, cash, and title deeds among other items. He stated that he had worked for and earned a salary for 25 years and made savings thereof. He also clarified that he was the administrator of the estates of his late father and brother which had been sold and he had been entrusted with the proceeds thereof to invest.

6. The Defendant also explained that in 1984, he obtained a World Bank funded scholarship from which he made savings and which he used to offset a HFCK mortgage loan. Further that he was a practicing Certified Public Accountant (CPA) and had worked in the finance sector in various institutions over the period of 25 years and that together with his savings, salaries, professional fees, sale of properties, and rental income, he had obtained loans from various financiers which he used to develop his properties.

7. Dissatisfied with the Defendant's reply, the Plaintiff filed the originating Summons dated 19th September, 2008 seeking to have the properties listed below declared as "unexplained assets" pursuant to section 3 of the Anti- Corruption and Economic Crimes Act, 2003 (herein referred to as ACECA) and be

forfeited to the government of Kenya.

1. House number A.18, Umoja Innercore
2. House number b.35- Umoja Innercore
3. Plot number C.37 Sector 1- Umoja Innercore
4. Ngong/Ngong/26632
5. Ngong/Ngong/38889
6. Ngong/Ngong/38890
7. Motor vehicles registration numbers; KBB059T, KBB537T, KAR 843M and KAH 223F.
8. Funds in the following bank accounts;

a. Accounts Number [Particulars withheld] Barclays Bank Of Kenya, Enterprise Road between September 2007 and June 2008.

b. Accounts Number [Particulars withheld]; Standard Chartered Bank, Harambee Avenue between September 2007 and 30th June, 2008

c. Account number [Particulars withheld] national west minister bank PLC-London branch 60-15-49 between September, 2007 and 20th June, 2008.

d. Cash of Kshs. 4,308,000/= (Four Million, Three Hundred and Eight Thousand Shillings) seized by the Plaintiff's agent on 2.7.2008 during execution of search warrants.

9. The defendants be condemned to pay to the government of Kenya a sum of Kshs. 140, 976, 020/- (one hundred and Forty Million, Nine Hundred and Seventy Six Thousand and Twenty Shillings being cumulative deposits made by the Defendant between September 2007 and 30th June, 2008 and **Kshs. 32, 500,000/-** (Thirty Two Million, Five Hundred Thousand Shillings) being the value of the landed properties enumerated above as unexplained assets.

10. In the alternative, the landed properties together with Motor vehicles referred to above be forfeited to the government of Kenya.

11. The sum of Kshs. **4,308,000/=** (Four Million, Three Hundred and Eight Thousand) Shillings seized from the Defendant's House be forfeited to the government of Kenya.

8. Together with the originating summons, the plaintiff filed a chamber summons application dated 19th September, 2008 seeking a temporary injunction to restrain the defendant from alienating, charging, leasing, transferring, wasting, disposing or in any way dealing with the landed properties and motor vehicles pending the hearing and determination of this suit. It also sought a temporary injunction restraining the defendant from withdrawing the funds in the bank accounts or in any manner dealing in the bank accounts pending the disposal of this suit which orders were granted on 22nd September, 2008 and are in existence to date.

9. The Defendant in a replying affidavit dated 2nd July, 2010 and filed on 5th July, 2010 deponed that he was a qualified accountant (CPA.K) and had worked in several public and private institutions in senior capacities for over 25 years. That he had invested in properties which he disposed of from time to time. He was also nominated by his family members to manage the estate of his late father who had worked with the railways corporation for over 30 years and that of his late brother, a teacher. Those estates were

sold and he was entrusted with investing the proceeds and providing for his brother's children.

10. The Defendant complained that the Plaintiff had deliberately misrepresented to court that he had deposited **Kshs. 140,976,020.55/=** (One Hundred and Forty Million, Nine Hundred and seventy Six Thousand, and Twenty Shillings and 55 cents) between September 2007 and August 2008 and that he had withdrawn a sum of **Kshs. 86,879,522.11/=** (Eighty Six Million, eight hundred and Seventy Nine Thousand, Five Hundred and Twenty Two Shillings, and Eleven Cents) in his various accounts yet they did not provide any bank deposit or withdrawal slip to prove the allegations.

11. The Defendant averred that following the allegations, he engaged the services of a professional audit firm who audited his accounts and swore an affidavit which confirmed that during the alleged period, he deposited a sum of **Kshs. 39,882,278.60/=** and withdrew a sum of **Kshs. 24,749,823.70/=** and not the amounts alleged by the Plaintiff. He said that during his working time, he had saved, and had some other family wealth which he invested over a period of 40 years and that his investments had grown. He charged that the Plaintiff had manipulated records and figures from his bank accounts and used them to destroy his career and reputation in the name of fighting corruption. He asserted that he was entitled to protection from deprivation of property under the constitution and that the plaintiff was infringing on his rights to property. He prayed that the summons be dismissed with costs.

12. This matter was initially heard by Rawal J (as she then was) by way of submissions. The record indicates that in that trial, the learned judge did not deal with the factual issues raised in the OS but invited counsels for both parties to address her on the issue of the constitutionality of **Section 55 of ACECA viz-a viz the provisions of Articles 20, 25(c) and 40(3) of the Constitution of Kenya, 2010**. The Judge then found that the provision was inconsistent with the Constitution and dismissed the Plaintiff's suit as null and void. The Plaintiff appealed against the ruling in **Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti [2015] eKLR**. The court of Appeal allowed the appeal and referred the suit back to the High Court for trial and determination.

13. Parties took directions on 29th June, 2016 for the matter to proceed by way of oral evidence. PW1 Anthony Kahiga an investigator at the Plaintiff Commission, who was part of the investigations team in this suit, testified that the Plaintiff received information that the Defendant had unexplained property and that he was the financial controller of the National Water Conservation and Pipeline Corporation. They sought for and obtained warrants to search the Defendant's home and office.

14. Upon searching the office, they retrieved Kshs. 310, 000/= (Three Hundred and Ten Thousand), electricity bills,, building plans for a house, banker's cheques worth Kshs. 4.3 Million, cash deposit slip dated 13th May, 2008 for 700,000/= (Seven Hundred Thousand), cash withdrawal slip for Kshs. 1.9 Million, offer for sale of land by the Defendant to Fredrick Obura, copy of sale agreement between the defendant one and Fredrick for a piece of land, Banker's cheque worth Kshs.13 Million in favor of Patrick Njogu Kariuki, bankers' cheque worth Kshs. 4.3 Million in favor of Gilbert Githunguri Mukamba, Log Book for Motor Vehicle Registration Number KBB 259T Toyota pick-up, bank deposit slip for Kshs. 2 million deposited on 13.5.2008.

15. They also recovered a bank draft for Kshs. 5,000,000/= (Five Million Shillings), and a personal spring file containing Barclays bank of Kenya FDR certificate for Kshs. 20,000,000/=. The witness testified that on 13th May, 2008, the Defendant carried out five transactions worth millions of shillings. From the Defendant's home PW1 and his team recovered Kshs. 4,000,000/= (Four Million Shillings) in denominations of Kshs. 1,000 notes, and a spring file containing details related to various parcels of land. They made an inventory of the recovered documents.

16. According to the investigation conducted on the Defendant's bank accounts, the Defendant made deposits amounting to Kshs. 140,097,020.55 within the period of September 2007 to June 2008, and in the same period, he withdrew and made payments totaling Kshs. 85,879,522/11. PW1 pointed out that the Defendant started working at the National Water Conservation and Pipeline Corporation in September 2007 as the financial controller and it was unusual that some of the funds were received from persons

trading with the corporation and that the Defendant ought to have known this.

17. PW1 singled out Jennifer Evelyn Mwaka who was a contractor and a supplier at the Corporation, who gave the Defendant a cheque worth Kshs. 5,000,000/= (Five Million only), which was deposited in the Defendant's Barclays Bank account Enterprise Road branch. Another person of interest was Antony Ng'ang'a Mwaura who traded as Toddy Merchants and issued a cheque dated 18th January, 2008 worth Kshs. 3,000,000/= and another dated 5th February, 2008 worth Kshs. 2,000,000/= (Two Million only). The Defendant also received from Hardy Enterprises two cheques worth Kshs. 4,900,000/= (Four million Nine Hundred Thousand) in total, on 3rd April, 2008 and 24th, June 2008 respectively.

18. PW1 referred to various payment vouchers for supplies and in particular Toddy Contractors, worth Kshs. 1,139,873/30 and Hardy Enterprises worth Kshs. 1,309,933/80, and Everno Enterprises dated 8th April, 2008 for Kshs. 6,357,600/=. He concluded that money was paid from the corporation, to the suppliers/ contractors and it came to back to the financial controller.

19. PW1 further testified that the investigations team obtained the Defendant's pay slips which showed that his gross salary ranged between 183,580/= to Kshs. 306,000/= between the period under investigations. That in his wealth declaration forms, the defendant declared his income as at 2005 to be salary Kshs. 107,035/= professional audit income per month Kshs. 10,000/= rental income of Kshs. 45,000/= and his assets as three acres of land worth 75,000/=Mortgage house in Commarock worth 750,000/=vehicle registration number KAR 843 M worth Kshs. 800,000/=.

20. In the same declaration his liabilities were indicated to be a loan of Kshs. 1.4 Million from Standard Chartered Bank, a car loan of Kshs. 47,000/= and CFC bank Loan of Kshs. 600,000/=. In 2007, his assets were salary of Kshs. 300,00 per month, and did not include any other income. He indicated his assets as one acre of land in Ngong, a motor vehicle valued at Kshs. 1.2 million, two acres of land in Kisumu, and land worth Kshs. 600,000/= (six hundred thousand shillings.). His liabilities then were a loan of Kshs. 3,500,000/= (Three million, five hundred thousand) from Standard Chartered Bank and Kshs. 1,200,000 (One Million Two Hundred Thousand) from CFC bank.

21. PW1 testified that the defendant was invited to explain the deposits on his account and justify the anomalies between what he had declared and what he possessed. The defendant's response was found to be unsatisfactory. To date the defendant has Kshs. 55,000,000/= (Fifty Five million) which is considered as unexplained assets. The amount was the difference between the defendant's deposits of kshs. 140,000,000/= (One Hundred and Forty Million) and withdrawals of Kshs. 85,000,000/= (Eighty Five Thousand). He prayed that the Defendant be compelled to pay to the government Kshs. 55,000,000/=.

22. In cross examination, PW1 stated that the deposit of Kshs. 140,000,000/= was an analysis of all the Defendant's bank accounts carried out by Enoch Otiko (PW2). It was not a single bank statement showing that he had made deposits of Kshs. 140,000,000/= but an accumulation of all the deposits made to the defendant's various accounts during the period of investigations. He said that the bank statements did not have bank authentication because they did not come from the bank but from EACC and that his assertion of deposits of Kshs. 140,000,000 was informed by the calculations done by PW2. Upon comparing what the Defendant earned from his known sources of wealth, and what he actually held, the commission concluded that the Defendant had unexplained assets and the fact that he received money from suppliers was a good inference to bribery.

23. PW1 stated that the corporation's offices were burnt as investigations were ongoing but further investigations, established that Mwaka and Mwaura who were the corporation's contractors had paid some money to the Defendant. He attached sale agreements for property said to have been sold to Mwaka and Mwaura by the Defendant to his affidavit in support of the OS. He however impugned the sale agreements on grounds that the consideration was not disclosed.

24. He confirmed that they recovered money from both the defendant's house and office and kept it in an account in the joint names of the EACC and the Defendant. Further that nobody had complained nor that the Defendant had demanded money from them, nor had the Defendant been charged for any corruption

related offences.

25. PW1 asked the court to order the forfeiture of Kshs. 55,000,000/= (Fifty Five Million) which the Defendant could not explain its legitimate source. This amount was however not in the Defendant's bank account and the court should therefore order attachment of his assets for its recovery. He asserted that it was not necessary that the Defendant be charged with a criminal offence since there was evidence that money was being paid by the corporation suppliers into the Defendant's account. He discounted the Defendant's assertion that he sold some property to the suppliers, saying that the agreements and particularly that of Jennifer Evelyn Mwaka was not signed and the one for Anthony Ng'ang'a was not genuine.

26. **PW2** Enoch Otiko a forensic investigator at the Commission swore an affidavit in relation to this matter on 18th October, 2008 having done the bulk of the analysis of the various documents recovered from the Defendant. He enumerated the documents recovered as bank records, transaction receipts, sale agreements, banker's cheques, bank statements, cash (both in the house and office) and folders containing documents relating to his properties. He prepared an inventory of the documents and obtained a warrant to investigate the Defendant's bank accounts.

27. PW2 also established that the Defendant operated bank accounts in Standard Chartered Bank being accounts No. [Particulars withheld] all of Harambee Avenue branch. The others were Barclays bank of Kenya account numbers [Particulars withheld], both of Enterprise road branch and National Westminster Bank PLC- London Branch.

28. The statements concerning the Standard Chartered Bank accounts were annexed to the affidavit of PW2. He analysed the deposits and withdrawals columns of the bank statements excluding salary of Kshs.306,000/= as it was a known source of income. The analysis showed that he Defendant made deposits in 2007 as follows:

- (i) September 2007 Kshs. 131,400/=
- (ii) October 2007, Kshs. 207,900/=
- (iii) November 2007, Kshs. 255,400/=
- (iv) December 2007, Kshs.173,900/=

The deposits made in 2008 were, as set out below:

- January Kshs. 253,400/=
- February Kshs. 489, 900/=
- March Kshs. 186,400/=
- April Kshs. 237,900/=
- May Kshs. 1,918,213/=
- June Kshs. 148,900/=

The total deposits in the months of interests made to the Defendant's Standard chartered bank account No. [Particulars withheld] amounted to **Kshs. 4,003,331/=**

29. In the 2nd Standard chartered bank account number [Particulars withheld], the defendant made deposits in **April 2008**, Kshs. 1,752,759/50=, Kshs. 4,191,000/= on 12th and 13th may, 2008. The total deposits in this account amounted to Kshs/- **5,943,759/50**.

30. The third account analyzed was the defendant's salary account No. [Particulars withheld]/= in Standard Chartered Bank. In the months of May and June, a total of Kshs. 440,000/= was made into this account.

31. The defendant's Barclays Bank of Kenya account number [Particulars withheld] showed that in January 2008, the defendant deposited a banker's cheque worth **Kshs. 3,000,000/=** issued by Antony Ng'ang'a Mwaura T/a Toddy Merchants and Hardy Enterprises. In February, a total deposit of Kshs. **8,300,000/=**, (Of which, 2, 900,000/= was deposited by Toddy and Hardy Merchants) in March, Deposits of Kshs. **1,200,000/=** (of which 1,000,000/= was deposited by Antony Ng'ang'a of Toddy Merchants). In April the transactions amounted to Kshs. 18,800,000/= (of which, Kshs. 600,000/= was deposited by Jennifer Evelyn Mwaka T/A Evemil Enterprises). In May total deposits of kshs. 25,000,000/=, June, 2008, Kshs. 31,280,000/= of which Antony of Toddy's enterprises deposited Kshs. 4,000,000/=.

32. PW2 stated that the fact that some of the national Water and Pipeline Corporation's merchants were depositing money into the Defendant's accounts meant that he was receiving kickbacks. The corporation's offices were also burnt down thus hindering further investigations. Investigations revealed that Toddy's merchants, Hardy Enterprises, Evemil Enterprises and Elburgon Enterprises, were one company that traded under different names. They found an LPO book with claims against the company running for two years which were prepared by the procurement officer one Mr. Masakhala, who had since died.

33. PW2 further testified that an analysis of the transactions in Barclays bank of Kenya A/C no. [Particulars withheld] showed that in April, 2008, there was a deposit of Kshs. 20,000,000/=, and another deposit of Kshs. 24,000,000/= in June, 2008 as a fixed deposit but it was impossible to tell from the bank statement where the funds had come from. He also testified that a sum of Kshs. 20,000,000/= was withdrawn from this account but another deposit was made into this account on 12th June, 2008 worth Kshs. 20,400,000/=. The same amount was withdrawn on 19th June, 2008 leaving the account with **Nil Balance**.

34. An analysis of National Westminster Bank PLC- London Branch account no. [Particulars withheld] shows that the defendant made deposits in July, 2007 of Kshs.43, 300/=, November 2007, an equivalent of Kshs. 86,600/= in sterling Pounds, and a sum of Kshs. 1,503,694/50. Within the period under investigations, the defendant made a total deposit of:

Kshs. 4, 003, 331/= in his Standard Chartered Bank account No. [Particulars withheld], **Kshs. 5, 943,759/50** in his standard chartered bank account No. [Particulars withheld],

Kshs. 1, 440,000/= in his standard Chartered Bank account No. [Particulars withheld],

Kshs. 87, 580,000/= in Barclays Bank of Kenya, account

No. [Particulars withheld],

Kshs. 40,400,000/- in Barclays Bank of Kenya account No. [Particulars withheld] and

Kshs. 1,633,594/55/= in National Westminster Bank PLC- London Branch account no. [Particulars withheld] making a total of **Kshs. 141, 000,685/50**.

35. PW2 further testified that within the said period of investigations, the defendant made withdrawals totaling **Kshs. 85,879,522/11** and was left with a sum of Kshs. 55,096,498/=. The analysis used the Defendant's records obtained from his house during the searches and traced how the money was being applied viz a vis the Defendant's known sources of income. According to PW2 the defendant's expenditure amounted to Kshs. 2,660,445/60/= during the period under investigations while his income in that period amounted to Kshs. 1,205,790/= being salary.

36. From the investigations, PW2 concluded that the Defendant's total documented expenditure within the period under investigations amounted to **Kshs. 41,238,280/65/=** against his salary for the same period of **Kshs. 1,888,145/50/=** which was his income.

37. PW2 stated that his 2nd analysis was based purely on the Defendant's documented expenditure as

reflected in the documents recovered since it was not possible for him to recover all the transaction documents, the first analysis was based on the Defendant's bank statements. He said that the bank documents indicated that the Defendant had a bank balance of Kshs. 55,000,000/= which was unexplained wealth. The claim for the **Kshs. 55,096,498/44** was based on **Section 55 of ACECA** and therefore it was not necessary for the Defendant to have been charged in a criminal case.

38. PW2 did not recover any deposit or withdrawal slips from the defendants. He obtained a court order to access the Defendant's bank accounts. He confirmed that there was no single deposit slip for Kshs. 140,000,000/= or a withdrawal slip for Kshs. 85,000,000/= nor did the Defendant's accounts hold a cumulative balance of Kshs. 55,000,000/= after withdrawals. He noted that in Barclays bank account No. [Particulars withheld] there was credited a sum of Kshs. 20,000,000 on 30.04.2008 and a debit of the same amount on 26th May, 2008. On 12th June, 2008, there was a deposit of Kshs. 20,400,000/= which was withdrawn on 19th June, 2008.

39. PW2 did not obtain any bank statements from the Defendant's various bankers, having already recovered copies of the statements from the Defendant's house. He said that the entries in the schedule of the Defendant's various bank accounts was based on a direct extract from the Defendant's bank statements.

40. PW2 is a Quantity Surveyor by profession and is also trained in asset recovery. He asserted that the sale agreements between the Defendant and various parties were not genuine and that the purchasers were merchant's dealing with the Defendant's employer although the Defendant did not sign any LPO at the National Water and Pipeline Corporation. He admitted that there was no law that barred the Defendant from doing business with the said merchants; that he did not interview the said Merchants and that it was not illegal for the Defendant to keep money in his house or the office or to own property.

41. The Defendant in his testimony stated that he was a Certified Public (CPAK) Accountant who had held a practicing certificate since 1990 and his work entailed conducting independent audits and preparing financial statements. That he owned an audit firm which offered consultancy services and that he had worked in the public service for over 25 years, in about 10 parastatals and government offices. He left the public service, at a monthly salary of sum of **Kshs. 306,000/=**.

42. The defendant explained that in 2008, the Plaintiff raided both his home and office and confiscated his private documents, and informed him that he had committed a corruption related offence. He has not been prosecuted since. He denied that he had deposited a total of **Kshs. 140,000,000/=** in his various bank accounts or that he had withdrawn **Kshs. 85,000,000/=** leaving a balance of **Kshs. 55,000,000/=**.

43. He questioned the schedules prepared by PW2 who was not an accountant and the documents produced which were not bank statements. He asserted that only the bank could correctly state the amounts of money deposited and withdrawn from his bank accounts yet no bank official had testified in this suit. The Defendant argued that PW2 had unlawfully converted the debit and credit advises amounting to **Kshs. 120,000,000/-** and renamed them in his schedule as major bank deposits.

44. The Defendant contended that what were termed major deposits were transfers from one bank account into an investment account and back. He described it as temporary deposits into investment accounts which came back with interest, and the only time he did not earn an interest was on 12/6/2008 when he gave a debit advise for **Kshs. 20,400,000/=** to be moved to his investment account and it was returned before the expiry of the investment period. He maintained that his money grew as a result investment in fixed deposit accounts and that also explained why there were no deposit slips in support of the alleged deposits.

45. He defined a credit advice as instructions given to a bank on how to manage money already in an account and that such requests would be rejected if there was no money in the account. A report by Mwathe and Associates Auditors whom he instructed to audit his accounts for the period between 27th August, 2007 and 27th June, 2008 concluded that within the said period, the defendant deposited a total of **Kshs. 39,882,278/=** and withdrew a total of Kshs. 24,749,823/70. The Auditor's report and affidavit were

filed in court.

46. The Defendant explained that he came to know Ms. Evelyn Mwaka and Mr. Tony Ng'ang'a Mwaura when he was selling his property and denied that he knew them in any other way. He made offers to sale property which they accepted. He sold property no 121/128 Komarock by the agreement dated 5th January, 2008 to Evelyn Mwaka, who paid him **Kshs. 5,000,000/=**. That he had a signed sale agreement to that effect. He denied having had knowledge that Ms. Mwaka was a supplier at the National Water and Pipeline Corporation, and maintained that the transaction did not amount to any conflict of interest. He blamed the failure of some of his transactions to go thorough on interference from the Plaintiff.

47. The Defendant stated that when he received a letter from the Plaintiff requiring him to explain the source of his wealth he explained that house no. 121/186 was bought in 1991 through a mortgage from HFCK, and that is the property that was sold to Jennifer Evelyn Mwaka. He said that the **Kshs. 55,000,000/-** in unexplained assets was as a result of "cooked" figures by PW2. He asserted that the schedules referred to were not prepared by the Plaintiff as they did not have the Plaintiff's letterhead. Further that he had worked for over 20 years and invested his salary earned over that period of time but the Plaintiff chose to concentrate on 9 months. He also said his audit firm had been in existence for over 26 years and also earned him income.

48. The Defendant testified that he had taken loans and invested them and that his family members also contributed to his income which factors were not considered. Further that none of his employers ever raised an issue of integrity or loss of money against him.

49. Regarding the Barclays bank Account No. [Particulars withheld], the defendant testified that the money was invested in a fixed deposit account as follows:

- i. 3rd March, 2008, **Kshs. 11, 000,000/=** debit advise and not a deposit as indicated by PW2.
- ii. 22nd April, 2008, the **Kshs. 11,000,000/=** above returned to the account having earned interest.
- iii. 30th April, 2008, **Kshs. 20,000,000/=** credit advise to the bank for the same reasons.
- iv. 26th May, 2008 **Kshs. 20,000,000/=** was a debit advice
- v. 12th June, 2008 was a debit advice and a further credit advice on 19th June, 2008 in the same account.

The Defendant argued that PW2 treated all these figures as deposits although they were not. That PW2 failed to distinguish between cash transfers within the same account and between different bank accounts, and treated such transfers as deposits although they concerned the same funds.

50. He pointed out that he had issued a banker's cheque worth **Kshs. 5,000,000/-** which was not cashed since the transaction it was intended for did not go through. He clarified that the total of credit and debit advises to the banks amounted to **Kshs. 121,400,000/=** which the Plaintiff mistakenly treated as deposits

51. He argued that due to lack of accounting knowledge, PW2 altered his bank statements resulting in the alleged deposit of **Kshs. 140,000,000/-** and the withdrawal of **Kshs. 85,000,000/-** which did not actually occur. He rejected the wealth declaration forms tendered by the Plaintiff in evidence saying they were incomplete. His view is that this trial was based on altered and manipulated records and that any attempt to forfeit his private property is illegal. He asserted that he had been denied the opportunity to use his property to generate income over a period of 8 years and the investigations were intended to remove him from office.

52. In cross examination, the Defendant confirmed that this investigations started with raids in both his home and office from where the Plaintiff took cash amounting to **Kshs. 3,998,000/-** together with cheques

worth **Kshs. 17,000,000/-**. Regarding the 16 ATM deposits of Kshs. 100,000/- each, he said that he had received the cash from a client being payment for audit fees. The cash deposit of **Kshs. 1,000,000/=** made to his account no. [Particulars withheld] was a collection from his community for an electricity project. The documents that could have explained this money were taken by the Plaintiff during the search in his home and office, he said.

53. Other deposits he testified, were rental income and savings which amounted to **Kshs. 1,000,000/=** and was deposited into his account on 29th November, 2007. All his deposits were therefore proceeds of legitimate income, rental income, professional accountant and audit fees, salary and sale of property of **Kshs.6,500,000/=**. The Defendant could not remember the source or purpose of the local cheques for **Kshs. 3,000,000/=** deposited in his account on 1st February, 2008 nor the one for **Kshs.4,300,600/=**. His testimony was that plot no. 18 Umoja was sold to Antony Ng'ang'a at a cost of **Kshs. 35,000,000/=**, while plot 121/186 was sold to Jennifer Evelyn Mwaka, and he was not aware that the two persons traded with the corporation for which he worked.

54. According to the Defendant his analysis of cash flow between the period under investigation came to **Kshs. 55,445,000/=** and he was relying on his memory since the Defendant confiscated his records. He asserted that he was unable to properly explain his bank account transactions since his accounts were already frozen and he could not obtain any statements.

55. The Defendant could only remember that within the period of 10 months under investigations, he spent a total of **Kshs. 43,208,000/=**. He confirmed that he paid a total of **Kshs. 7.600, 000/=** to Toyota Kenya for his two motor vehicles. He estimated his entire earnings for the 25 years professional period to be about **Kshs. 86,000,000/=** and could not tell how much the Plaintiff was claiming from him.

56. The Defendant denied having cumulative Kshs. **55,096,498/44** in bank balances or unexplained wealth and said this amount had not been explained by any bank official. He said that the statement relied on by the Plaintiff was interim and explained the sources of his wealth as follows:

- i. Balance brought forward of **Kshs. 6,500,000/=**
- ii. Cash brought by a Sudanese national of **Kshs. 15,500,000/=** paid as professional fees and that the invoice and receipt for this transaction were confiscated by the Plaintiff.
- iii. Salary, rental income and sale of property.

The Defendant complained that the Plaintiff failed to prepare folios for the documents confiscated and only referred to some of the documents as "etc." and was unable to account for all the confiscated documents.

57. The Defendant disclosed that he paid tax on the Kshs. 15,500,000/= received as professional fees from the Sudanese national and that this was the money deposited in segments of Kshs. 100,000/= via ATM deposits. He urged that the Plaintiff confiscated his documents because they wanted to weaken his defence. He said that when he received the notice from the Plaintiff, he asked his employer for his wealth declaration forms for the years 2005, 2006 and 2007 and these were stamped by his employer and forwarded to the Plaintiff yet the wealth declaration forms filed in court were not stamped and were not the ones forwarded by the Defendant's employer.

58. The Defendant said that the Plaintiff's Notice did not ask him to explain the **Kshs. 55,096, 468/-** and pointed at the big difference between the figures of Kshs. **55,096,498/44** referred to by PW1, while PW2 referred to an amount of 43,898,722/65. His request for his accounts to be audited by a professional auditor was not heeded. In his view these proceedings are criminal in nature yet he was not charged with any offence relating to this matter in any court. Further that some of the documents recovered from his house were not recorded in the inventories and as such, the plaintiff's investigations were incomplete.

59. Having carefully analyzed the Originating summons herein, the response thereto, the evidence as well

as the submissions by both parties, the issue that arise for determination is whether the 1st defendant is in possession of unexplained assets being:

1. House number A.18, Umoja Innercore
2. House number b.35- Umoja Innercore
3. Plot number C.37 Sector 1- Umoja Innercore
4. Ngong/Ngong/26632
5. Ngong/Ngong/38889
6. Ngong/Ngong/38890
7. Motor vehicles registration numbers; KBB059T, KBB537T, KAR 843M and KAH 223F.
8. Funds in the following bank accounts;
 - a. Accounts Number [Particulars withheld] and [Particulars withheld] Barclays Bank Of Kenya, Enterprise Road between September 2007 and June 2008.
 - b. Account Number [Particulars withheld]; Standard Chartered Bank, Harambee Avenue between September 2007 and 30th June, 2008
 - c. Account number [Particulars withheld] national west minister bank PLC-London branch 60-15-49 between September, 2007 and 20th June, 2008.
 - d. Cash of Kshs. 4,308,000/= (Four Million, Three Hundred and Eight Thousand Shillings) seized by the Plaintiff's agent on 2.7.2008 during execution of search warrants.

60. The Plaintiff further prayed that the defendant be ordered to forfeit landed properties as well as the value of the developments thereon amounting to **Kshs. 32,500,000/-**.

61. Learned State Counsel Mr. Kagucia prosecuted the case while learned counsel Mr. Omino appeared for the Defendant.

The definition of unexplained assets is to be found in Section 2 of ACECA which states as follows:

“Unexplained assets means assets of a person—

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 for which there is no satisfactory explanation.

The starting point is therefore to determine when the Defendant's assets aforementioned were acquired, to establish whether or not they can be classified as unexplained.

62. The burden of proof and the manner in which the court may be approached was addressed by the Kenya Court of Appeal in **Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti COA NO. 213 OF 2011 [2015] eKLR** held thus:

“Further, under Section 55 (3), (4), (5) and (6) of the Act, EACC is provided with procedure to

*follow once they have carried out investigations and they are satisfied that the person has unexplained assets and the person has been given an opportunity to explain the source. **If EACC is not satisfied with the explanation, they can institute proceedings by way of an originating summons and the burden remains with EACC to discharge, on a balance of probability, that the alleged assets were acquired through abuse of public office.** (Emphasis provided)*

63. In the Ugandan case of **Col. Dr. Besigye Kiiza V. Museveni Yoweri Kaguta, Election Petition No. 1 of 2001.** Which was relied on in the case of **Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti [2015] eKLR,** it was held that:

“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.”

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.

The burden therefore lies with the plaintiff herein to prove the allegations that the defendant has

unexplained assets and proof is above a balance of probability.

64. The period within which the Defendant herein is alleged to have been involved in corruption and acquisition of unexplained assets is between **September 2007 to June 2008**. Using the definition in Section 2 ACECA this court therefore considered only the property acquired within the period in question to ascertain whether it consists of the Defendant's unexplained assets. From the Plaintiff's supporting affidavits and annexures thereto, the plaintiff purchased properties as follows:

- a. House number A. 18 Umoja acquired on 8/10/1999
- b. House No. B. 35 Umoja acquired on 14/4/1999
- c. Plot No. C.37 Acquired on 29/11/2007
- d. Ngong/ Ngong 38889 and 38890 acquired on 17/6/2007 via cheque dated same day.
- e. Ngong/Ngong/23281 acquired in 2002

65. **On the landed properties** it appears that the Plaintiff was satisfied with the Defendant's explanation regarding some of the properties in relation to their notice. The notice concerned Residential houses on L.R. No. Nairobi/ Block121/86, Residential house No. 231 on L.R. No. 77/256 Buruburu phase V extension, properties known as Uhoho/ Magoya 540, Uhoho/Magoya 1068, Uhoho/Ugunja 1327, Uhoho/Ugunja 1500 and Jua Kali plots No. 650,651,652 and 692 Kakamega town. These properties are not subject of the proceedings in the Originating summons dated 19th September, 2008.

66. Landed properties comprising House number A. 18 Umoja acquired on 8/10/1999, House No. B. 35 Umoja acquired on 14th April, 1999 and acquired on 26th August, 2002 shall also not be considered to form part of the Defendant's unexplained assets. The said properties were acquired way before the period under investigations. Properties known as Plot No. C.37, and Ngong/ Ngong 38889 and 38890, were acquired on 29th November, 2007 and 17th June, 2008 respectively, within the period under investigation. These Properties therefore fall in the category for consideration as unexplained assets as alleged by the Plaintiff.

67. The Defendant stated that the source of the funds used to acquire properties, known as Ngong/Ngong/38889 and Ngong/Ngong/38890, was his salary, savings, sale of property, professional fees, bank loans and advances from friends and family income. I have considered the documents produced in evidence and particularly the sale agreements. Indeed it is not in dispute that the Defendant had been in employment for 25 years he had a private accounting firm and that he also had firm and rental houses at the time of this investigations. The value of the two properties above was not disclosed nor was it demonstrated that the defendant could not have bought them from his source of income.

68. The motor vehicles in the defendant's possession also came under investigation. The defendant was required to explain how he acquired motor vehicles registration numbers; KBB 059T, KBB 537T, KAR 843M and KAH 223F. A perusal of the documents annexed to the Plaintiff's Supporting affidavit dated 19th September, 2008 shows that motor vehicle registration number KAH 223F was acquired in the year 1999 and therefore does not fall within the period under investigation. As for the remaining cars, although the Defendant did admit that he paid Kshs.7,550,000/= to Toyota Kenya for two motor vehicles in the period under investigation, the receipts issued to him from Toyota Kenya for the stated amount do not indicate what the payments were for. The court cannot therefore state with any degree of certainty that the vehicles listed above fall within the unexplained assets.

69. On the issue of cumulative bank deposits the Plaintiff stated that the Defendant had made cumulative deposits into his various bank accounts referred to in the Originating Summons amounting to **Kshs. 140,976,620.55** withdrawn a cumulative sum of **Kshs. 86,876,522/11** and had a balance of **Kshs. 55,000,000/=** within the period under investigation between September 2007 and 30th June 2008. The

Plaintiff prayed that this be forfeited to the state as it constituted the Defendant's unexplained assets. PW2 a quantity surveyor trained in asset recovery testified that he arrived at the figure by analyzing the Defendant's bank account deposits for the period under investigations. His analysis was also relied upon by PW1 a fellow investigator. The Defendant on his part questioned his ability to analyze bank records and statements, since he was not an accountant and therefore lacked the technical accounting knowledge.

70. The bank accounts pertinent to the above prayer are:

- i) Standard Chartered Bank, Harambee Avenue Branch **A/C No.** [Particulars withheld];
- ii) Standard Chartered Bank, Yaya Center branch **A/C No.** [Particulars withheld];
- iii) Standard Chartered Bank, Harambee Avenue Branch **A/C No.** [Particulars withheld];
- iv) HFCK Chiromo Branch, **A/C No.** [Particulars withheld], CFC A/C No. [Particulars withheld],
- v) Cooperative Bank of Kenya, Haile-Selassie Branch **A/C No.** [Particulars withheld];
- vi) National Westminster Bank PLC- London Branch **60-15-49 A/C** [Particulars withheld];
- vii) Barclays bank of Kenya account Nos. [Particulars withheld] enterprise road branch.

The Plaintiff did not however, obtain comprehensive bank statements from the Defendant's respective bankers, even after obtaining an order to freeze and investigate the said accounts.

71. The affidavit deposed by Mwathe and Associate Auditors, who audited the Defendant's accounts at his instructions for the relevant period indicates that cumulatively, the Defendant had deposited a sum of **Kshs. 39,882,278/-**, and withdrawn a total of **Kshs. 24,749,823/-**, leaving a balance of **Kshs. 15,132,455/=**. The Defendant explained that the difference between his figures and the Plaintiff's figures was brought about by the fact that the Plaintiff treated debit and credit advices made by the Defendant to his bankers, requesting the bank to transfer funds from his bank accounts to Fixed deposit accounts and back, as deposits.

72. From a basic addition of deposits and withdrawals, in the bank statements tendered in evidence, I found that the Defendant made cumulative deposits of **Kshs. 37,508,561/5**, cumulative withdrawals of **Kshs. 7,388,717/25** and was left with a cumulative balance of **Kshs. 30,119,844/25**. I note that indeed the Defendant issued credit and debit advices as aforementioned for the bank to move his funds to Fixed Deposit accounts. These funds were already in the Defendant's account. They were simply being moved from the Defendant's regular account to fixed deposit accounts and back into the regular accounts. It would therefore be erroneous, to consider the credit and debit advice amounts in the computation of the cumulative deposits and withdrawals as deposits.

73. The Plaintiffs obtained search warrants to search the Defendant's residence and office on 1st of July, 2008. They also sought and obtained on 18th July 2008 warrants to investigate the Defendant's bank accounts. The order also froze the Defendant's accounts referred therein. Both the plaintiff and defendant confirm that the search warrant was duly executed and the Defendant's office and residence were searched, whereupon the documents relied upon herein were impounded.

74. As stated earlier the Plaintiff bore the burden of proving the allegations made herein, including those regarding the Defendant's financial transactions. PW2 was a Quantity Surveyor (QS) who is a construction industry professional, with expert knowledge on construction costs and contracts. This court was not told that PW2 had the additional professional and technical accounting knowledge to analyze the Defendant's accounts. The status of the Defendant's accounts required the services of a Forensic Auditor or a bank official, to re-solve the mystery of the different figures arrived at by the Plaintiff, the defendant and the court upon examination of the bank statements.

75. The upshot of my analysis is that the court cannot, even on a balance of probability, establish that the Defendant made a cumulative deposit of **Kshs. 140,976,020/=**, withdrew a cumulative sum of **Kshs. 85,879,522/11** and had a cumulative balance of **Kshs. 55,094,498/-** in his bank accounts within the period under investigations; September 2007 and June 2008.

76. Other impugned monetary receipts that came into the possession of the defendant fall into four broad categories. The Defendant alleged that these funds came from advances from friends and family, professional fees, community funds and funds from sale of property.

77. On the advances from friends and family the Defendant testified that he received advances from friends and particularly Kshs. **9,500,000/=** from one Samuel Gitonga, Vide an agreement dated 18th January, 2008. This is an averment which however, was not supported by any evidence. The said Samuel Gitonga did not testify, nor did the Defendant provide any documentary evidence to support his allegation. The court was not told of any difficulty in securing Mr. Gitonga's attendance in court to testify on behalf of the Defendant if the defendant so wished.

78. I also note that the Defendant did not produced any document in support of the grants of Letters of Administration made to him regarding the alleged estate of his let father and brother. None of his family members were called to testify to this end, nor was it demonstrated to the court when and how much of the proceeds of the sale of this said estate had been injected into his funds.

79. With regard to professional fees, the Defendant testified that some of the deposits into his bank accounts came from payments made to him for professional accounting services he had rendered. In particular he stated that he earned **Kshs. 15.5 million** from a Sudanese National. There was however not a shred of evidence to back such an averment. In my view, for the defendant to attract professional fees of the magnitude of Kshs.15.5 million, he would have to have served a very large corporate body for a considerable amount of time or work to earn such an amount.

80. The Defendant did not provide the name or company of the so called "Sudanese national" that he served, the period for which services were provided, the nature of the actual services provided and the fee notes raised. It is not clear why he chose to bank the said fees in tranches of Kshs.100,000/= via ATM over a period of days. It is doubtful that the "Sudanese National" would have paid such a large amount of fees in cash and in such small bits over a number of days, instead of making one bank transfer or a few large transfers.

81. On the deposits from Community funds the defendant told the court that he collected **Kshs.1,000,000.00** through fund raising, for purposes of electricity installation on behalf of his community back in his village. One would expect that there would be some sort of committee to oversee such a noble idea or that even the area chief or sub-chief would lend credence to such assertion. I note however, that not a single witness testified in support of the said project. The Defendant said that the relevant invoice was among the documents impounded by the Plaintiff from his house and office. He however did not supply any copies of documentation from Kenya Power and Lighting Corporation for such a project.

82. On the funds from sale of property, of interest are the deposits made by one Jennifer Evelyn Mwaka t/a Evemil Enterprises and Anthony Mwaura Ng'ang'a T/a Toddy Merchants and Hardy Enterprises into the Defendant's Barclay's Bank Account No. 8240656. The deposits made in the period under investigation by these two persons amounted to Kshs.10.9 million.

83. The defendant admitted that he received money from Jenifer Evelyn Mwaka and Antony Ng'ang'a Mwaura amounting to Kshs. **10,900,000/=**. This he explained, was because he was in the process of selling a plot of land to Mr. Ng'ang'a at a cost of Kshs. 35,000,000/=. The Defendant supplied the Plaintiff with a sale agreement between himself and Antony Ng'ang'a as evidence of that sale. The said agreement indicates that it was signed on 28th November, 2007, and that on its strength the Defendant had received the 1st and 2nd instalments of the purchase price. The Defendant also supplied a sale agreement for Plot number 121/186 Komarock concerning Jennifer Evelyn Mwaka. This document was also not

among the documents in the inventory of items recovered from his house or office during the search.

84. Several issues arise for consideration concerning these deposits. First, the Appellant did not deny that these two were merchants who had supplied goods and services to the corporation for which the Defendant worked as the Finance Manager. The Defendant told the court that he was unaware of these facts, but that even if it were true it would not preclude him from doing his own private business with them. Such a relationship is obviously one that would give rise to conflict of interest where persons with whom the Defendant was carrying on private business, were also the ones being awarded the corporation tenders and he had not disclosed such interest.

85. Second, it is difficult to believe that as Finance Manager, the Defendant was not aware of the names of persons he was authorizing to receive such hefty payments from the Corporation on a regular basis even if he did not know them in person. Evidence showed that the two persons had received several Local Purchase Orders (LPO) from the company during that time. It is hardly likely that at the time of signing the supposed private contracts the two persons did not disclose this fact to him. In so trading with them he offended **Section 66(1) of Public Procurement and Asset Disposal Act 2005.**

86. Third, if these were people with whom the Defendant was conducting bonafide trade or business they would have easily come forward to testify on his behalf and to produce their copies of the transaction documents. No such evidence was tendered.

87. Fourth, it is my view that these documents which were presented as sale agreements were suspect and were the Defendant's attempt to show that his money was from genuine transactions. It is telling that there is no evidence that the various monies have since been refunded to the alleged purchasers, or Mr. Samuel Gitonga or even the community back in the village, since the Defendant complained that the intended transactions were frustrated by the actions of the Plaintiff of confiscating his documents.

88. Fifth, the authenticity of the sale agreement which indicated that the defendant received money from Mr. Ng'ang'a in February and March 2008 and that the plot alleged to have been sold was Plot No. A18 Umoja Innercore is doubtful. The amounts of the alleged instalments received were not disclosed. The sale agreement was not part of the documents found and retrieved from the Defendant's house by the Plaintiff during the search. The alleged sale agreement between Janifer Evely Mwaka and the Defendant was dated 5th January, 2008 but was not signed nor was it witnessed.

89. Sixth, there was in evidence another offer dated 14th May, 2008 from the Defendant to one Fredrick Oburu for the sale of the same property, which from the Defendant's testimony had already been sold to Jennifer Evelyn Mwaka at a sale price of Kshs. 3,500,000/=. Together with the offer there was a sale agreement drawn by Siganga & Co. Advocate between the Plaintiff and the said Fredrick Oburu.

90. From the foregoing I make a finding that there was no sale of property between the Defendant and M/s. Jenifer Evelyn Mwaka or Mr. Anthony Ng'ang'a Mwaura.

91. Then there was also the matter of Kshs. **4,308,000/-** cash seized from the Defendant's house. The Defendant told the court that this is the money intended for the building material which was well and good. He did not however tell the court the source of this money.

92. This is a claim for civil recovery. 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. The Plaintiff herein is therefore not required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA. In the case of **Director of Assets Recovery Agency & Ors, Republic versus Green & Ors [2005] EWHC 3168**, 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.”

93. The Defendant was a public official with known sources of income, as stated in his declaration under the Public Officer Ethics Act, 2003. He suddenly and inexplicably amassed wealth within the relatively short period between September 2007 to June 2008. Only he could explain his wealth and he was afforded this opportunity when he was issued with a statutory notice.

94. I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial. See - **Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another [2017] eKLR.**

95. Section 55(5) of the Anti-corruption and Economic Crimes Act envisages that if the Plaintiff satisfies the court, on a balance of probability, on the evidence adduced, that the Defendant has unexplained assets, the burden shifts so that the court may require the Defendant to satisfy it that the assets were acquired otherwise than as a result of corrupt conduct. See 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.”

Applying the *ratios decidendii* of the **Dr. Besigye Kiza** case above, the amount of proof that produces the court’s satisfaction must be that which leaves the court without reasonable doubt.

96. In the present case I have considered the property acquired at or around the time the defendant was reasonably suspected of corruption or economic crime; and whose value is disproportionate to his known sources of income at or around that time, and for which I consider that there is no satisfactory explanation. I am satisfied that the Plaintiff proved on a balance of probability that the property listed below fits into the definition of the term unexplained assets as defined under Section 2 of ACECA and should be forfeited to the State:

1. Kshs. **9,500,000/=** said to have been advanced by one Samuel Gitonga,
2. Kshs. **15.5 million** said to be professional fees from a Sudanese National
3. Kshs. **10,900,000/=**. Said to be instalments paid by Evelyn Mwaka and Antony Ng’ang’a Mwaura for sale of property.
4. Kshs. **1,000,000.00** said to be funds for a community project.
5. Kshs. **4,308,000/-** cash seized from the Defendant’s house.

I therefore declare the foregoing sums of monies to be unexplained assets and order that the Defendant do pay the Kenya Government Kshs.**41,208,000/-** being the sum total of the monies listed above.

There are no orders as to costs.

SIGNED, DATED this 23rd **day** of **November, 2017.**

.....

L. A. ACHODE

JUDGE