



REPUBLIC OF KENYA

HIGH COURT OF KENYA

ANTI-CORRUPTION DIVISION AT NAIROBI

MISCELLANEOUS APPLICATION NO.7 OF 2016

ETHICS AND ANTI –CORRUPTION.....PLAINTIFF/APPLICANT

VERSUS

ENG.PETER MANGITI.....1ST DEFENDANT/RESPONDENT

ADAN GEDOW HAKAKHE.....2ND DEFENDANT/RESPONDENT

DR. NELSON GITHINJI.....3RD DEFENDANT/RESPONDENT

HASSAN NOOR HASSAN.....4TH DEFENDANT/RESPONDENT

SAMUEL CLOYD ODHIAMBO.....5TH DEFENDANT/RESPONDENT

SAMUEL MDANYI WACHENJE.....6TH DEFENDANT/RESPONDENT

HENDIRICK NYONGESA PLILISI.....7TH DEFENDANT/RESPONDENT

JOHN MUNYWOKI.....8TH DEFENDANT/RESPONDENT

RUTH KIIRU.....9TH DEFENDANT/RESPONDENT

HEZBOURNE MACKOBONGO10 DEFENDANT/RESPONDENT

MICHAEL W. OJIAMBO.....11TH DEFENDANT/RESPONDENT

JAMES KIRIGWI.....12TH DEFENDANT/RESPONDENT

SALIM ALI MOLA.....13TH DEFENDANT/RESPONDENT

KENNEDY NYAMAO.....14TH DEFENDANT/RESPONDENT

MOSES OSORO OGOLA.....15TH DEFENDANT/RESPONDENT

FRESHIA KAMAU.....16TH DEFENDANT/RESPONDENT

BETTY NJOKI MURITHII t/a

BLUE STAR ENTERPRISE.....17TH DEFENDANT/RESPONDENT

JENNIFER MUTHONI KINOTI t/a

BLUE STAR ENTERPRISES.....18TH DEFENDANT/RESPONDENT

R U L I N G

1. The Plaintiff/Applicant has filed the Notice of Motion application dated 16th May 2016 in which they seek the following orders principally as against the 17th and 18th Defendant.

1. This application be certified urgent and fit for admission to hearing In the first instance on a priority basis.

2. Pending interpartes hearing and determination of this application, the 17th and 18th Defendants/ Respondents by themselves, their agents, servants, assigns or any other person whoever be restrained from taking possession of or withdrawing, transferring, disposing or in other way dealing with the sum of Ksh.45,137,937.05 held in account number 030002061501 at Paramount bank Nairobi.

3. Pending the hearing and final determination of this suit the 17th and 18th Defendants/Respondents by themselves, their agents, servants, assign's or any other person whosoever be restrained from taking possession of withdrawing, transferring, disposing or in any other way dealing with the sum of Ksh.45,137,937 held in account number 030002061501 Paramount Bank, Nairobi.

4. The costs of this application be provided for.

2. The application is premised on the grounds on its face thereof and supported by the supporting and supplementary affidavit of **Mark Ndiema** an investigator with the Ethics and Anti-Corruption Commission, sworn on 16th May and 28th July 2016. He reiterated the legal mandate of EACC which includes investigation and institution of Court proceedings in court for the recovery or protection of public property and confiscation of proceeds of corruption.

3. He deposed that pursuant to its mandate it investigated allegations of embezzlement of public funds at the Ministry of Devolution and Planning on reasonable suspicion that public officers, had colluded with private persons to pay out funds allocated to the National Youth Service, on account of goods and services delivered.

4. He stated that their investigation established that the 4th, 5th, 9th, 10th 11th, 12th, 13th, 14th, 15th and 16th Defendants were members of the Ministerial Tender Committee, while the 1st Defendant was the Principal Secretary and accounting officer, State Department of Planning in the Ministry of Devolution and Planning (MD&P).

5. Further that the 2nd and 6th Defendants were alternate A.I.E holders while the 3rd Defendant/Respondent was the Director National Youth Service. That the 7th Defendant was the Head of procurement in the NYS department as well as the Secretary to the NYS. He was also the head of procurement in the National Youth Department as well as then Secretary to the NYS Departmental Tender Committee.

6. It was further established that the tender for the supply and delivery of training material in Automotive Engineering was processed through restricted tendering pursuant to the decision of the Ministerial Tender Committee meeting that took place on 16th December, 2014, where 10 firms were proposed to participate with six responding. He stated that there was no justification for the use of restricted tendering and how the firms were selected to participate in the tender.

7. He deposed that there is nothing to show how the ten firms were contacted as most of them allege that they were contacted through phone. The tenders for the six responsive firms were opened on the 29th January 2015 by members who were appointed at a later date by the first Defendant.

8. He stated that the Tender Committee recommended five firms for the award of the tenders and proceeded to give details of the tenders awarded. From the evaluation report he contended that Dama Services Company limited which was awarded a contract was not among the ten firms that were to participate in the restricted tendering process.

9. He contended that on the authority of the resolution of the Ministerial Tender Committee the 17th and 18th Defendants were awarded the tender for supply and delivery of training materials in automotive engineering

10. Subsequently by an undated contract, signed by the 1st and 3rd Defendant on behalf of the MD&P and NYS respectively, together with the 17th and 18th Defendants, the MD&P committed to pay a total of Ksh.47,600,000 for the supply and delivery of training material in automotive engineering.

11. It was his case that a Local Purchase Order (**L.P.O**) No2481900 dated 3rd March, 2015 was issued to Blue Star Enterprises (**BSE**). He proceeded to describe equipment that was supplied by Blue Star Enterprises as follows;

S/No	Item Description	Unit issue	Qty	Unit price (Kshs.)	Total cost
1.	Cut away Model Piston pump	No	20	980,000	19,600,000
2.	3700 PSI Pressure washer with Ts MD PC 3700	No	20	595,000	11,900,000
3.	50 litres of Petrol Engine compressor 5.5 Hp	No	20	295,000	5,900,000
4.	Cut away torque converter	No	20	510,00	10,200,000
Total					47,600,000

12. He explained that a sum of Ksh.45,137,937 was by way of an inward RTGS from the state department credited into the 17th and 18th Defendants/Respondents account number 030002061501 held at Paramount Bank Limited, Koinange street branch.

He contended that the valuation of the automotive equipment was carried out by the Ministry of Transport and Infrastructure which revealed that it was over inflated by a sum of Ksh.32,000,000/- and that the

procurement of the materials was not in the 2014/2015 annual procurement plan.

13. He asserted that there was no purchase requisition for the equipment done by the user department and that BSE and the other five firms that responded to the invitation were not among the prequalified firms with the NYS and MD&P.

According to their investigations it was established that BSE was a sole proprietor business since 1998, with the objective of training. Its proprietors are the 17th and 18th Defendants.

14. Their Bank Account No. 030002061501 was opened on 12th November, 2014 at Paramount Bank, Koinange branch with **Betty Njoki** and **Jennifer Muthoni Kinoti** as signatories; that prior to the remittance of the sum of Ksh.45,137,397.05 the account had been inactive with deposits of Ksh.2000 made on the 12th November 2014 and 21st November, 2014 respectively.

15. That their investigations revealed a narrow margin on the prices of the training equipment, to the Automotive Engineering, quoted by the firms selected to supply the equipment which is a pointer to a possible collusion in the selection of the firms and award of the tender.

He submitted on the need to preserve the monies in the account to avoid the same being dissipated, transferred, withdrawn and or disposed which actions may render this application and the recovery suit nugatory.

16. The application was opposed by **Ruth Kiiru** the 9th Defendant through her replying affidavit sworn on the 30th May 2016. She responded in general to the whole suit. She denied knowing **Eliud Koome** who worked for NYS and later joined the Ministry of Agriculture in 1999 the year she stopped working for the said Ministry. She also denied all the allegations made against her by Mr. Koome in his witness statement.

17. She explained that, when she was being interrogated on the issues that have been raised she was categorical that the Ministerial Tender Committee was not properly constituted which they have failed to disclose or address. That she informed the Plaintiff through Mr. Mohamed that the then Cabinet Secretary **Mrs. Ann Waiguru** had failed to constitute a Ministerial Tender Committee for the MD&P as a distinct entity from the Ministerial Tender Committee for the Ministry of Devolution but the Cabinet Secretary insisted on her directions being followed. She could therefore not be crucified for attending the meetings.

18. In response to paragraph 5 (iii) of the Applicants affidavit she stated that, the secretariat to the Ministerial Tender Committee led by **Samuel Cloyd Odhiambo** together with **Hassan Noor** who used to be the Chair of the Joint Ministerial Committee were responsible in confirming that all documents were in order in compliance with S. 29 (3) (a) of the then Public Procurement And Disposal Act 2005. She has also denied approving the restricted tendering or issuance of any LPO. All in all, the 9th Defendant/Respondent has denied any involvement in the issues raised by the Plaintiff/Applicant.

19. In the supplementary affidavit Mr. Ndiema averred that the 1st Respondent was the Principal Secretary of the MD&P and therefore the Accounting Officer who was responsible for ensuring that the procurement in the ministry was done in accordance with the Public Procurement and Disposal Act (PPDA).

That the 3rd Respondent was the director NYS which was the user of the equipment being procured and he ought to have ensured that that the Public Procurement Act 2005 was complied with in the initiation and request procurement to the Ministerial Tender Committee; as the head of the NYS he was also responsible for approving requests for procurement to the Ministerial Tender Committee, while the 7th Respondent was the one responsible for justifying the need for restricted tendering which he did not.

20. He reiterated that the reasons for using restricted tendering as provided for in Section 73 (2) were not satisfied for the purposes of the tender committee meeting; that the firms proposed were on account of

access to government procurement opportunities. He explained that, according to Treasury Circular No. 14/2013 under reference NT/PPD/1/3/26(24) the list of items reserved for persons with disabilities is clearly enumerated and any procuring entity wishing to amend the list should notify the National Treasury, Public Procurement Directorate enumerating the reasons for their proposed list of items. This was never done in this case.

21. He stated that contrary to the 5th Respondent's assertions the training materials were captured in the Annual Procurement Plan referred to as SCO-2 and were not indicated as part of the requirements in the part relating to NYS. He averred that there was no indication that the procurement for the training equipment was reserved for the target group of the youth, women or persons with disability and therefore his averment that BSE got the tender because of AGPO is an afterthought.

22. In responding to the 17th Respondent he averred that there was no indication that the firm owned by the 17th and 18th Defendant had ever done business with the NYS before, and it was not clear how they were invited to the bid for the tender in question. That the equipment supplied by them was valued by competent officers from the Ministry of Roads and Infrastructure. After factoring in market prices, inflation, shipping costs, duty and profit margins, the equipment was valued at Kshs.15,400.000/=.

He refuted allegations that the 17th and 18th Defendant have been discriminated against, as investigations against other companies was still ongoing.

23. He stated that the Respondents had the responsibility of ensuring that all procurement was undertaken in accordance with the PPDA of 2005 without NYS paying anything in excess of market prices as required under Regulation 10 of the 2006 Act. He deposed that in accordance with Section 30 (4) of the PPDA 2005 public officials involved in transactions in which standard goods, services and works are procured at unreasonably inflated prices would in addition to the other sanctions be required to pay the procuring entity for the loss resulting from their actions.

24. With regard to Nairobi HCC Miscellaneous Application No. 517 of 2015 filed pursuant to Section 56 of the Anti-Corruption and Economic Crimes Act 2003 seeking preservation orders of the subject matter pending investigations he said the orders issued lapsed on the 18th May 2016.

He deposed that the issue in ***HC Criminal Revision No. 218 of 2015*** whose parties are ***Betty Njoki Mureithi T/A Blue Star Enterprises –vs- Inspector General*** is still the subject of adjudication in court and the order lifting the freezing was stayed.

25. The 1st Respondent, a former Principal Secretary in the MD&P ***Peter Onganga Mangiti*** also opposed the application through his replying affidavit dated 26th may 2016. He averred that the contract for the supply and delivery of the training materials in the Automotive Engineering contract NYS/RT/29/2014 was duly dated and signed by him, after the completion of the procurement process. That his role in the procurement was limited to the appointment of members of the Ministerial Tender Committee, Members of the Evaluation Committee, signing of the notification of the awards and finally signing the contract and was not directly involved in the substantive procurement process.

26. Further that under the PPDA and Regulations, the members of the committees have set statutory roles breach of which they are jointly and severally held responsible. That as the Principal Secretary he gallantly discharged his duties by reminding the members of this committee of their roles and expectation and that the procurement in issue had been captured in the NYS Procurement Plan contrary to assertions made.

27. He asserted that in signing of the contract no illegality or irregularity was brought to his attention and there was no collusion on his part with anyone in this particular procurement. That when investigations began he fully co-operated with the Plaintiff's officers and even wrote a letter to the officers requesting for preservation of the monies paid under the contract.

28. The 17th and 18th Respondents also opposed the application through the replying affidavit of **Betty Njoki Mureithi** sworn on the 13th July 2016. She averred that the procurement laws and tender procedures were fully complied with and the restricted tendering was approved as seen in the minutes.

That the Applicant had no credentials to question the proceedings of the statutory Ministerial Tender Boards. She wondered why no steps had been taken against Dama Services. She deposed that the contract signed was and is still valid and the want of the date does not vitiate a contract which has been fully performed by the 17th and 18th Defendants. Further that BSE supplied materials which were accepted by the MD&P and have been in use. Payment was also made but is withheld at Paramount Bank.

She averred that the Ministry of Transport and Infrastructure is not the public body constituted for the purposes of carrying out evaluation works and any attempt to deem them as such was misleading.

29. She stated that the procurement of the training materials was in the procurement plan which was on line basis as opposed to specific items due to the huge number of items incorporating the training materials under which the items in question fall. That the assertion that BSE was not prequalified is grossly wrong as the process followed was restricted tendering and BSE fell under the special category duly governed by Legal Notice No. 114 of 2013 and the precondition was that the special category group must have been registered which made it prequalified.

She refuted that the 18th Defendant is one of the proprietors of BSE and explained that it had other accounts which had been active.

30. She deposed that the transaction had been fully investigated and found to be above board. She raised the issue of the application being *res judicata* having been handled in HCC No. 517 of 2015. On her part, the contract had not been inflated as the tendered and evaluation Committees had done their work.

31. She explained that in order to satisfy the contract BSE borrowed heavily and the actions of the Applicant had left and exposed them to extreme loss and prejudice not to mention civil and criminal actions by the creditors. According to her, the Applicant had not established a case for the issuance of the orders and is further abusing the court process as the orders they are seeking were sought on their behalf by the office of the Director of Public Prosecution in Misc Criminal Revision No. 218 of 2015; that in Misc. 517 of 2015 the Applicant had obtained conservatory orders for six months which is still pending in court. That the criminal investigation department had also obtained orders in Kiambu Chief Magistrate Misc. Criminal Application No. 328 of 2015.

32. She contended that she had gone through every document filed in court and none of them disclosed the slightest evidence of fraud, collusion or conspiracy or any facts that would justify non-payment of the contract. She added that the attitude of the Plaintiff/Applicant exhibits gross ignorance of procurement regulations whose consequence is to bring the Government into disrepute as under the regulations they were to pay within thirty days of supply of the goods which the Applicant had failed to do.

She averred that both the Plaintiff/Applicant and the MD&P would not suffer any prejudice if the orders are not granted as they had failed to show that damages would not suffice and the Respondents were incapable of paying such damages.

33. The 2nd Defendant **Adan Gedow Harakhe** in his replying affidavit contended that he was appointed to the Ministerial Tender Committee on 15th January, 2015 and as the AIE holder by the 1st Respondent on 19th February, 2015.

He gave a chronology of events that had taken place prior to him being appointed as the account holder. That the department had prepared a procurement plan for the year 2014-15 and a budget had been approved for specialised plant equipment. That the NYS requested the Ministerial Tender Committee to use restricted tendering which was approved on 16th December, 2014. Ten firms were further approved to participate in it. That the rest of the procedure was properly adhered to and as a result he signed the

payment voucher on or about the 10th of September 2015 as the expenditure had been incurred for that purpose and was charged to the items supplied. He denied engaging in any corrupt or fraudulent practices of any nature.

34. The 4th Defendant **Hassan Noor Hassan** in his replying affidavit dated 30th June 2016 was not opposed to the orders being sought as against the 17th and 18th Defendants/Respondents. He stated that he was the secretary administration state department of planning in the ministry of devolution and was appointed chairman of the Ministerial Tender Committee on the 16th July 2014. He asserted that the NYS as the user department sought to procure the special plan, equipment and machinery for training material through restricted tendering. It was therefore the duty of NYS to initiate the procurement requirements and participate in all processes involved with the restricted tendering.

35. He contended that since all the processes had been complied with, he had no reason to make him reject the recommendations of the technical committee especially when the tender had been awarded to the lowest bidder.

He stated that he discharged his duty in good faith in accordance with the law and the constitution that created room for the participation of disadvantaged categories in Government procurement opportunities. And that the law protects him from civil or criminal proceedings.

36. The 7th Defendant **Hendrick Nyogesa Pilisi** in his replying affidavit stated that he had no interest in the orders being sought as against the 17th and 18th Defendant.

He admitted that he was in the meeting in which the Ministerial Tender Committee approved the use of restricted tendering for the purchase of special equipment and machinery for training of service men and women at NYS and did not have any voting or decision making power. He did not sit in any of the committees that opened and evaluated the tenders.

37. He proceeded to state that as the principal supply chain management officer at the NYS, he signed the payment voucher acknowledging the receipt of the goods as supported by the counter receipt vouchers, purchase orders and delivery notes. He denied any impropriety on his part.

38. The 8th Defendant **John Munywoki** in his replying affidavit averred that he was appointed member of the Ministerial Tender Committee on 16th July 2014, and Deputy Chairman in accordance with the PPDA. That on the 16th December, 2014 the committee approved the use of restricted tendering. Ten firms were then identified by the NYS but only six returned the tender documents.

He stated that the supply of the training items were won by different companies inclusive of BSE. He denied any fraud in the process.

He refuted the allegations that the items had not been budgeted for and requested for by user department.

39. The 3rd Defendant **Dr. Nelson Gitau Githinji** also filed a replying affidavit in opposing the application. He denied being a member of the Ministerial Committee and playing any role in the appointment of its members. That he was appointed as an AIE holder in the year 2014 which was revoked on 19/2/2015 and the 2nd Defendant /Respondent appointed as such on even date. That his mandate and designation therefore narrowed to policy direction and general oversight of the NYS.

40. He contended that after the tender was awarded to the 17th and 18th Defendants/Respondents the contract was executed and he witnessed it as the titular head of NYS together with **Stanley Karuri** on behalf of the 17th and 18th Defendants. He denied playing any role in the tendering, valuation, payment and processes of the supplied automotive engineering training equipment within the NYS.

PLAINTIFF/APPLICANT'S SUBMISSIONS

41. Mr. Ruto for the Plaintiff/Applicant submitted that it had carried out investigations into the allegations that funds were embezzled at the MD&P. That it came to the reasonable suspicion that public officers had conspired with private individuals to pilfer funds. He submitted that during their investigations they discovered that based on an undated contract, the ministry of devolution was committed by the 1st and 3rd Defendants/Respondents to pay 47,600,000/- founded on the resolutions of the Ministerial Tender Committee.

It was his submission that under Section 56 of the Anti-Corruption and Economic Crimes Act 2003 through Misc. Application No. 517 of 2015 the Applicant obtained preservation orders against the 17th and 18th Defendant.

42. He submitted that the first issue for determination was whether HC AEC No. 7 of 2016 and Notice of Motion dated 16th May 2016 by the Plaintiff/Applicant is *res judicata*.

On this he relied on section 7 of the Civil procedure Act that no court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a court of competent jurisdiction.

He relied on the case of ***Uhuru Highway Development-vs-Central Bank Of Kenya & 2 Others 1996 eKLR***, where the Court held that for a matter to be *res judicata* the following must be established

- a. There must be a previous suit in which the matter was in issue;
- b. The parties must be the same litigating under the same title;
- c. There must be a competent court which heard the matter in issue;
- d. The issue must have been raised once again in a fresh suit;

43. On the first issue that there must be a previous suit in which the matter was in issue, counsel invited the Court to look at ***HCC Misc. Appl. No 517 of 2015*** together with the pleadings in ***HCCC 7 of 2016*** and the Notice of Motion dated 16th May, 2016 to determine whether the issues are the same and what issues were determined.

He further relied on the case of ***Ukay Estate & Another –vs- Shah Hirji Manek & 2 Others [2006] eKLR***, where the issue of *res judicata* was analysed by ***Justice Deverell***. He submitted that the suit and the application as filed in court cannot be *res judicata*.

44. On the second limb, that the parties must be the same or litigating under the same title. It was his submission that the Court should look at ***HCC Misc. Appl. No. 517 of 2015*** and the Notice of Motion dated 16th May, 2016; ***Misc. Criminal Application Case No. 328 of 2015*** and ***HC Criminal Revision No. 218 of 2015*** where it will be ascertained that the parties are different and not identical and neither litigating under the same title. In the ***Application No 517 of 2015*** are ***Ethics and Anti- Corruption Commission –vs- Betty Njoki Mureithi & Jennifer Muthoni Kinoti t/a Blue Star***. While in ***HCCC No. 7 of 2016*** parties are ***EACC –vs- Engineer Peter Mangiti & 17 Others***.

45. He submitted that in the other suits the parties are not identical citing HC criminal revision No 218 of 2015 and Criminal case no 328 of 2015 where the parties are ***Director of Criminal Investigations –vs- Paramount Universal Bank***. While in ***HC Criminal Revision No. 218 of 2015*** the parties are ***Betty Njoki Mureithi t/a Blue Star Enterprises –vs- Inspector General of Police*** which is yet to be determined to its logical conclusion.

He further relied on the case of ***Henderson v Henderson (1843) 67 ER 313*** where the court held that the Court requires parties to bring forward their whole case and will not, except under special circumstances permit the same person to open the same subject in respect of a matter which might have been brought

forward.

46. On the third limb that there must be a competent court which heard the matter, he submitted that **Misc. Application No. 517 of 2015** was filed in a competent court seeking preservation of the assets under S. 56 and was not a decision of finality. He further submitted that on the issue in dispute in **HCCC No. 7 of 2016** the Defendants/Respondents jointly and severally conspired and executed a plan to fraudulently award the tender to the 17th and 18th Defendants/Respondents. That the suit was instituted for the recovery of public property which is Kshs.47,600,000 while the notice of motion is seeking to preserve money held in the same account to avoid the same being dissipated, transferred, withdrawn actions that would render the suit and recovery nugatory thus occasioning loss of public funds.

47. On the fourth issue that the issue must have been raised once again in a fresh suit, Mr. Ruto submitted that the Court ought to look at **HCC Misc. Appli. No. 517 of 2015** and the case in court to ascertain what issues were determined, and find that what was pending in both cases was completely different. He relied on the case of **Kenya Hotel Properties Limited –vs- Wilsden Investment Ltd & Others 2013 eKLR**, where the Court of Appeal observed that whereas the subject matter was the same the cause of action was different and therefore the ingredients of *res judicata* stood ousted. Counsel asked the court to arrive at a similar conclusion in this matter.

48. On the issue of whether there was a misjoinder of the 1st to 16th Defendants/Respondents, he submitted that the action arose from the alleged conspiracy and execution of a plan to award the tender to the 17th and 18th Defendants/Respondents. He proceeded to describe the role of each of the Respondents beginning with the 1st Respondent who was at all material times the accounting officer with the duty to ensure that the Public Procurement Act and Regulation are complied with. He submitted that the 3rd Respondent was the director general at the NYS and that through its investigations it established that by an undated contract the two of them had committed the Ministry to pay Kshs.47,600,000 for the supply and delivery of the training material. It was the Plaintiff's submission that the cause of action is captured well in the pleadings founded on the breach of the procurement laws.

49. He further describes the tender committee and its composition and the regulations governing it, further submitting that the 1st Respondent being the accounting officer appointed the 4th to 16th Respondents as members of the Ministerial Tender Committee with the 4th Respondent as the Chairman and the 8th Respondent as the Deputy Chairman of the state department of planning, Ministerial Tender Committee. It was his submissions that on the 28th of July 2014 the 14th Defendant/Respondent was appointed as the deputy chair by the Principal Secretary **Mr. John Konchelah**.

Further that the 9th, 13th and 14th Defendants were members of the Ministerial Tender Committee and participated in the tender process the subject of the award. All these members deliberated on the use of the restricted tendering process with the 7th Defendant/Respondent justifying its use. They all further participated in the Ministerial Tender Committee and deliberated on the evaluation committee recommendations, approving and awarding the six firms, the tender.

50. He submitted that the 2nd Respondent was the Senior Deputy Director General and an alternate AIE holder of the NYS and was appointed to the Ministerial Tender Committee on the 15th of January 2015 by the 1st Respondent as a representative of the NYS and he executed the payment voucher dated 22nd September 2015 contrary to the Procurement Laws.

He relied on Order 1 Rule 3 Criminal Procedure Rules together with Code of Civil Procedure Mulla 12th Edition where it's stated that **"all persons may be joined as Defendants against whom any right to relief is alleged to exist"**.

Relying on Mulla at page 42 he submitted that misjoinder and causes of action appear where there are two or more Defendants and two or more causes of action and stated that in this case the cause of action is one which is for the recovery of money allegedly fraudulently paid and further submitting that the cause of

action clearly arises from the same transaction. He further stated that in the meeting held on the 39th January, 2015 which awarded the tender, some of the respondents were present, and there was a variance in the shortlisting of the firms for the tender as Dama Services was introduced at that meeting.

51. He refuted the 5th Respondent's assertions that the list was provided by the NYS and that the firms were of disadvantaged people. He stated further that Legal Notice No. 58 of 2011 has prequalification regulations which were not complied with and there was no indication that the 17th and 18th Defendants/Respondents fell within this special category, and wondered how they were contacted. That the ministry of transport upon valuation found that the prices were exaggerated contrary to Section 30 of the Act by over 200% and that the reserved items for women youth and persons with disabilities did not fall in that category. Moreover, he submitted that the 5th Respondent had annexed an incomplete procurement plan.

52. On whether the parameters for issuance of an injunction have been met, he relied on the case of ***Giella –vs- Cassman Brown Co. Ltd & another (1973) EA 358*** where it was held that for one to succeed in an application for temporary injunction, one must demonstrate the existence of a *prima facie* case with a probability of success at the hearing; and that further it will not issue where damages is an adequate remedy; and that if the court is in doubt the matter will be decided on a balance of convenience.

He submitted that the issues for determination before the court were therefore two; (i) whether the tender awarded to the 17th and 18th Defendants/Respondents was in breach of public procurement requirements as prescribed by the PPDA and (ii) whether the contract and subsequent payment made were all illegal, fraudulent or a conspiracy to defraud the public.

53. Mr. Ruto submitted that the applicant undertook investigations and discovered that the Defendants/Respondents jointly and severally colluded to pay out funds allocated to NYS purporting them to be payments for goods delivered.

That it was further discovered that it was not within their procurement plan or budget to procure the materials neither was there any purchase requisition and justification given for the use of restricted tendering contrary to Section 29(1) and 73(2).

54. It was his submission that BSE had never supplied training materials in Automotive Engineering and did not qualify to be awarded the tender as it was never a prequalified supplier for specialised plant equipment and machinery as per the Public Procurement and Oversight Authority list of small micro enterprises disadvantaged groups as at the 8th of September 2014.

55. He further submitted that the recommendation of the evaluation committee was full of inconsistencies and anomalies as companies that were not in the list were awarded tenders. He reiterated that the contract entered into was undated and the pricing of the materials was inflated as it was discovered that the true cost of the material was 14,400,000.

It was his submission that the above issues are serious issues to be tried which justified injunctive orders to be issued in their favour.

He submitted that there is the threat of irreparable injury as other than the deposits of Ksh.2000 by the 17th and 18th Defendants/Respondents in the account held at Paramount Bank the only other transaction is the money in contention and they are not aware of any other sources of funding or properties held by BSE. It was his submission that if the amount is not preserved it will be transferred or dissipated.

56. He further submitted that on a balance of convenience the Plaintiff/Applicant will be the most inconvenienced if the order is not issued, as it would have to trace the assets of the Defendants/Respondents to recover money which would lead to an increase of costs to be borne by the Government of Kenya.

He relied on the case of Nairobi HCC No.33 of 2016 **Ethics and Anti-Corruption Commission –vs- Jimmy Mutuku Kiamba** where *Justice Sergon* on a balance of convenience found that the Applicant would be more inconvenienced as it may be forced to file multiple suits in pursuit of properties already transferred.

He also relied on the case of **Kenya Anti-Corruption Commission –vs- Stanley Mombo Amuti 2011 eKLR** where the court held that an order of forfeiture can only be made if the order is still available for such forfeiture and therefore follows that if there was no conservatory order the property may well have ceased to exist.

17TH AND 18TH DEFENDANT’S/RESPONDENTS’ SUBMISSIONS

57. **Mr. Wandugi** for the Defendants submitted that the MD&P floated the tender by way of restricted tendering, where several bidders including the two Defendants sent their bids and BSE emerged the lowest bidder. That having won the tender they supplied the goods which are since in the possession and use by the ministry. He narrated how the DPP moved to the Chief Magistrate’s Court in Kiambu in **Misc. Criminal Case 328 of 2015** and obtained orders to freeze the account in issue. They were not satisfied with the order and moved to the High Court through **Criminal Revision No 218 of 2015** where the orders were vacated.

58. That during the hearing of the application the DPP conceded that having conducted thorough investigations there was no need for the conservatory orders as the matter had been cleared. It was the Mr. Wandugi’s submission that they again moved through High Court in **Civil Case No. 517 /2015** by way of originating summons obtaining conservatory orders which lasted for six months of which they abandoned that application and brought the current suit in court.

59. He submitted that the main issues for determination by the court are as follows;

i. Whether or not the deliberations on procurement were within the 2014/2015 plan. On this he submitted that the 17th and 18th Defendant had no role in the deliberations.

ii. Whether or not deliberations on procurement and supply of training, materials in Automotive Engineering were within the approved budget. On this it was his submission it was not their duty to establish whether this condition had been met.

iii. Whether or not there was a purchase requisition. On this it was his submission that that they had no role in compliance with the tendering procedure.

iv. Whether or not the conditions on restrictive tendering were met.

On this the counsel for the Defendants submitted that they were prequalified for the tender and relied on the Public Procurement and Disposal (preference and reservations) (amendment) regulations 2013 which provide for registration of micro enterprises and disadvantaged groups.

v. Whether or not the 17th and 18th Defendant were prequalified to participate in restricted tendering.

vi. Whether or not the contractual amount of Kshs.45 million was inflated and if so which body is to determine the price index.

vii. Whether or not there was conspiracy to defraud the MD&P.

60. He submitted that the principles of issuance of injunctions are settled and relied on the case of **Giella –vs- Cassman Brown 1973 EA 358 at 360**. The said principles have already been stated hereinabove. On the first limb of *prima facie* case with a probability of success, he submitted that the Applicant had not established a case with probability of success and relied on the case of **Mrao –vs- First American Bank**

(K) Limited where it was held that the applicant had to establish that his legal right had been infringed by the defendants.

61. He submitted that the said case demonstrated the distinction between an arguable case and a *prima facie* case with chances of success. That it's not sufficient to merely raise arguable issues but show by way of evidence that the Applicants rights or express provisions of law have been infringed or breached. He further submitted that the witness statements filed in Court lend credence to the 17th and 18th Defendants' case and that the statements taken in whole do not disclose any *prima facie* case. He stated that the Applicant is not a party to the contract it seeks to enforce and that the issue of privity of contract could determine the matter finally. That the doctrine of privity at common law cannot confer rights or impose obligations on strangers to the contract. On this, he further relied on the case of **Kanjenje Karangaita Gakombe –vs- Automobile Association of Kenya**, in which the Court of Appeal dealt with the issue of privity of contract.

62. To buttress this point he further relied on the following cases **Dunloppneumatic Tyre Co Ltd –vs- Selfridge and Co. Ltd. (1915) AC; Agricultural Finance Co-operation V Lengetia Ltd –vs- Albert Mario Cordeiro & Another and Aineah Likuyani Njirah –vs- Agakhan Health Services 2013 Civil Application No. 194 of 2009.**

It was his submission that should the Court find that the Applicant has not satisfied this limb then the Court need not go further to examine the other limbs. For this, he relied on the case of **Symon Gatutu Kimamo & 587 Others -vs- East African Portland Cement Co. Ltd.**

63. On the second limb of irreparable loss it was his submission that the 17th and 18th Defendants/Respondents have already supplied all the equipment to the MD&P and the Defendants/Respondents should not be barred from accessing funds from the account. The Applicant will therefore not suffer any irreparable harm as the subject matter and the damages to be awarded are both quantifiable. Further that it had not been demonstrated that either of the Defendants intends to leave the jurisdiction of the court or that they cannot satisfy the judgment if the Plaintiff/Applicant is successful.

64. On the third limb of balance of convenience, it was his submission that the balance tilts in favour of the 17th and 18th Defendants/Respondents as they have supplied the equipment which is being used by the MD&P who are not party to this suit. In closing, it was his submission that the suit together with the application have been brought in bad faith and are an abuse of the court process. Counsel further faulted the Plaintiff/Applicant for intentionally refusing to disclose the previous suits and their outcomes to the Court.

THE 8TH DEFENDANT/RESPONDENT'S SUBMISSIONS

65. **Mr. Olonde** for the 8th Defendant sought to associate himself with the submissions by the 17th and 18th Defendants. He submitted that the suit is not a *bona fide* claim for refund of monies paid on account of goods supplied to the Government. That the contract originated from NYS under the MD&P and that all due processes were adhered to and the 17th and 18th Defendants/Respondents who, were the lowest bidders were awarded the tenders. He stated that the suit herein has been filed for speculative purposes and that the officials giving statements were new in their stations and the onus in a civil suit rests with the Plaintiff and not Defendant.

66. It was his submission that the valuation was done at the instance of the investigator who is not saying who the complainant is and the objectivity of the report as the person is a government employee. That in taking up these proceedings the Plaintiff/Applicant is usurping the role of institutions set up under the Procurement and Public Disposals Act which has safeguards.

67. He said the suit has been filed in bad faith and maliciously aimed at portraying the 17th and 18th Defendants/Respondents in bad light and that of all the transactions, this was the only one that has been singled out for valuation for reasons only known to the Plaintiff/Applicant. That it has not been shown

how the 16th, 17th and 18th Defendants stand to benefit to warrant the inference of collusion, to warrant the orders sought. That under the Sale of Goods Act the property in the supplied goods passed on to the department upon the supply of the tendered goods. In closing he stated that the Plaintiff/Applicant failed to establish a prima facie case with the probability of success.

68. In a rejoinder Mr. Ruto stated that the Plaintiff/Applicant was not doing any forum shopping and that the Plaintiff/Applicant had introduced a new regime and procedures in corruption matters and that the matter the Court has been referred to was filed by the DPP and the Court gave its reasons for the Orders issue. Further that what is before the Court is a civil suit and reiterated that the 17th and 18th Defendants were not in business with the Plaintiff/Applicant. He stated that the 3rd Respondent was head of the NYS and cannot deny what came from his institution.

On the issue of preferential treatment he said it was an afterthought and there were no exemptions to the procurement procedures and that regular briefings on the restricted tendering were supposed to be done which never occurred.

69. I have considered the application dated 16th May, 2016, the affidavits, annexures, submissions and authorities herein. I find the following issues to fall for determination:

- i. whether the suit and application filed herein are res judicata;
- ii. whether the Plaintiff/Applicant has satisfied the conditions for issuance of an injunction.

70. It is the submission by the 17th and 18th Defendants/Respondents that the suit and application before this Court i.e. ACEC Civil Case No. 7 of 20016 has already been dealt with by other competent courts. They cite the following cases;

- i. *Kiambu CM's Court Misc. Criminal Application No. 328 of 2015*
- ii. *Nairobi High Court Criminal Revision No. 218 of 2015*
- iii. *ACEC Misc. Application No. 15 of 2016 former Nairobi HC Misc. Application No. 517 of 2015*

71. Section 7 of the Civil Procedure Act provides as follows;

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

72. A matter is found to be res judicata when the following are established as was held in ***Uhuru Highway Development –vs- Central Bank of Kenya & 2 Others 1996 eKLR***;

- a. There must be a previous suit in which the matter was in issue;
- b. The parties must be the same litigating under the same title;
- c. There must be a competent court which heard the matter in issue;
- d. The issue must have been raised once again in a fresh suit.

73. Besides the issue of *res judicata*, the 8th, 17th and 18th Defendants/Respondents have also stated that the Applicant in filing these proceedings was usurping the role of institutions set up under the PPDA.

74. The Ethics and Anti-Corruption Commission (EACC) is established under Chapter fifteen of the Constitution and is governed by the Ethics and Anti-Corruption Act Cap 65A. The functions of the Applicant are set out under Article 252 of the Constitution, and Section 11 of the EACC Act. Key among these functions is investigation of corruption or economic crimes or violation of Codes of Ethics or other matters prescribed under the EACC Act.

75. Section 11 (j) of EACC Act provides;

“In addition to the functions of the Commission under Article 252 and Chapter six of the Constitution, the Commission shall; “institute and conduct proceedings in court for purposes of the recovery or protection of public, or for the freeze or confiscation of proceeds of corruption or related to corruption or the payment of compensation or other punitive and disciplinary measures.”

76. From the above it cannot be said that the Applicant cannot investigate or file a suit in respect of a corruption related matter. The only thing to be checked is the subject of the investigation. In this case, there are allegations of a conspiracy to defraud the public of millions of shillings through what the Defendant/Respondents allegedly did. I find this to fall within the mandate of the Plaintiff/Applicant.

77. On whether this case is *res judicata* or not, the Court needs to look at the matters referred to.

The Kiambu Chief Magistrate’s Criminal Application and the High Court Criminal Revision are both criminal cases, and relate to the freezing and unfreezing of the Bank Account No. 03000206150 Paramount Bank which is the same Account the subject of the matter before this Court. I have carefully read the Ruling by the High Court in the said Criminal Revision. The reason why the Account was unfrozen was because of the laxity by the Applicant’s officers in concluding their criminal investigations.

78. The parties in the said two cases are not the same as the ones before this Court. They are: ***Betty Njoki Mureithi t/a Blue Star Enterprises –vs- The Inspector General and Director of Public Prosecution.***

79. In her Ruling, *Ngenye J.* at page 7 states thus;

“It was brought to the attention of the Court as earlier noted that the EACC obtained an Interlocutory Order freezing the Applicant’s account in HCCC No. 135 of 2016. My take is that this case must be completely divorced from the pending civil matter as either court is independent of the other. The Orders that I make herein are informed by the background and history of this matter exclusively. Probably the proceedings will aid the Applicant in the civil suit in whatever manner.”

I entirely agree with this observation by the Hon. Judge.

80. The matter that was being handled by the Kiambu court and the High Court was of the Criminal arm of the investigation. What is before this Court is Asset Recovery which is Civil in nature. The Asset Recovery has not been adjudicated upon by any court.

ACEC Misc. Application No. 15 of 2016 formerly High Court Misc. 517 of 2015 was filed under Section 56 of the ACECA for preservation, of assets.

81. The Exparte Orders issued under that provision remained in force for six (6) months. The Orders were meant to preserve the Asset before any recovery proceedings were instituted.

82. At that exparte stage, it cannot be said the Court made any determination over the issues raised in the present suit. The said file was closed upon the expiry of the six (6) months as there was no discharge or extension.

I therefore, find that the suit and application herein are not *res judicata*.

83. Issue **(ii) Whether the Plaintiff/Applicant has satisfied the conditions for issuance of an injunction.** The principles governing the issuance of an injunction are well stated in the case of **Giella –vs- Cassman Brown (supra)**. The said principles have been well stated at paragraph 52 above and I will not repeat them here.

84. There is no dispute that the 1st – 16th Defendants/Respondents were members of the Ministerial Tender Committee that awarded the tender involving Kshs.47,600,000/- to the 17th and 18th Defendants/Respondents for the supply and delivery of training materials in Automotive Engineering.

85. There are allegations of breach of the PPDA and Regulations. That restricted tendering should not have been applied in the subject procurement. The Defendants/Respondents state that the process was above board, and there was no fraud or any form of impropriety involved.

86. The truth or otherwise of all these accusations and counter accusations can only be ascertained after a full hearing.

87. The Applicant has stated that the 17th and 18th Defendants/Respondents supplied materials which were below standard and which were subjected to a valuation by competent officers from the Ministry of Transport and Infrastructure. The same was then valued at Kshs.15,400,000/=, while the 17th and 18th Defendants/Respondents were paid Kshs.45,137,937/=.

The Defendants/Respondents have countered this saying the Valuers from the said Ministry were not competent to do the valuation. That the said Valuers ignored market prices, inflation, shipping duties and the profit margin which ought to have been considered in such a business transaction.

88. They cannot therefore question the competence of the Valuers and at the same time accept their valuation.

All these questions can only be adequately answered when the Court is taken through the whole process that was undertaken by the parties concerned. This can only be achieved through a hearing.

89. There is no dispute that the amount involved herein is a colossal sum and it is public money. It is therefore important that this case be heard and a determination made as soon as possible so that if there was no wrong doing, the 17th and 18th Defendants/Respondents should get what is rightfully theirs unconditionally.

90. The only account mentioned as belonging to the 17th and 18th Defendants/Respondents is the one at Paramount Bank, which is the account in issue. The Applicant has stated that prior to the payment in issue, the account had only Kshs.2000/= for some time. It is in the public interest that the public coffers money be protected until this suit is heard and determined.

91. I am therefore satisfied that the Applicant has made out a *prima facie* case to warrant the issuance of prayer No. 3 of the application dated 16th May, 2016 for conservation of Kshs.45,137,937 held in Account No. 030002061501 at Paramount Bank, Nairobi. Prayers No. 1 and 2 were already spent.

92. Prayer No. 3 is granted. Costs in Cause.

I do appreciate that this matter should be heard and determined as soon as possible.

The record shows that it's only the following Defendants who have filed their defences; 3rd, 5th, 8th, 10th, 11th, 12th, 15th, 16th and 17th.

I therefore direct that those defendants who are yet to file theirs do so within 7 days.

The Plaintiff has filed witness statements plus the list of documents. Some of the Defendants have also

filed witness statements.

I also direct all the Defendants who are yet to comply with Order 11 Civil Procedure Rules to do so within 14 days.

Mention on 5th December, 2016 at 9.00 am to confirm compliance and **issuance of directions for the hearing.**

Date and delivered this 23rd day of November 2016 at NAIROBI

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE