



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 448 OF 2008 (O.S)

IN THE MATTER OF: HOUSE NO. A 18 – UMOJA INNERCORE SECTOR III, HOUSE NO. B 35- UMOJA INNERCORE, PLOT NO. C37, SECTOR 1 UMOJA INNERCORE NGONG/NGONG/26632; NGONG/NGONG/38889; NGONG/NGONG/388890.

IN THE MATTER OF: ACCOUNT NUMBERS xxxxxxxx AND xxxxxxxxxxxx, BARCLAYS BANK OF KENYA, ENTERPRISE ROAD; ACCOUNT NUMBERS xxxxxxxxxxxx, xxxxxxxxxxxx AND xxxxxxxxxxxxxxxx, STANDARD CHARTERED BANK HARAMBEE AVENUE AND ACCOUNT NO. xxxxxxxxxxxxxxxx, NWB PLC-60-15.

IN THE MATTER OF: MOTOR VEHICLES REGISTRATION NOS. KBB 059T, KBB 538 T, KAR 843 M & KAH 223F

AND

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

BETWEEN

**KENYA ANTI-CORRUPTION COMMISSION
.....PLAINTIFF**

AND

STANLEY MOMBO AMUTIDEFENDANT

JUDGMENT

This Originating Summons is premised under Sec. 55 of Anti Corruption and Economic Crimes Act (No. 3 of 2003) (hereinafter referred to as “The Act”)

The plaintiff, Kenya Anti-Corruption Commission, is established as a body corporate under Sec. 6 of The Act. Sec. 7 thereof stipulates the functions of the said commission. In my opinion Sec. 7 (1) (a) and (h) are relevant provisions in respect of this matter.

a. to investigate any matter that, in the Commission’s opinion, raises suspicion that any of the following have occurred or are about to occur –

- i. conduct constituting corruption or economic crime;**
- ii. conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;**

(h) to investigate the extent of liability for the loss of or damage to any public property and

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(i) to institute civil proceeding against any person for the recovery of such property or for compensation; and

(ii) to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya; and

(iii) to carry out any other functions conferred on the Commission by or under this Act or any other law.

Furthermore, Sec. 55 of The Act has to be dealt with, in view of the fact that the defendant has raised legal issues on its provisions.

The defendant is employed as a financial controller with National Water Conservation and Pipeline Corporation and admittedly earns gross salary of Kshs.306,000/- pm. It is also not disputed that the period between which the investigation by the plaintiff was carried out against him is between September, 2007 and June, 2008. Thus the court has to confine its consideration in respect of the said stipulated period.

The office of the defendant was searched by the Plaintiff on 1st July, 2008 and the plaintiff seized all the documents, money (Kshs.310,000/=), and title deeds. Similarly, his house was also searched and some items and Kshs.3,998,000/= were seized.

The directions to hear and determine the O.S on affidavit evidence were given by consent. It was also agreed that written submissions be thereafter filed. The hearing was completed as per the directions taken.

During highlights of the submissions, it was agreed that further written submissions be filed on the issue of legal implication of the provisions of Sec. 55 (5) and (6) of The Act vis-à-vis The Constitution.

The Originating Summons seeks determinations by the court on the following issues namely:-

- 1. Whether the Defendant is in possession of ‘unexplained assets’ pursuant to the provisions of the Anti Corruption and Economic Crimes Act, No. 3 of 2003 as itemized hereunder in paragraph 3;**
- 2. Whether the under listed properties should be preserved pending the determination and or declaration on whether the said assets constitute unexplained assets pursuant to the provisions of Section 55 of the Anti corruption and Economic Crimes Act.**
- 3. Whether Declarations should issue that the following properties constitute unexplained assets pursuant to the provisions of section 55 of the Anti Corruption and Economic Crimes Act:-**
 - a. House No. A 18, Umoja Innercore;**
 - b. House No. B 35 Umoja Innercore;**
 - c. Plot No. C 37 Sector 1 – Umoja Innercore**
 - d. Plot No. C 37 Sector – Umoja Innercore**
 - e. Ngong/Ngong/26632;**
 - f. Ngong/Ngong/38889;**
 - g. Ngong/Ngong.38890;**
 - h. Motor Vehicle registration numbers KBB 059T; KBB 537 T; KAR 843 M; and KAH 223F;**
 - i. Funds in:-**
 - i. Account Numbers xxxxxxxx and xxxxxxxx, Barclays Bank of Kenya, Enterprise Road**

- between September, 2007 and 30th June, 2008;
- ii. Account Numbers xxxxxxxxxx, xxxxxxxxxx and xxxxxxxxxx, Standard Chartered Bank Harambee Avenue between September, 2007 and 30th June, 2008;
 - iii. Account number xxxxxxxx, National Westminster Bank PLC – London, Branch 60-15-49 between September, 2007 and 30th June, 2008;
 - iv. Cash of Kshs.4,308,000/- seized by the plaintiff's agents on 2.07.2008 during execution of search warrants.
4. Whether the defendant should be condemned by this Honourable Court to pay to the Government of Kenya Kshs.140,976,020.00 being the cumulative bank deposits made by the Defendant between September 2007 and 30th June, 2008 and Kshs.32,500,000.00 being the value of the amount above landed properties constituting unexplained assets or any other amount that this Honourable Court finds to constitute unexplained assets and in default the said landed properties be sold through public auction.
 5. In the alternative and without prejudice to the above whether the funds mentioned in paragraph 3 (I), (i) – (iv) above, the motor vehicles listed in paragraph 3 (h) and the landed properties listed in paragraph 3 (a) – (g) should be forfeited to the Government of Kenya.
 6. Whether the sum of Kshs.4,308,000/= which was seized from the defendant's office and house should be forfeited to the Government of Kenya.
 7. Who is to meet the costs of the suit.

Before, I deal with the facts of the matter as brought forth by affidavits of the parties, it may be appropriate to deal with the legal issues raised. I shall begin with noting certain provisions of the Constitution.

Article 264 of the Constitution stipulates that subject to sixth Schedule, the previous Constitution shall stand repealed with effect from effective date (27th August, 2010).

Clause 7 of the sixth Schedule stipulates inter alia that all law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualification and exceptions necessary to bring it into conformity with this Constitution.

Article 259 (1) specifies the manner of interpretation of the Constitution. It states:-

“259 (1) This Constitution shall be interpreted in a manner that –

- a. *promotes its purposes, values and principles;*
- b. *advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
- c. *permits the development of the law; and*
- d. *Contributes to good governance.”*

Article 24 prescribes Limitation of Rights and Fundamental Freedom.

It shall suffice to enumerate or cite Article 24 (1) of the Constitution.

“24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- a. *The nature of the right or fundamental freedom;*
- b. *The importance of the purpose of the limitation;*
- c. *The nature and extent of the limitation;*
- d. *The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

- e. ***The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***

It may be appropriate also to look at the provisions of Article 25 of the Constitution which enumerates the fundamental rights and freedoms which shall not be limited. I shall note one of the right mentioned in Article 25 (c) i.e. ***the right to a fair trial.***

The right to property is prescribed in Article 40 of the Constitution which prescribed right to acquire and protections against arbitrary deprivation of the property.

Article 40 (6), I would like to cite, which stipulates:-

“(6) The right under this Article do not extend to any property that has been found to have been acquired unlawfully.”

Mr. Kilukumi relied on the said provision while submitting on inconsistency between Article 40 of the Constitution and Sec. 55 (5) and (6) of The Act.

It may not be out of line if I cite the two provisions

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

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

Coming to the issue raised, in short, its gist was that Sec. 55 (5) and (6) of The Act impose reverse burden of proof on the defendant with the resultant penalty and those provisions offend the due process as stipulated in Article 40 (6), which in effect provides that the only property which could be exempted from protection of the Right of Property as per Article 40 of the Constitution is the one ***“found to have been unlawfully acquired”***.

Mr. Angote, the learned counsel for the plaintiff, submitted that though generally the onus to prove any wrongdoing is on the party alleging the same, that burden can be shifted under certain circumstances.

Our own Evidence Act (Cap 80) displaces the general principles of burden of proof stipulated in Sec. 108 thereof, by provisions stipulated in Sections 110, 111 and 112. Sections 110 and 112 apply to the Civil Proceedings.

Sec. 119 thereafter grants discretion to the court to presume existence of any fact which it thinks likely to have happened.

Mr. Angote relied on the Judgment of 3 Judge Bench of the High Court in ***Misc. CA No. 54 of 2006 Dr. Christopher N. Murungaru –vs- KACC & AG*** wherein after a studious considerations of the learned submissions by all concerned, the court declared that Sections 26, 27, and 28 of the Act are not inconsistent with sections 70 (a), 70 (c), 77 (2) (a), 76 (1), 77 (a) or 82 of the previous Constitution of Kenya. I may not dwell much on the said Judgment as in my view, the facts and laws applicable in the said case could be distinguishable.

I may, however, get some guidance in the case of AG's Reference (No. 1 of 2004) (2004), WLR 2111. In the said reference, the five Judge Bench of Court of Appeal of England considered the issue of reversal of burden vis-à-vis Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

At page 2112 of the said Judgment in holding (2) thereof the Court observed as under:-

“(2) That the common law and article 6 (2) of the Convention both permitted the imposition of a legal burden of proof on a defendant, provided that it was proportionate and reasonably necessary in the circumstances; that such a legal burden would usually be justified if the prosecution had to prove the essential ingredients of the offence but, in respect of a particular issue, it was fair and reasonable to deny a defendant the general protection normally guaranteed by the presumption of innocence; that the easier it was for a defendant to discharge such a burden, as where the relevant facts were within his own knowledge, the more likely it was that the legal burden would be justified; that the difficulty which would face the prosecution in establishing those facts was also a relevant factor and that the ultimate question was whether such a legal burden would prevent a fair trial and, if it would, it must either be interpreted, if possible, as imposing only an evidential burden, in which case there would be no risk of contravention of article 6 (2), or it should be declared incompatible with article 6 (2).”

Article 6 of the Convention provides:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

Dickson CJC of the Supreme Court of Canada in the case of *R. V. Whyte (1988) 51 DLR (4th) 481* of page 495 observed which was cited with approval in the Reference (Supra):-

“There are three components to the proportionality test; the measure must be carefully designed to achieve the objective of the legislation with a rationale connection to the objective. The second component is that the measure would impair the right or freedom as little as possible. Finally there must be proportionality between the effects of the impugned measures on the protected right and the attainment of the objective.”

Paragraph 16 of Halsbury's Laws of England P. 14 states that ***“where a question of gifts to public officers arises, consideration is deemed to be given corrupt unless the contrary is proved”***.

It was thus urged by Mr. Angote that it is only the defendant who can prove on a ***balance of probability*** that is, how he acquired the money he deposited in his account for the period under inquiry. These are the facts which are exclusively within his knowledge and the provisions of Sec. 55 of the Act do not contravene Article 40 of the Constitution.

Mr. Kilukumi, on the other hand contended that the process which is prescribed by Sec. 55 (5) and (6) of The Act is not the inquiry under the due process of law. It is not upon the plaintiff KACC to determine whether or not the property was lawfully acquired but it is to be determined by a Judicial Process

As per Mr. Kilukumi, the Constitution has adopted the values and aspirations of the Kenyan People which intended to protect the right to lawfully acquire and own property. KACC who intends to deprive the defendant of his property must prove to the satisfaction of the court that the property was unlawfully acquired. The Constitution is supreme and no property could be forfeited under any statutory provisions which do not mirror the aspirations of the Constitution. He also relied on Article 20 (3) and (4) which

enjoins the courts (a) to develop the law to the extent that it gives effect to a right or fundamental freedom and (b) to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

He also stressed that the Constitution does not place any onus on the owner to prove that he acquired it lawfully. Thus the onus is upon the plaintiff who alleges that the property were unlawfully acquired. So far as Section 55 (5) and (6) of the Act imposes the burden on the defendant they should be declared void to the extent of inconsistency under Article 2 of the Constitution.

Reliance was placed on observations made by the Court of Appeal in the case of *Christopher Ndarathi Murungaru –vs- Kenya Anti Corruption Commission and Another (2006) e KLR*

The court observed:

“We recognize and are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished. But in our view, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public.”

It is not an overstatement that the Courts all over the world have always agonized over the issue which is raised before me.

The balance between Public and Private Rights, between the process of bringing the wrongdoers to the threshold of the Justice and expectation of the public to see that justice, is in actuality, rendered, between the social aspirations of a common man and the rights of the persons brought before the courts, is a delicate one and, courts have to be wary to bring in any factors which should not pass through the network of fair and just process of law.

I have enumerated the relevant provisions of the Constitution and The Act, as well as observations made on the issue by different courts both local and foreign.

It will be a truism to state that the Constitution is Supreme and no provisions of law which contravenes the Constitution should be allowed to stand or be given any deference.

The Constitution has granted rights and freedoms to the Kenyans but those rights and freedom are not unlimited as is clear from the provisions of Article 24. The Constitution has also given Kenyans unfettered rights enumerated in Article 25 and I have noted and specified one such right of ‘fair trial’ hereinbefore.

Due process covers fair trial and vice versa. Thus the question, which remains before the court, is whether provisions of Sec. 55 (5) and (6) of The Act provides or offers fair trial to the persons affected under those provisions?

The objective of The Act is to provide for the prevention, investigation and punishment of Corruption, Economic Crime and related offences and for matters incidental thereto and connected therewith.

Section 55, which is in question, falls under Part VI of The Act entitled “*Compensation and Recovery of Improper Benefits*”

It is thus clear that the Part VI deals with matters incidental or connected to the object of The Act.

The process under which the Commission has to come before the court is also the Civil process as it has to move the court by way of Originating Summons. I shall not be wrong if I find, which I hereby do, that the proceedings under section 55 is a Civil proceedings and the same should be considered and interpreted accordingly.

The standard of proof also should be determined accordingly. In any event, the Commission has to

adduce evidence which satisfies the court on **balance of probabilities** that the Defendant has unexplained assets.

Thereafter, as per Sec. 55 (5) of The Act, if the court is so satisfied, the court may require the defendant to testify or adduce evidence **“as the court deems sufficient to satisfy the court”** that the assets were acquired otherwise than as the result of **corrupt conduct**.

Sec. 55 (6) provides what the court shall order if not satisfied that all of the assets **were not acquired otherwise than as the result of corrupt conduct**. I shall order the person to pay to the government an amount equal to the value of unexplained asset.

I may pause here and observe that by the use of words “corrupt conduct” after the Commission has adduced evidence to show that the defendant has “unexplained assets”, the Act has created the presumption of corrupt conduct on the part of the defendant in acquiring unexplained assets.

The rebuttable presumption which is created against the defendant, as per the wordings of the section 55 (5) and (6), in my view, is a legal burden and not only the evidentiary burden. I say so because Standard of Proof of satisfaction of the court is not stipulated or specified and it has to be noted further that the said satisfaction results in the court making order of forfeiture of the property of the defendant. The Act has though specified the Standard of Proof for the Commission.

I would further observe that the provision of Sec. 55 (5), to wit “The court to require the defendant to adduce such evidence as the **court deems sufficient to satisfy it**”, seems to infer that the court has to indicate itself the nature and scope of the evidence which is expected to be adduced by the defendant to satisfy it otherwise. This brings the court into arena of litigation which is definitely not the due process of law. I may not comment much on the wordings. Suffice it shall be to state that the same does not augur well with the Rule of Law or Due process of Law. I shall stop here.

I am aware of the object of The Act and I wish that the legislature would have enacted an appropriate provision of law which would have fulfilled its purpose along with following the due process. The court, despite the temptation, social or emotional, cannot fill in the gaps in law.

Mr. Angote has relied on and submitted that the cardinal rule of construction of an Act of Parliament is to construe it according to plain, literal and grammatical meaning of the words (See. **KACC –vs- LZ Engineering Construction and Others Misc. Application NO. 559/04**

I further note that The Act has avoided/failed to stipulate the standard of burden of proof which would entail the court’s satisfaction, as against the standard of balance of probabilities stipulated for the case of the commission. I shall lay my emphasize on the last part of Sec. 55 (5) of the Act, which provides:-

“... 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 a result of corrupt conduct.”

From the cursory reading of the said provision, it is apparent that The Act has stipulated “*higher Standard of proof*” than the one stipulated for the commission and I do find so.

The words “*any property that has been unlawfully acquired*” found to have been stipulated in Article 40 (6) of the Constitution definitely suggest the due process which, in civil process, required equality of standard of proof. Moreover, the word ‘*found*’ mentioned in the said Article (40) of the Constitution would also strengthen my observations that the Act and the court would be expected to subscribe to the higher standard of proof than that of balance of probability.

With the above observations, I can state that there is no proportionality or justified balance between the effects of the impugned measures on the protected right and the attainment of the objective.

If I am right in finding so, which I hope I am, then the question is paused, “is the trial fair?”

The answer should be resounding “NO” and I do find so.

The absence of fair trial in the process stipulated in Sec. 55 (5) and (6) of The Act, does render those provisions starkly inconsistent to the provisions of Constitution i.e. Article 20, 25 and 40 (3). The proceedings filed by the Commission by way of the present Originating Summons, is thus null and void and I declare so.

I have to observe that, the issue, which I have taken up in respect of the standard of proof, has not been canvassed by either of the counsel.

However, I should not shirk from my duty to take any pertinent point of Constitutional law *suo motu* to develop the law in line with spirit and Article 20 (3) as well as to protect aspiration of the Constitution.

I do express my gratitude to both the counsel for their assistance to the court.

The issue raised is of public interest and thus I shall not make any order on costs.

I direct that this judgment be served on the State Law Office and Law Reform Commission with the hope that appropriate actions shall be taken.

Dated, signed and delivered at Nairobi this 4th day of **February, 2011**

K. H. RAWAL

JUDGE

04.02.2011