REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

MISCELLANEOUS APPLICATION 42 OF 2007

KENYA ANTI-CORRUPTION COMMISSION ….........….. APPLICANT

VERSUS

WILSON GACHANJA ……………………….….…. 1ST RESPONDENT

ROCKVILLE LIMITED ……..………..….………… 2ND RESPONDENT

STANDARD ASSURANCE KENYA LIMITED ....3RD RESPONDENT

WILSON KIPKOTI ……….……………..……….… 4TH RESPONDENT

PHILIP KANYARE ………………..……………..… 5TH RESPONDENT

RULING

On 26th January, 2007 Kenya Anti-Corruption Commission, the Applicant herein, filed an "Originating Motion" under Section 56 of the Anti-Corruption and Economic Crimes Act, No. 3of 2003 (hereinafter "the Act") seeking, in the main, a preservation Order in the following terms:

> "***This Honourable Court be pleased to issue orders for preservation in terms of Section 56 of the Anti-Corruption & Economic Crimes Act, No. 3 of 2003 preserving the property referred to as, Government House No. HG/613, Land Reference No. 209/6238, I.R. No. 74856 (Kilimani, Nairobi) and restraining the Respondents jointly and severally; their agents, servants or any other person from selling, disposing off, wasting or in any other way dealing with the property aforesaid."***

The Motion was heard ex-parte by this Court on 29th January, 2007 and the Order sought was granted in terms of the prayer, but limited to six months from that date.

On 13th February, 2007 the Third and Fourth Respondents filed an application for the discharge of that Order.

On 15th February, 2007, the Second Respondent, Rockville Limited, filed an application for an Order that the proceedings against it be struck out.

Both these applications came up for hearing before this Court on 28th March, 2007. At some point after

the hearing commenced, **the Third and Fourth Respondents chose to discontinue their application, leaving only one application for determination, that of the Second Respondent, to strike out the proceedings against it.** The grounds relied upon in the application are as follows:

> ***(a) That instant proceedings in so far as they relate to the 2nd Respondent are scandalous, frivolous and vexatious.***
>
> ***(b) That the proceedings as filed do not satisfy the provision of Section 56 in respect to the applicant and amounts to abuse of process of court.***
>
> ***(c) That the originating motion as filed is bad in law and ought to be struck off.***
>
> ***(d) That it is fair and just that the orders do issue.***

Mr. Njuguna, Counsel for the Second Respondent, argued that this suit having been brought under Section 56 of the Act is incompetent because "**a suit cannot originate under Section 56"**; that only an "**application**" (for an Order preserving suspect property) may be brought under Section 56; that Section 56 **presumes** that a suit has been filed (under Section 7(h) (i)) for **recovery** of property.

In answer to this argument, Mr. Ngah, for Kenya Anti-Corruption Commission, relied on the decision of this Court in ***Kenya Anti-Corruption Commission v. Lands Limited*** (HC Misc. Appl. No. 587/06) to argue that Section 56 creates a **new jurisdiction** giving Kenya Anti-Corruption Commission the power to file an application without a suit, and without reference to Section 7(h) (i); and that not all actions are necessarily suits.

Mr. Njuguna submitted that because the Act did not outline what procedure, if any, should be followed, the Civil Procedure Act and Rules should apply, and if so, the procedure of commencing action by way of an Originating Motion was unknown. In reply, Mr. Ngah relied on the case of ***Saint Benoist Plantations Ltd v. Jean Emile Adrien Felix*** (CA No 25 of 1954) to submit that the procedure adopted herein was correct.

The argument advanced by Mr. Njuguna is attractive, and I have given it anxious consideration. Indeed, it is easy to come to the conclusion that Section 7(h) (i) of the Act requires that a suit for the recovery of property be instituted, before Section 56 is invoked to seek an Order preserving the property sought to be recovered. That is logical. But I must go well beyond the logical analyses presented by Counsel; I must look at the intention of Parliament in enacting this important legislation; I must consider the mischief that this law intended to address; and I must give it a purposeful interpretation that I believe coincides with the intent of the legislature.

In ***Kenya Anti-Corruption Commission v. Lands Limited*** (supra) I observed as follows;

> "***Section 56 (1) empowers this Court to prohibit the transfer or disposal or any dealing with property which "on evidence" was acquired as a result of corrupt conduct. The "application" may be made ex-parte, and the Order of prohibition "shall" have effect for six months.***
>
> ***This Section clearly envisages that an application will, in the first instance, be "ex parte", and where the Court is satisfied that there is "evidence" to support the grant of the Orders sought, may make the Orders preserving the property for six months (subject to further extensions).***
>
> ***Ordinarily, under the Civil Procedure Rules the Court would grant ex parte restraining Order for only 14 days initially, and direct that the matter be heard inter-partes. Section 56 of the new Act does not envisage an inter-partes hearing but shifts the burden on the aggrieved party to apply to the Court to discharge or vary the Order {Section 56 (4)}.***
>
> ***I am satisfied that this Section creates a new jurisdiction, with a new remedy, and a new procedure. And where it deviates from the Civil Procedure Act and Rules, I must apply and***

follow the Act. In <u>Syedna Mohamed Burhannudin Saheb vs Mohamedally Hassanally</u> Civil Appeal (No 28 of 1980, Nairobi), the Court of Appeal stated:

"***In construing an Act as this, the ordinary rule as laid down by Esher, M R in <u>R V Judge of Essex County Court</u> (1887) 18 Q B 704, must be applied i.e. … In the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms or remedies there prescribed, and no other, must be followed until altered by subsequent legislation."***

I reiterate the same here. I am of the view that the Act allows the use of new procedure. This new procedure, of itself, does not in any way prejudice the Respondents. **Nor can procedure alone invalidate suits**. In the ***<u>Welcome case</u>*** (supra) Ringera, J. (as he then was) stated:

"***The proceedings herein have been initiated by way of originating Notice of Motion. The motion does not purport to be made under any order or rule in the Civil Procedure Rules. Instead it invokes the Companies Act, the Companies Winding Up Rules and the Banking Act. This is not to me surprising for the Civil Procedure Act does not purport to be exhaustive on procedural law in civil matters. Indeed, as Mr. K'Owade pointed out, section 3 of the Act expressly saves special jurisdiction and powers including procedural rules and forms under any other law in force. Such saved laws include, for instance, the Law of Succession Act (cap 160) and the Companies Act (cap 486). The procedure invoked in the instant matter is that under the Companies Act. And I can see nothing in the procedural rules invoked which require that a motion, originating or otherwise, be signed by the Court. But even if the originating process herein were to be viewed as being within the ambit of the Civil Procedure Rules, and in my view it is decidedly not, I would reject the submission that it is nullified by want of signature by Court."***

Justice Ringera then went on to say (at page 409) as follows:

"***I am in agreement with the main thrust of Mr. K'Owade's submissions that a procedural defect does not oust the jurisdiction of the Court and that unless injustice or prejudice is shown defects of form and other procedural lapses cannot vitiate the proceedings. In the instant case, the respondents do not complain of any prejudice or injustice."***

In this case before me, too, the Respondents have not demonstrated any prejudice because of the "procedure" adopted by the Applicant. So, assuming, that a suit had indeed been filed for recovery under Section 7(h) (i) together with an application under Section 56, in my view the Respondents would still be responding to the same issue: whether an Order to preserve the property should issue.

In my view, Section 7(h) (i) of the Act does not create a condition precedent which must be complied with before Section 56 can be invoked to issue preservation Orders. Section 56 states as follows:

"***Section 56: On an ex-parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct."***

It is instructive to note that the legislature has not used the word "**investigation**" in Section 56. Instead the word "**evidence**" is used. Clearly, in my view, Parliament intended to give the Court the power to "**prevent**" further disposition of property on evidence that it had been acquired by corrupt conduct. Parliament did not say "**on investigation under the Act**". It simply said "**on evidence**". As I stated before, I must provide a purposeful interpretation of this Act, taking into account the mischief it sought to suppress.

In **Interpretation of statutes** by Maxwell, 12th Edition, at page 137 the learned authors state, and I quote:

"***On the other hand, there is no doubt that the office of the judge is to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the***

continuance of the mischief . To carry out effectively, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that it has prohibited or enjoined."

The mischief the legislature intended to suppress was to prevent people from acquiring public property by corrupt conduct, and to stop the wrong-doers from enjoying their ill-gotten assets.

Let me repeat, here, what I said in the **Lands case** (supra).

> "***In <u>Saint Benoist Plantations Ltd vs Jean Emile Adrien Felix</u> (CA No 25 of 1954) the Court of Appeal for Eastern Africa said that where a local statute law does not provide a forum of procedure for a particular proceeding, it could be by an Originating Motion. "Originating Motion", the Court said, "means a motion which is not interlocutory but originates the proceedings in question."***

Addressing a similar issue, Justice Rawal, in ***<u>Kenya Anti-Corruption Commission v. Pattni</u>*** (2003) KLR 643 stated:

> "***I shall consider the submissions of Dr. Kuria, the learned counsel for the plaintiff, who submitted that if there is no procedure prescribed and there is a right created, then a litigant can come before this court in any manner prescribed by law. He added that procedure of Originating Summons is one of those procedures. He relied on the case of <u>Olive Casey Jaundo & Attorney General of Guyana</u> (1971) AC 972 to support his contention. At page 983 thereof the following observation by Warrington J in <u>Re Meister Lucious and Bruuning Ltd</u> (1914) 31 TLR 3, 8, 29 were adopted with approval, Viz:***
>
> "***Where the Act '(S C Constitution) merely provides for an application and does not say in what form that application is to be made, as a matter of procedure it may be made in any way in which the Court can be approached."***
>
> ***I can and do take judicial notice of the fact that till the rules of procedure under the Constitution of Kenya were prescribed, our courts were accepting and determining the applications made thereunder by way of Originating Summons which procedure is now prescribed by the Constitution of Kenya (protection of fundamental rights & freedom of individual) Practice 7 Procedure Rules.***
>
> ***Here I reiterate my observations made on the provisions of section 55(3) and section 55(4) of the Act.***
>
> ***In the premises, I cannot find and do not find that these proceedings are one of the three classes of proceedings which can be termed as nullities as observed in the case of <u>In Re Pritchand</u> [1963] 1 All ER 873 and adopted in the case of <u>U Kafuma v Kimborva Builders & Contractors</u> (1974) EA (U) 91.***
>
> ***Thus the proceedings which have been brought before this court are not nullity as I find that there is no fundamental defect in issuing these proceedings, and thus find that the same is properly before the court at this stage.***
>
> ***The chamber summons and orders in pursuance thereof are therefore not vitiated and are not nullities."***

I would adopt, and apply here the same reasoning.

Finally, Mr. Njuguna argued that the purpose of Section 56 of the Act was to **preserve** public property, and no more; that if, indeed, a person had no control on that property (as, here, the Second Respondent had sold the property to the Third Respondent) no Orders can issue against such a person. The answer to

that argument, in my view, lies in Section 7(h) (i) of the Act, which states as follows:

> ***S. 7(h) (i): to investigate the extent of liability for the loss of or damage to any public property and –***
>
> ***(i) to institute civil proceedings against any person for the recovery of such property or for compensation;***

The operative words are “**or for compensation”**. Clearly, the Act envisages both **recovery** and **compensation**, and based on the evidence presented before this Court, the Second Respondent has a case to answer. I find that it is a necessary party to this litigation.

Accordingly, and for reasons outlined, this application is dismissed with costs to Kenya Anti-Corruption Commission.

Dated and delivered at Nairobi this 16th day of October, 2007.

ALNASHIR VISRAM

JUDGE