



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 33 OF 2016**

**ETHICS & ANTI CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**JIMMY MUTUKU KIAMBA ..... 1<sup>ST</sup> DEFENDANT**

**TRACY MBINYA MUSAU..... 2<sup>ND</sup> DEFENDANT**

**JIMBISE LIMITED .....3<sup>RD</sup> DEFENDANT**

**MUTHAIGA GREEN ACRES LIMITED.....4<sup>TH</sup> DEFENDANT**

**AND**

**EQUITY BANK LIMITED.....INTERESTED PARY**

**RULING**

1. The subject matter of this ruling is the motion dated 29<sup>th</sup> January 2016 taken out by Ethics and Anti-corruption Commission, the Plaintiff/Applicant herein, in which it sought for the following orders:

1. *That this application be certified as urgent and service thereof upon the Defendant be dispensed with in the first instance.*
2. *That pending inter partes hearing and determination of this application the Defendants by themselves, their agents, servants and/or employees be restrained from alienating, selling, charging or further charging, leasing, transferring, wasting, disposing or in any similar manner dealing with the parcels of land know as*
  - a. *Maisonette number 6 on L. R. No. 209/12736, South C, Nairobi*
  - b. *Maisonette number 15 on L.R. No. 209/12742, South C, Nairobi*
  - c. *Mavoko Municipality Block 6/831*
  - d. *Machakos/KIandani/4260*
  - e. *Machakos Kiandani/3749*
  - f. *Land reference no. 209/19522 (Original number 209/12742) I.R 129284*
  - g. *Land reference no. 209/18417 (Original number 209/127336/17) I.R 111252, Bandari Villas Phase 1 Estate, South C, Nairobi*
  - h. *Apartment No. B1 Block B in Pritt Lane court erected on Land Reference Runda Water Estate,*

**Nairobi City Count;**

- i. **Land reference no. 7785/605 (Original number 7785/10/430, I.R 56556 Runda Water Estate, Nairobi City County**
- j. **Apartment No. B5 Block B in Pritt Lane Court 3 erected on Land reference no. 330/1310 Lease number I.R 136088/1**
- k. **Apartment no. A8 Block A in Pritt Lane Court 3 erected on Land reference no. 330/1310 Lease No. 136089/1**
- l. **Town House No. 2 erected on Land reference no. 209/19582 (I.R 132743) Kileleshwa Estate, Nairobi City County**
- m. **Skyrock Apartment, Block B, Unit 11, 4<sup>th</sup> floor LR No. 330/317, Nairobi;**
- n. **LR No. 7785/818 (Original No. 7785/10/557)**
- o. **LR No. 214/211 of Naivasha Avenue, Naivasha Lane in Old Muthaiga Estate, Nairobi County.**

3. **That pending inter partes hearing and determination of this application the Defendants by themselves, their agents, servants and/or employees be restrained from selling, charging, leasing, transferring, wasting, disposing or in any similar manner dealing with the following motor vehicles**

- i. **KBT 454X**
- ii. **KBP 255V**
- iii. **KBS 454G**
- iv. **KBD 978K**
- v. **KBK 888S**
- vi. **KBG 079F**
- vii. **KBZ 298X**

4. **That pending the hearing and determination of this application inter partes the Defendants by themselves, their agents, servants and/or employees be restrained from withdrawing funds or in any other way dealing with the following bank accounts:-**

- i. **Account number 0100002572677, 0100000527003, MM1428009380, US Dollar Account 0100002598633 CFC Stanbic Bank Limited, Harambee Avenue Branch-Nairobi, held in the name of Jimmy Mutuku Kiamba;**
- ii. **Account number 0100001817517 CFC Stanbic Bank Limited, Harambee Avenue Branch-Nairobi held in the name of Jimbise Limited'**
- iii. **Account Number 0101967767700 Standard Chartered Bank Limited-Machakos Branch held in the name of Jimmy Mutuku Kiamba;**
- iv. **Account Number 0100310598100 Standard Chartered Bank Limited-Yaya Centre Branch held in the name of Tracy Mbinya Musau;**
- v. **Account Number 01109066255900 Co-operative Bank of Kenya-Athi River Branch held in the name of Jimmy Mutuku Kiamba;**
- vi. **Account number 01105168722700 Co-operative Bank of Kenya Kimathi Street branch Jumbo Junior Access A./C for Serena Mutuku c/o Tracy Mbinya Musau;**
- vii. **Account number 0120757701 Gulf African Bank Limited-Kenyatta Avenue held in the name of Jimmy Mutuku Kiamba;**
- viii. **Account number 0810199948962 Equity bank Limited-Equity Supreme centre**

5. **The costs of this application be provided for.**

2. The aforesaid motion is supported by the supporting and supplementary affidavits sworn by James Kamau Kariuki. When served, Jimmy Mutuku Kiamba, Tracy Mbinya Musau, Jimbise Ltd and Muthaiga Green Acres Ltd, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents respectively, filed the replying affidavit sworn by Jimmy Mutuku Kiamba to oppose the same.
3. I have considered the grounds stated on the face of the motion plus the facts deposed in the affidavits filed in support and against. I have also considered the oral submissions of learned

counsels from both sides. It is the submission of Mr. Kagucia, learned advocate for the Plaintiff/Applicant that the Plaintiff has commenced investigations into allegations of corruption or economic crimes with a view of instituting civil proceedings against any persons for the recovery of assets whose value is disproportionate to the person's legitimate sources of income.

4. Pursuant to the provisions of section 11 of the Ethics and Anti- corruption Act, 2011 as read with Section 55 of the Anti-Corruption and Economic Crimes Act, 2003. The Plaintiff further stated that on 5.11.2014 it received credible information that 1<sup>st</sup> Defendant was receiving in his bank accounts with various banks in Kenya deposits way beyond his known sources of income. The learned advocate further argued that the 1<sup>st</sup> Defendant/Respondent by himself alongside his spouse (Tracy Mbinya Musau) and Jimbise Ltd plus Muthaiga Green Acres Ltd where both Jimmy and Tracy are the sole directors acquired assets listed in paragraphs 2, 3 and 4 of the motion whose value is way beyond the 1<sup>st</sup> Defendant's known sources of income. It is further stated by the Plaintiff that between 2009 and 2015, the Defendants jointly and severally received deposits amounting to kssh.1,057,915,456/= in bank accounts listed in paragraph 4 of the motion yet the known sources of income of the 1<sup>st</sup> Defendant for the same period was ksh.5,821,309/= being his net salary income having served in various local authorities as a town treasurer. The learned advocate further pointed out that there was a clear disparity of ksh.268,050,000/= between the value of 1<sup>st</sup> Defendants known/declared assets and his known/declared sources of income. It is stated that the Defendants were given an opportunity to explain the disproportion between his assets and his known sources of income but the Defendants offered unsatisfactory explanations. The Plaintiff has further stated it intends to recover from the Defendants through the substantive originating summons the unexplained assets worth kshs.872,094,147/=
5. The Plaintiff has also stated that it is apprehensive that the Defendants may dispose of or transfer the properties stated on the face of the motion with the aim of rendering nugatory the substantive originating summons.
6. Mr. Kagucia beseeched this court and urged it to find that it is just to prohibit the Defendants, their agents, servants and or any other persons interested in the properties listed in paragraphs 2, 3 and 4 of the notice of motion herein from selling charging further charging, transferring or disposing of the properties or dealing with the said properties in any other manner which is prejudicial to the suit herein, including but not limited to the transfer of monies held in the accounts listed in paragraph 4 of the motion. It is further argued that unless the orders sought are granted, the government of Kenya and the general public shall suffer irreparable injury.
7. Mr. Nyachoti, the learned advocate for the Defendants vehemently opposed the motion. It is the submission of Mr. Nyachoti that the 1<sup>st</sup> Defendant faced a charge of corruption vide Anti-corruption case no. 7 of 2014 which case is in respect of a charge of fraudulent acquisition of public property worth ksh.17.9 million. It is Mr. Nyachoti's argument that there is no nexus between the alleged charge sheet and the attached assets which are worth more than ksh. 1 billion. The learned advocate also pointed out that the period of investigation is between 2009 and 2013, whereas the period before 2009, the 1<sup>st</sup> Defendant/Respondent had acquired substantial part of the properties listed for recovery by the Plaintiff. It is therefore the Plaintiff's argument that there is no justification for the issuance of the aforesaid orders. It was argued that suspicion alone is not enough to link the 1<sup>st</sup> Respondent to corruption allegation. The Defendants further argued that they have explained how the properties listed herein for investigations were acquired but the Plaintiff thinks the explanation was not sufficient, yet the Defendants have given more than sufficient information. For example L. R. No 240/211 old Muthaiga estate is said to have been acquired through a bank loan while some properties do not belong to 1<sup>st</sup> Defendant. Mr. Nyachoti further argued the motion is res-judicata and does not even meet the threshold for granting orders of injunction.
8. Equity Bank Ltd, the interested party herein filed the replying affidavit of Robert Kinoti to oppose the motion too. It is the submission of the Interested Party that the 1<sup>st</sup> Defendant/Respondent was

advanced a sum of kshs.180,000,000/= to purchase the parcel of land know as L.R. No. 214/2116 which amount was repayable by monthly instalments for 10 years. It is argued that at the moment the 1<sup>st</sup> Defendant is finding it extremely difficult to service the loan forcing him to dispose of one of the properties at kshs.150,000,000/= to redeem L. R. No. 214/2116 leaving a balance of ksh.32,000,000/=. The Interested Party is of the view that if the orders sought are granted then its right to exercise its statutory power of sale under Sections 81, 90 and 96 of the Land Act will be defeated. The Interested Party also argued that the motion is fatally defective in that it should have been premised under Section 56 of the Anti-corruption and Economic Crimes Act instead of Order 40 of the Civil Procedure Rules, 2010. In response to the Interested Party's arguments, Mr. Kagucia pointed out that the Interested Party will not suffer any substantial loss because there is evidence that the 1<sup>st</sup> Defendant has sold off some of his properties to offset outstanding loan he had with the Interested Party. Mr. Kagucia argued that the Interested Party has demonstrated the diminished exposure to risk.

9. At the closing stages of his submissions, Mr. Nyachoti informed this court that the Applicant has only asked for orders to last until this motion is heard and determined. Mr. Kagucia admitted that there was a typographical error on the sort of orders the Applicant sought. He argued that a careful perusal of the certificate of urgency, the motion and the supporting and supplementary affidavits will reveal that the Applicant, intended to apply for orders of injunction to last until the substantive suit is heard and determined.

10. I have carefully considered the material placed before this court and the rival oral submissions. I have already outlined the sort or orders the Applicant is seeking. I think it is appropriate to begin with the preliminary issue Mr. Nyachoti had raised in his closing submissions. It is the submission of Mr. Nyachoti that at the conclusion of the motion dated 29.1.2016, if this court grants the orders sought, the same will lapse at the pronouncement of those orders because the Applicant has only applied for the same pending the interpartes hearing and determination of the motion. Mr. Kagucia responded to the submission by admitting that on the face of the motion the Applicant had only asked for injunctive orders pending the hearing and determination of the motion. He however beseeched this court to infer that there was a typographical error. Mr. Kagucia further beseeched this court to critically examine the motion, the affidavits filed in support of the motion and the certificate of urgency and infer that the Applicant meant to seek for the aforesaid orders pending the hearing and determination of the suit. I have carefully examined the motion and it is clear the Applicant applied for three injunctive orders i.e prayers 2, 3 and 4 pending the hearing and determination of the application. Mr. Kagucia has argued that it was the intention of the Applicant to obtain such orders pending the hearing and determination of the suit. The substantive suit in this matter is expressed in the Originating Summons dated 29<sup>th</sup> January 2016 and filed pursuant to Section 55 of the Anti-corruption & Economic Crimes Act and under Order 27 rule 14 of the Civil Procedure Rules. I have been invited to establish the intention of the Applicant when it took out the motion dated 29.1.2016. In my view in order to ascertain the intention of the Applicant it is important to look at various pleadings, statements and affidavits accompanying the motion. The first document I propose to examine is the certificate of urgency. In paragraph 6 the Plaintiff's/Applicant's advocate expressed himself on behalf of the Plaintiff as follows:

**“6. That the application filed herewith seeks to restrain the Defendants from disposing of the suit property pending the hearing and determination of this application at the first instance and, subsequently, pending the hearing and determination of the present suit.”**

11. The second document to examine is the motion itself. In paragraphs XV and XVI, the Plaintiff/Applicant stated as follows

**“XV) that the Applicant is reasonably apprehensive that the Defendants may dispose of or transfer all or part of the properties listed in the notice of motion and the suit herein in order to frustrate any decree that may be passed against him.**

**XVI)That it is therefore just and meet to prohibit the Defendants, their agents, servants and/or any other person interested in the properties listed in paragraphs 2, 3 and 4 of the notice of motion herein from selling, charging, further charging, transferring or disposing of the properties or dealing with the said properties in any other manner howsoever which is prejudicial to the outcome of the suit herein, including but not limited to withdrawal and/or transfer of the monies held in the accounts listed in paragraph 4 of the notice of motion herein.”**

12.The third document to examine is the affidavit of James Kamau Kariuki sworn on 29<sup>th</sup> January 2016 and filed in support of the originating summons. In paragraphs 37 and 38 of the aforesaid affidavit the deponent stated as follows

**“37. THAT the Plaintiff is reasonably apprehensive that the Defendant shall seek to dispose of or transfer all or part of the properties listed in the suit in order to frustrate any decree that may be passed against him.**

**38. THAT it is therefore just and necessary to prohibit the Defendant, his agents, servants and/or any other persons from transferring or disposing of or otherwise dealing with the suit properties pending the hearing and determination of the summons herein to obviate dissipation of the assets and or rendering these proceedings nugatory altogether.”**

13.The fourth and final document to examine is paragraph 12 of the supplementary affidavit of James Kamau Kariuki and in which he deposes as follows:

**“THAT these proceedings were instituted with a view to recover unexplained assets from the Defendants and it is critical to preserve the said assets pending hearing and determination of this suit.”**

14.After a critical examination of the above excerpts, it is clear to me that the Plaintiff/Applicant intended to apply for injunctive orders to restrain the Defendants/Respondent, their agents, servants and or any other person interested in the properties mentioned on the face of the motion from selling, charging, further charging, transferring as disposing of and or dealing with the same in a manner prejudicial to the outcome of the suit **pending the hearing and determination of the suit**. I am therefore convinced that in the circumstances of this case, this court is entitled to make the inference it was invited to make. In the end I overrule the preliminary objection raised by Mr. Nyachoti and proceed to consider the merits of the motion.

15.In the motion the Applicant is seeking for temporary orders of injunction. The principles to be considered in determining such applications are well settled. The first principle is that an Applicant must show a prima facie case with a probability of success. In this saga, the Applicant has been able to show that it has conducted investigations which show that the Respondents jointly and severally have unexplained assets worth kshs.872,094,147/= which assets the Applicant seeks to recover from the Respondents through the originating summons. The Defendants have contested the Plaintiff’s assertion. On the face of it, there are serious issues which can only be determined through a trial. In short, I am convinced that the Plaintiff/Applicant has shown a prima facie case with a probability of success.

16.Secondly, an Applicant must show the irreparable loss it would suffer if the order is denied. The Applicant herein has listed the properties which should be preserved by issuance of a prohibitory order of injunction. It has been argued that unless the orders sought are granted the government of Kenya and the general public will suffer irreparable injury. The Defendants argued that the current motion is resjudicata in view of the ruling delivered by Mr. Justice Mbogholi on 25.5.2015 vide Nairobi H. C. Misc. No. 804 of 2014. The Plaintiff is of the view that the motion cannot be regarded as resjudicata because the application which was before Justice Mbogholi was brought under Section 56 of the Anti-corruption and Economic Crimes Act whereas the motion herein is brought under Order 40 of the Civil Procedure Rules. With respect, I agree with the

submissions of Mr. Kagucia that the application which was before Justice Mbogholi was totally different from the one now before this court. I find the motion herein not resjudicata. It is the submission of Mr. Nyachoti that there is no complaint from any party that there will be any loss if the order of injunction is denied. The Interested Party has claimed that if the order is granted it would suffer irreparable loss in that it will not be in a position to exercise its statutory power of sale over the property if charged. In my humble assessment of the competing arguments, I am of the view that the Applicant has shown that unless the order is granted the Applicant will suffer irreparable loss in that the Defendants/Respondents will be at liberty to deal with the mentioned properties in the manner stated on the face of the motion. This will mean that the Applicant will have nothing to recover in furtherance of its statutory mandate. This in my view is an irreparable loss which cannot be compensated in monetary terms.

17.The third principle to be considered is that where the court is in doubt, it would determine the motion on a balance of convenience. Though I am not in doubt in this matter, I feel obliged to mention something about this principle in relation to the dispute at hand. The question which this court must grapple with is which between the Applicant and the Respondents and the Interested Parties will be more inconvenienced if the order of injunction is given or denied? In my view all the parties herein will be inconvenienced in one way or the other depending on what position this court takes. If the order is granted the Respondents will be inconvenienced in that they will not be in a position to access the assets/properties in question until the substantive originating summons is heard and determined. On the other hand the interested party will not be in a position to exercise its statutory power of sale until the substantive suit is heard and determined. On the other hand if the order is denied, the Applicant will not be in a position to preserve the suit property before the suit is heard and determined. It may be forced to file multiple suits in pursuit of properties already transferred to third parties. In my humble view, the party which will be more inconvenienced in the circumstances is the Applicant as opposed to the Respondents and the interested party.

18.In the end, I am satisfied that the Applicant's motion dated 29.1.2016 is well founded. It is allowed in terms of prayers 2, 3 and 4 pending the hearing and determination of the originating summons. Costs of the motion to abide the outcome of the suit.

19.This court is alive of the fact that the Applicant has previously enjoyed preservative orders issued pursuant to the provision of Section 56 of the Anti-corruption and Economic Crimes Act. The Applicant has now obtained temporary orders of injunction issued pursuant to the provision of Order 40 of the Civil Procedure rules. Under the later provisions the rules makes time of essence from the time of filing the application upto the time of concluding the sit. Under Order 40 rule 6 of the Civil Procedure rules, where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant of the order of injunction the order shall lapse unless for any other sufficient reason the court orders otherwise. From the affidavit evidence exchanged by the parties it is apparent that most of the evidence required to be presented at the trial are within the reach of the parties. There is therefore the need to expedite the hearing and determination of this suit on priority basis by taking directions right away.

**Dated, Signed and Delivered in open court this 20<sup>th</sup> day of May, 2016**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant