



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 448 of 2008 (OS)**

**KENYA ANTI – CORRUPTION COMMISSION.....PLAINTIFF**

**V E R S U S**

**STANLEY MOMBO AMUTI .....DEFENDANT**

**R U L I N G**

This is an application by the Defendant (by notice of motion dated 30<sup>th</sup> September, 2008). It seeks, as argued, two main orders:-

1. A mandatory injunction to compel the Plaintiff to “release forthwith to the (Defendant) ....all his personal belongings, documents, money, title deeds, cheques, drivers licenses and all other documents as enumerated in the inventory lists dated 2<sup>nd</sup> July, 2008 and the undated inventory lists of 46 items that were confiscated by the Plaintiff”.
2. That the suit herein be struck out with costs to the Defendant.

The application is expressed to be brought under Order 39, rule 4 and Order 50, rule 1 of the Civil Procedure Rules (the Rules), and also under section 3A of the Civil procedure Act, Cap 21 and section 55 of the Anti-Corruption and Economic Crimes Act.

Various grounds for the application are given on the face thereof. They may be re-phrased as follows:-

1. That the suit has been instituted in clear violation of the Anti-Corruption and Economic Crimes Act, and is thus contra-statute, in that the Defendant was not afforded a reasonable opportunity to explain his wealth and assets suspected to be disproportionate to his known income.
2. That without the documents, etc seized by the Plaintiff the Defendant cannot adequately answer or rebut the case he faces in this action. The trial of the suit (including the pending application by chamber summons dated 19<sup>th</sup> September, 2008) is thus substantially compromised and cannot be free and fair.
3. That the Plaintiff is unlawfully keeping the Defendant’s documents that it seized in order to disable the Defendant’s defence.

There is a supporting affidavit sworn by the Defendant.

The Plaintiff has opposed the application as set out in the replying affidavit sworn by one ANTHONY

KAHIGA and filed on 13<sup>th</sup> October, 2008. Anthony Kahiga says he is duly appointed investigator in the Plaintiff's employment. The grounds of opposition emerging from the replying affidavit include the following:-

1. That the Plaintiff duly obtained warrants of search in respect to the Defendant's office and home and duly seized the Defendant's documents, etc.
2. That the Plaintiff is lawfully keeping the documents, etc seized for purposes of the present proceedings and also of criminal proceedings against the Defendant.
3. That the Plaintiff duly obtained warrants to investigate the Defendant's bank accounts and to freeze those accounts.
4. That upon completing investigations the Plaintiff afforded the Defendant a reasonable opportunity to explain the disproportion between his assets and his known income as a public officer.
5. That the Defendant indeed gave an explanation, but the Plaintiff was not satisfied that the explanation was adequate.
6. That whereas the Defendant has challenged by judicial review the freezing of his bank accounts, and obtained an *ex parte* stay that enabled him to have access to the accounts and move the funds therein, he has not similarly or at all challenged the warrants of search and seizure.
7. That the Defendant has not been prejudiced at all by the Plaintiff continuing to hold the documents, etc, seized.
8. That the application is frivolous, vexatious and an abuse of the process of the court.

A little background is in order. The Plaintiff herein filed the present suit against the Defendant under section 55 of the Anti- Corruption and Economic Crimes Act, 2003 (hereinafter called the Act) for forfeiture of unexplained assets. These assets include seven landed properties in Nairobi and Ngong, four motor vehicles, sums of money in local and foreign bank accounts, and cash seized from the Defendant's office and house.

The Defendant is a public officer, being the Financial Controller of the National Water Conservation and Pipeline Corporation, a Government corporation. The landed properties are stated in the originating summons to be valued at KShs. 32.5 million, while the cumulative bank deposits said to have been made by the Defendant in his bank accounts between September, 2007 and 30<sup>th</sup> June, 2008 are stated to be KShs. 140,976,020/00. KShs. 4,308,000/00 in cash was seized at the Defendant's office and house.

Together with the originating summons the Plaintiff filed an application by chamber summons dated 19<sup>th</sup> September, 2008 seeking various temporary injunctions pending disposal of the suit. The court directed that the present application by the Defendant be heard first.

I have considered the submissions of the learned counsels appearing, including the authorities cited. I will say at the outset that I do not find the Defendant's application to be frivolous, vexatious or an abuse of the process of the court. It is a serious application.

It is convenient first to deal with prayer 3 of the application and then prayer 1. The issue raised in prayer 3 is whether the Plaintiff's suit was filed contrary to the provisions of the Act and therefore liable to be struck out. Mr. Ahmednasir, learned counsel for the Defendant, submitted as follows on this issue. Under section 55 of the Act there are two conditions precedent that must be fulfilled before the Plaintiff institutes suit for forfeiture. First, there must be an investigation. Secondly, the person investigated must be afforded a reasonable opportunity to explain the disproportion between his assets and his known means. Whereas there was indeed an investigation, further submitted Mr. Ahmednasir, the Defendant

was not afforded a reasonable opportunity to explain his assets. Though notice dated 9<sup>th</sup> July, 2008 under section 26 of the Act was sent to the Defendant, this was after all his documents, etc. had been confiscated by the Plaintiff. How then could he properly explain his assets, notwithstanding that he tried to do so by his reply dated 18<sup>th</sup> July, 2008? It behoves the Plaintiff to strictly comply with the requirements of the Act, which is a penal statute giving to the Plaintiff what amounts to penal powers over citizens. Having breached the strict requirements of the Act the Plaintiff could not be permitted to found an action against the Defendant on the very same statute. Given the draconian powers of the Plaintiff under the Act, it should not be allowed to take shortcuts when exercising those powers. Mr. Ahmednasir relied on various cases in support of his submissions.

On this issue, Mr. Angote, learned counsel for the Plaintiff responded as follows. The Plaintiff duly conducted an investigation and found that the Defendant had unexplained assets. It then afforded him a reasonable opportunity to explain the assets by serving him with a notice under section 26 of the Act. The Defendant, in his letter dated 18<sup>th</sup> July, 2008, responded to each and every query raised by the Plaintiff, notwithstanding that the Plaintiff did not find that explanation adequate. It was not necessary for the Defendant to have in his possession the documents that had been seized by the Plaintiff in order to adequately explain the assets. That is why, Mr. Angote further submitted, the Defendant was able to respond to each and every issue raised by the Plaintiff, a clear indication that he was accorded a reasonable opportunity to explain his assets.

I have read the three cases relied upon the Defendant. These are:-

- (i) C. N. Murungaru –vs- Kenya Anti-Corruption Commission & Another, Nairobi HC Misc. Civil Application No. 54 of 2006 (unreported).
- (ii) D. P. P. –vs- Felician [1973] EA 440
- (iii) Kenya Anti-Corruption Commission –vs- L. Z. Engineering Construction Limited & Others, Nairobi HC Misc. Application No. 599 of 2004 (unreported).

I accept, as was stated in the first and third cases, that the Act is a penal statute, and must, like all other penal statutes, be strictly construed. I have read section 55(2) of the Act. Mr. Ahmednasir is correct in his submission that the Plaintiff needs to meet two conditions precedent before it can file suit for forfeiture of unexplained assets. These conditions precedent are:-

- (i) There must be an investigation which satisfies the Plaintiff that the person investigated has unexplained assets.
- (ii) Such person must, in the course of the exercise by the Plaintiff of its powers of investigation or otherwise, have been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his compensation as a public officer and the Plaintiff is not satisfied that an adequate explanation has been given.

It is common ground that there was an investigation. What is in dispute is whether the Defendant was afforded a reasonable opportunity to explain his assets in the course of that investigation or otherwise. It is the Defendant's case that he was not afforded a reasonable opportunity because when he was required to explain by the notice dated 9<sup>th</sup> July, 2008 the Plaintiff had already searched his home and office and seized his documents, etc and had also obtained orders freezing his accounts.

The said notice was issued more than two months before the Plaintiff filed suit. It runs to some six pages and details all the assets in respect of which explanation was sought. The Defendant responded by his letter dated 17<sup>th</sup> July, 2008 which runs to ten pages. I have closely read that letter. In it the Defendant offers an explanation in respect to each and every asset set out in the Plaintiff's notice. In the preliminaries the Defendant does not complain that he will be unable to explain his assets on account of the Plaintiff's action of searching his house and office and seizing his documents, etc. Parts of his

introductory remarks are:-

“I am very grateful to you, sir, for this opportunity. His will enable me to account for the property I have acquired over the 25 years working life ....

“Turning to the matter under investigation, I

wish to account for my property in the following

order....”.

He then proceeds in the next seven pages to do just that. But he does, in the notes at the end of his letter, that in respect to certain assets he was handicapped in his explanations because the relevant documents had been taken away by the Plaintiff’s investigators. By and large, however, he does explain his assets. All the court is concerned with at this stage is whether the Defendant was accorded a reasonable opportunity to explain his assets in the course of the investigation conducted by the Plaintiff. What constitutes reasonable opportunity will depend on the circumstances of each particular case.

In the present case investigation by the Plaintiff showed that the Defendant had acquired assets in the period under investigation which, in the Plaintiff’s view, were quite disproportionate to the Defendant’s known means of income as a public officer. What started as a reasonable suspicion was confirmed, from the Plaintiff’s point of view, by the investigation which included, upon sanction by a magistrate’s court, search of the Defendant’s office and home and seizure of documents and other properties found therein, and also by investigation of his bank accounts. Could the Plaintiff have invited the Defendant to explain his assets before those assets were confirmed by the investigation? I think not. Only after ascertaining that the Defendant had the suspected assets could the Plaintiff then invite him to explain them. The fact that the Plaintiff had already seized the Defendant’s documents did not appear to significantly handicap him in his explanation.

The Plaintiff did not consider the explanation given to be adequate, and it therefore filed this suit. If the suit goes to trial the Plaintiff will have the evidential burden of proving to the required standard that the Defendant has unexplained assets. The Defendant shall be afforded the opportunity to cross-examine any witnesses called and to challenge any evidence adduced by the Plaintiff. See subsection (4) of section 55 of the Act. There are additional provisions in sub-sections (5) and (6) of the section regarding conduct of such trial. The point here is that in an application of this nature the court should not be tempted to decide issues that properly belong to trial of the action.

I find that the Defendant was afforded a reasonable opportunity in the circumstances to explain the disproportion between the assets concerned and his compensation as a public officer. The Defendant indeed gave an explanation. The Plaintiff considered that explanation not to be adequate and filed suit, as it was entitled to. I therefore find that the suit is not contrary to statute and is properly before the court. I must refuse prayer 3 of the application.

I will now consider prayer 1. The Defendant has urged that he requires his documents for a proper defence of the action and the chamber summons dated 19<sup>th</sup> September, 2008. It was also submitted on his behalf that the Plaintiff unlawfully seized the documents because there were no criminal proceedings against the Defendant pending at the time of the seizure and none have been instituted since. In the view of Mr. Ahmednasir, learned counsel for the Defendant, the Plaintiff’s action amounts to confiscation of the Defendant’s documents without due process. It cannot continue to hold onto those documents upon pretext that it is intending to charge the Defendant with criminal offences under the Act.

For the Plaintiff it was submitted that the search of the Defendant’s house and office and seizure of the documents in question, was upon warrants duly issued by a court of law. Mr. Angote observed that no challenge by way of judicial review to those warrants, or the proceedings resulting in them, has been mounted by the Defendant by way of judicial review, as he did with respect to the orders freezing his accounts. Mr. Angote further submitted that the Plaintiff indeed has criminally investigated the

Defendant and has compiled a file which has been forwarded to the Attorney-General for action. The documents are therefore held for purposes of the intended criminal prosecution and also for the purposes of this suit.

In my view the present application is not the proper forum to investigate the legality or otherwise of the warrants issued by a lower court upon which the Plaintiff searched the Defendant's house and office and seized the documents in question. Such an investigation belongs to a judicial review. I have my doubts whether the legality or otherwise of the search and seizure would be germane to the main issues in this suit. What is clear to me, however, is that there cannot be any doubt that the Defendant will need his documents for a proper preparation of his defence in this suit. It is equally clear that the Plaintiff is entitled to retain these documents for evidential purposes in this present suit. I cannot uphold the submission that the Plaintiff can legitimately hold the documents for an intended criminal prosecution over four months after it seized the documents.

It seems to me that for purposes of preparing his defence the Defendant can do with copies of the documents in question. I will therefore order that the Plaintiff do, within seven (7) days of delivery of this ruling, supply to the Defendant good copies of all documents, including title deeds, cheques, etc. enumerated in the two inventories mentioned in the application. Needless to say, these documents shall not include the cash mentioned in the inventories, which shall be retained by the Plaintiff pending disposal of the suit or the further order of the court.

To sum up, prayer No. 3 of the application is refused. Prayer No. 1 is allowed only to the extent indicated above. Costs of the application shall be in the cause. Those shall be the orders of the court.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2008**