



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 599 of 2004

**IN THE MATTER OF YAYA CENTRE IN NAIROBI OR LAND OR PROPERTY OTHERWISE
KNOWN AS LAND REFERENCE NUMBER 209/10670 WITH BUILDINGS AND
IMPROVEMENTS ERECTED THEREON**

AND

IN THE MATTER OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003

BETWEEN

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

AND

**L. Z. ENGINEERING CONSTRUCTION LIMITED.....FIRST
DEFENDANT**

**YAYA TOWERS LIMITED.....SECOND
DEFENDANT**

**HON. KIPYATOR NICHOLAS KIPRONO BIWOTT.....THIRD
DEFENDANT**

**H. Z. & COMPANY (K) LIMITED.....FOURTH
DEFENDANT**

**ZIBA MANAGEMENT SERVICES LIMITED.....FIFTH
DEFENDANT**

**GREENWOOD HOLDING LIMITED.....SIXTH
DEFENDANT**

R U L I N G

There are two applications before me both brought by way of Chamber Summons and expressed to have been brought under the inherent powers of the court, section 55(2) of the Anti-Corruption and Economic Crimes Act, 2003 (to which I shall hereinafter refer to as “**the Act**”) and Order 36 rule 12 of the Civil Procedures Rules. The first of these applications and bearing date the 25th August 2004 was filed on the 27th August 2004 by the Fourth, Fifth and Sixth Defendants/Applicants; the second, dated and

filed on the 31st August 2004, was taken out by the Second and Third Defendants/Applicants. As both applications seek orders in identical terms namely:

“that this suit be dismissed and or struck out AND the Plaintiff do pay each of these Defendants’ costs of this application and those of this suit”

and were heard together with the consent of the parties, I shall deal with them both in this ruling and for the purposes thereof refer to them hereinafter as **“the applications”** and to all of the said Second to the Sixth Defendants/Applicants inclusive jointly and severally as **“the Applicants.”**

The applications are premised upon the grounds set forth in the replying affidavit of James Frederick Norbury made on the 20th August 2004 and filed on the 23rd August 2004 in which the deponent also adopted each and every issue advanced or raised in his earlier affidavit made on the 2nd June 2004 and filed on the 3rd June 2004.

The applications are opposed by the Kenya Anti – Corruption Commission, the Plaintiff in the suit and Respondent in the applications upon the grounds dated and filed on the 21st October 2004 and the affidavits sworn by Gideon Muoki Mutua on the 14th May 2004 and the 18th June 2004 respectively.

Before summarizing the submissions of respective counsel and by way of background, it is necessary to note that the Plaintiff/Respondent (to which I shall hereinafter refer to as **“the Respondent”**) is a statutory body corporate duly established under section 6 of the Act which came into force on the 2nd May 2003. The Respondent instituted this suit against the Applicants by way of the Originating Summons dated and filed on the 14th May 2004 (hereinafter referred to as **“the OS”**) in which the Respondent claims to have been injured by the unlawful ownership and possession of YAYA CENTRE or land or property otherwise known as Land Reference Number 201/10670 situate in Nairobi (**“the property”**) and seeks determination of the several questions set out therein and for this court to give the declarations and orders also therein more particularly set forth including the following:-

“45. Whether each and all of the Defendants are in possession of unexplained assets or ill-gotten wealth including the property.”

“46. Whether the property, being an unexplained asset, should be forfeited to the Government of Kenya.”

“49. A declaration that each and all the Defendants are holding and are in possession of the property in trust for the Deposit Protection Fund and/or the Government of Kenya and the Central Bank of Kenya.”

“53. An order for payment of K. Shs. 25,000,000,000/- (K. Shs. 25 billion) less the value of the property if the Plaintiff recovers the property and is vested with ownership thereof”; and

“54. An order for compensation for loss of income and mesne profits.”

The OS is expressed to have been brought under the provisions of Order 36 rule 7 of the Civil Procedure Rules, sections 55(3) and 56 (1) of the Act, the inherent power and jurisdiction of the court and all other enabling provisions of the law.

For reasons which will come to light later in this ruling, I set out hereunder the provisions of the whole of section 55 of the Act as follows:-

“55.(1) In this section, “corrupt conduct” means -

(a) conduct that constitutes corruption or economic crime; or

- (b) conduct that took place before this Act came into operation and which –
- (i) at the time, constituted an offence; and
- (ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime
- (2) The Commission may commence proceedings under this section against a person who is or was a public officer if -
- (a) after an investigation, the Commission is satisfied that the person has unexplained assets; and
- (b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his compensation as a public officer and the Commission is not satisfied that an adequate explanation of that disproportion has been given.
- (3) Proceedings under this section shall be commenced in the High Court by way of originating summons.
- (4) In proceedings under this section -
- (a) the Commission shall adduce evidence that the person has unexplained assets; and
- (b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.
- (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 of 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.
- (7) For the purposes of proceedings
- under this section, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds -
- (a) are held in trust for the person whose assets are in question or otherwise on his behalf; or
- (b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration
- (8) The record of proceedings under
- this section shall be admissible in evidence in any other proceedings, including any prosecution for corruption or economic crime.”

Section 56(2) of the Act reads as follows:-

“ An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.”

Unexplained assets are defined in section 2(1) of the Act in the following terms:-

“unexplained assets” means assets of a person-

- (a) *the person was allegedly guilty of corruption or economic crime; and*
- (b) *whose value is disproportionate to his known sources of income at or around that time and acquired at or around the time for which there is no satisfactory explanation.”*

The Act, enacted “to provide for the prevention, investigation and punishment of corruption, economic crime and related offences” defines “corruption” as meaning-

“ (a) an offence under any of the provisions of sections 39 to 44, and 47;

(b) bribery;

(c) fraud;

(d) embezzlement or misappropriation of public funds;

(e) abuse of office;

(f) breach of trust; or

(g) an offence involving dishonesty-

(i) *in connection with any tax, rate or impost levied under any Act; or*

(ii) *under any written law relating to the elections of persons to public office;”*

while “*economic crime*” means –

“ (a) an offence under section 45; or

(b) an offence involving dishonesty under any written law providing for the maintenance or protection of the public revenue.”

I shall now deal with the submissions of respective counsel. In lengthy submissions at the hearing of the applications, Mr. D. Oyatsi, learned counsel for the Second and Third Defendants/Applicants, advanced further grounds and reasons in support of the applications, citing a battery of judicial and other authorities.

Observing that the powers, functions and obligations of the Respondent are clearly set out in the Act and that one of such functions is to recover unexplained assets, but strictly in the manner prescribed thereunder, Mr. Oyatsi emphasized that the Respondent in performing its statutory duties is also under a statutory obligation to ensure that the rights of any person under investigation, or whose assets are in question, are not violated – such rights including the strict observance of the due process of law which is the underlying principle of the rule of law and natural justice expressly incorporated in the Act. Counsel noted that the exhaustive and comprehensive procedure to be followed by the Respondent for purposes of proceedings under section 55 of the Act is in four stages, namely:

- (1) there must be an investigation and the Respondent must satisfy itself that the person under investigation has unexplained assets after affording such person a reasonable opportunity to explain the disproportion.
- (2) if the Respondent is not satisfied with the explanation so given, it may commence proceedings in this court in which the person whose assets are in question shall be afforded the opportunity to challenge the evidence adduced by the Respondent.
- (3) if on that evidence the court is satisfied that the person concerned does have unexplained assets, the court may require such person to adduce evidence to satisfy the court that the assets were not acquired as a result of corruption conduct; and
- (4) if the court is not satisfied, it may require the person concerned to pay to the Government an amount equal to the value of the unexplained assets.

In learned counsel's opinion, the investigation required under section 55(2) (a) of the Act could only have been undertaken after the 2nd May 2003 when the Respondent came into existence. In paragraph 6 of the affidavit of James Fredrick Norbury sworn on the 20th August 2004, the deponent states that he believes that if the Respondent ever made any investigation required by the Act, it never completed it in the manner prescribed by section 55 (2) of the Act. Mr. Oyatsi submitted that this must have been the case not only because there has been no reply to the said affidavit but also because the affidavits of Gideon Muoki Mutua on which the Respondent relies do not show when such investigations commenced, if ever they were, in fact, undertaken nor when the Applicants were informed of the same nor when they were afforded a reasonable opportunity to explain the unexplained assets nor why the Respondent was not satisfied with the explanation tendered by the Applicants, if ever one was given, which the Applicants deny on the ground that they were never afforded the opportunity as required by the Act.

Relying on the decision in Lloyd and Others v. Mc Mahon [1987] 1 All ER 1118 at 1161 that "when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.....", and the Respondent having failed to follow the procedure prescribed under section 55 of the Act, learned counsel submitted that the OS is an abuse of the process of the court and should be struck out or dismissed and the Respondent non-suited.

Further, and by reason of the Respondent's failure to afford the Applicants a reasonable opportunity of explaining the unexplained assets, the Respondent had already violated not only the statutory requirement in that behalf expressly provided in the Act but also, and in the words of Lord Morris of Borth - Y - Gest in the House of Lords decision in Ridge v. Baldwin and Others [1963] 2 All ER 66 at 102, that "the essential requirements of natural justice that before someone is condemned he is to have an opportunity of defending himself and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet."

Finally, and on the authority of other earlier English decisions in the line of R v. Electricity Commissioners. Ex parte London Electricity Joint Committee Co. [1923] All ER Rep. 150 at 162, Fisher v. Keane [1879] II Ch. D. 353 at 362 and 363 and Arthur John Spackman v. The Plumstead District Board of Works [1885] 10 AC 229 at 240, it was contended for the Second and Third Applicants that by failing to act impartially and honestly in instituting proceedings before fulfilling the requirements of the Act, that omission on the part of the Respondent rendered the OS null and void. For these reasons, Mr. Oyatsi urged that the suit be dismissed with costs.

Submitting on behalf of the Fourth, Fifth and Sixth Defendants/Applicants, and in associating himself fully with the submissions made by Mr. Oyatsi, Mr. Fred Ngatia, their learned counsel, narrowed the issues to be determined by the court to the following three:-

- (1) whether S. 55 (2) of the Act prescribes conditions precedent to be fulfilled by the Respondent prior

to the commencement of any proceedings under that section.

- (2) whether such conditions precedent were complied with by the Respondent before instituting the OS.
- (3) if such conditions were not duly complied with, should the OS be struck out or dismissed.

Mr. Ngatia submitted that in the absence of an affidavit from the Respondent rebutting the Applicants' averments that no investigation within the meaning of section 55(2) (a) of the Act was undertaken, the court is bound to make a finding that no investigation was, in fact, made: The Owners of the Motor Vessel "Lilian S" v. Caltex Oil Ltd. (Civil Appeal No. 50 of 1989) (unreported) per the judgment of Nyarangi, JA, at page 13 thereof. In consequence, and relying on the decision in the English Court of Appeal decision in In re An Arbitration Between Mahmoud and Ispahani [1921] 2KB 716 at 725, "what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject matter of an action" as the Respondent had purported to do in filing the OS. Referring to the Court of Appeal decision in DT

Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 cited in the Respondent's list of authorities, learned counsel distinguished it and urged the court to ignore it for reasons including that it is beyond the perview of the applications to look at the merits or otherwise of the OS which should in any event be dismissed.

Mr. Ngatia also cited a host of other authorities including the Privy Council decision in Edward Ramia Ltd. v. African Woods, Ltd. [1960] All ER 627 at 630 to show not only that strict application of statutory regulative provisions is essential and imperative but also, and in the words of the authoritative treatise of Maxwell on the Interpretation of Statutes (10th edition) at page 376, that

"Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a vigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature".

It follows, therefore, Mr. Ngatia contended, that the Respondent cannot claim to recover by virtue of the Act, and at the same time insist upon doing so by means other than those prescribed by the Act which alone confers the right: Barraclough v. Brown and Others [1897] AC 615 at 620.

As to whether the OS should be struck out or dismissed, Mr. Ngatia was firmly of the view that it should be dismissed because the proceedings are a nullity having been instituted when the Respondent was clearly in breach of the mandatory provisions of the Act. In this regard, counsel referred me to the judgments of the Court of Appeal in Andrew Kamau Mucuha v. The Ripples Ltd. (Civil Appeal No. 19 of 1998) (unreported) and Kenya Breweries Ltd. v. Republic [1987] KLR 696.

In response to these submissions Mr. James Orenge, learned counsel for the Respondent, urged that the Applications be dismissed as they are misplaced and misconceived inasmuch as the arguments advanced by the Applicants had concentrated entirely on section 55 of the Act, which deals with forfeiture of unexplained assets (the subject of paragraphs 45 and 46 of the OS), whereas the OS seeks various declarations and orders under several other sections of the Act. By making corruption a high risk but law profit enterprise, the Act has conferred very wide functions and powers on the Respondent under section 7 and it is in pursuance thereof that this suit is before the court. Mr. Orenge then took me through various aspects of section 2 of the Act (on interpretation), including the respective meanings of "corruption", "economic crime" and "public officer" for purposes of the Act. To demonstrate that the OS does indeed deal with other sections of the Act other than section 55, learned counsel referred me to several paragraphs in the OS and to the corresponding sections of the Act and the offences to which they relate. The sections included sections 42(1) 45, 46, and 47 which should be read in conjunction with sections 51, 52 and 53 of the Act.

Mr. Orenge conceded, respectfully, that insofar as the Third Defendant/Applicant is concerned, the

conditions precedent set out in section 55 of the Act are mandatory but apply only to the Third Defendant/Applicant and to him alone as he is the only public officer who is a party to the suit – such conditions precedent do not and cannot apply to the other Applicants. To this extent, counsel had nothing more to add on the authorities cited by the Applicants which he agreed constitute good law. This notwithstanding, however, Mr. Orengo observed that there is no prayer in the OS for forfeiture. Counsel argued that though the other Applicants are not public officers, S.55 (2) of the Act is permissive and does not bar the taking out of the OS against them. Further, the section does not specify by whom an investigation is to be undertaken, implying that it need not necessarily be made by the Respondent.

Having submitted at length to demonstrate that the OS is premised on several other sections of the Act of which section 55 constitutes a very small part, Mr. Orengo argued that I should look at the whole body of the suit in determining whether or not the applications should be allowed. Relying on the unreported judgment of this court dated the 10th August 2004 (Ibrahim, J.) in Antony Musila (Mulonzi) Mumangi v Emmanuel Karisa Maitha, Minister for Local Government and Others (Nairobi Misc. Application No. 669 of 2004) and Order 34 rule 10 of the Civil Procedure Rules, counsel submitted that the court does have the power to allow amendment of pleadings which are necessary for the attainment of substantial justice. Accordingly, should the court find that the provisions of S. 55 of the Act were not followed in relation to the Third Applicant, then the paragraphs in the OS brought under that section should be struck out and the rest of the OS allowed to proceed to trial. In this regard, the court was referred to the decision in Republic of the Philippines, v. Hon. Sandiganbayan (Special First Division), Ferdinand E. Marcos and Others (<http://www.supremecourt.gov.ph/2003/jul2003/152154.htm>) in which the court saw it fit to set aside technicalities and formalities that merely serve to delay or impede judicious resolution especially where the case is undeniably ingrained with immense public interest, public policy and deep historical repercussions.

Finally, and relying on the DT. Dobie case (supra), Mr. Orengo submitted that the OS is not a clear and obvious case for striking out and the court must therefore act with extreme caution particularly as the Applicants had not adduced any evidence whatsoever to show that the suit is an abuse of the process of the court. While in agreement with the Applicants that insofar only as the claim is for forfeiture and against a public officer the conditions precedent must be met, counsel nonetheless argued that section 55 is permissive as against the other Applicants who were not public officers and as the OS raises numerous other claims for compensation, it should be allowed to go to trial. For these reasons, Mr. Orengo urged that the applications be dismissed with costs.

In a brief reply, Mr. Oyatsi distinguished between proceedings under the Civil Procedure Rules and proceedings brought under the Act. In his view, proceedings under section 53(4) of the Act to recover property under sections 51 and 52 thereof are normal civil proceedings falling under the ambit of the Civil Procedure Rules. However, should the Respondent opt to commence proceedings under section 7(1) (h) (i) of the Act, then the jurisdiction of the court emanates from, and is restricted to section 55 of the Act. Counsel submitted that as the OS invokes sections 55(3) and 56(1) of the Act as well as the inherent powers of the court, such inherent powers cannot properly be invoked where, as in the present suit, there are other powers provided by statute, namely the Act. Further, and as the Respondent has not invoked the other provisions of the Act the OS is purported to rely on, the Respondent is estopped from invoking such other provisions without first amending the OS. On section 51 of the Act, it was submitted that the provision applies only where there has been a conviction for economic crime or corruption and as none of the Applicants have been so convicted under Part V of the Act, no compensation can be sought under Part VI thereof.

Mr. Oyatsi further submitted that for purposes of section 55(2) of the Act, the public officer, namely the Third Applicant, is deemed to be the principal Defendant and the other persons have been joined in the proceedings for purposes of sub-section (7) thereof. Accordingly, the conditions precedent to the section must apply to all the Applicants and not to the public officer alone. As the Respondent is in breach of the Applicants' statutory rights, the OS should be dismissed.

Mr. Ngatia agreed and associated himself fully with Mr. Oyatsi's submissions adding that the court should take special note of the fact that at no point has the Respondent sought to amend the OS. Further,

counsel reiterated that the safeguards and conditions precedent accorded a public officer under section 55 of the Act must apply to any private person who aided and abetted the public officer or became a beneficiary of the property in question. Counsel also invited the court to note that under section 4(1) of the Act, only special Magistrates within the meaning of the Act have jurisdiction to try offences under Part IV thereof. Mr. Ngatia therefore urged that the applications be allowed.

I now consider the applications in light of these submissions of learned counsel and of the evidence before me and the law. In doing so, I am particularly conscious of the fact that there are no decided cases on the interpretation of Part VI of the Act – on

compensation and recovery of improper benefits - with specific reference to section 55 thereof. The Act remains largely untested, having only come into force in May last year, and developing the appropriate jurisprudence will in all certainty be a most painstakingly slow process which can be achieved only through collaboration and exchange of ideas on the lessons to be learnt from the experiences of others in the implementation of similar legislations in other jurisdictions. In this connection, I am indebted to learned counsel for their scholarship and industry which I found refreshingly stimulating and illuminating.

In my own research, I have stumbled on some useful extracts from The Report of the 2002 Commonwealth Secretariat Conference on the Changing Face of International Co-operation in Criminal Matters in the 21st Century held in Christ Church, Oxford from the 27th to the 30th August 2002 and of particular interest were the following articles, namely:-

(1) Restraint and Forfeiture of Proceeds of Crime in International Cases: Lessons Learned and Ways Forward (by Cherno S. Jallow, Attorney - General, British Virgin Islands) and the well - articulated decision

in R v. Benjafield [2001] 2 Cr. App. R 87

and the other cases referred to therein.

(2) Criminal and Civil Forfeiture as a Means of Pursuing the Proceeds of Crime – Lessons from South Africa (by Raylene Keightley, DPP Asset Forfeiture Unit)

I would commend these and other articles in the said Report to any serious student of the subject.

Returning to the applications at hand, and as to the issue as to whether the Respondent can rely on evidence gathered prior to its formation and/or through investigations other than its own, section 55 would appear to provide sufficient support for an answer in the affirmative. The use of the words “ or otherwise” in sub-section (2) (b) implies, in my judgment, that the process through which evidence is gathered may be independent of the Respondent but the Respondent must, of course, satisfy itself in terms of sub-section (2) (a) before acting on such evidence. The cardinal rule of construction of an Act of Parliament is to construe it according to the plain, literal and grammatical meaning of the words: In Magor & St. Mellons District Council v. Newport Corpn. [1951] AC 189 at 191 per Lord Simonds. If it had been the intention of the legislature to restrict investigations under section 55(2) to the Respondent, then Parliament would expressly have so provided. I cannot, therefore, as the Applicants suggest I do, “ add words to a statute or read words into it which are not there” : In R. v. Wimbledon Justices, ex.p. Derwent [1953] 1 QB 380 per Goddard, CJ.

My view is fortified by the provisions of section 73 of the Act sub-section (3) which transferred all ongoing and past investigations of the anti-corruption unit of the Kenya Police Force to the Respondent together with all assets which include all files and documents. Looking at the affidavits of Gideon Muoki Mutua on which the Respondent relies and even in the absence of a replying affidavit in answer to that of James Fredrick Norbury made on the 20th August 2004, it is quite evident if not obvious that an investigation was duly undertaken, though I will not venture to speculate by whom it was made. Suffice to say that I cannot ignore the evidence presently on record. I therefore find and hold that an

investigation is a condition precedent for purposes of any proceedings under section 55 of the Act and that the same may be undertaken independently of the Respondent but that the Respondent must satisfy itself in terms of section 55 (2) (a) of the Act before acting on the result of any investigation whether undertaken independently or in exercise of the Respondent's powers of investigation or otherwise.

This brings me to the second question, namely: were the Applicants afforded a reasonable opportunity to explain the unexplained assets in terms of section 55 (2) (b) of the Act?

It may be argued that this provision is an embodiment of the rules of natural justice and more particularly of the rule that no man shall be condemned unheard. These rules are implicit in the concept of fair adjudication and are enshrined in section 77 of The Constitution of Kenya - hence any body exercising a judicial function must always endeavor to apply these rules. Failure to do so would invariably result in a constitutional challenge. In Halsbury's Laws of England Volume I (I) 4th Edition paragraph 84, it is stated:

“ However, the obligation to observe natural justice is not confined to bodies constrained to observe the procedural and evidential rules of a court of law. For this reason, the courts have tended in recent years to speak less of natural justice and more of a duty to act fairly. This is not a duty which is confined to persons and bodies having a duty to act judicially or quasi-judicially, although whether a function is more characteristically administrative or quasi-judicial may be one factor determining what fairness requires in its exercise.”

It has been observed further (Ibid., at paragraph 85) that:-

“ a presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or inquiring or where the decision is one entailing the determination of disputed questions of law and fact. *Prima facie*, moreover, a duty to act in accordance with natural justice will arise in exercise of a power to deprive a person..... of property rights though conferment of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation so to act. The content of the duty to act fairly will normally be very limited where the authority is in the course of exercising a function not culminating in a binding decision, but that may be the case if the wording of the grant of powers or the context indicates that a fair hearing ought to be extended to persons likely to be prejudicially affected by an investigation or recommendation.”

These principles have been the subject of numerous English decisions and have also been tested in our courts in a variety of circumstances including the case of Republic v. Attorney - General Ex Parte Biwott [2002] 1KLR 668. Having considered the applications in light thereof and of the other authorities cited by learned counsel, I have no doubt that the provisions of section 55 (2) (b) are mandatory and a condition precedent to any proceedings commenced under section 55 and that they apply not only to public officers but also to all other persons joined in such proceedings under and by virtue of sub-section (7) thereof.

The Respondent has not shown nor demonstrated that it complied with the provisions aforesaid by affording the Applicants or any of them a reasonable opportunity to explain the unexplained assets. Further, and with respect, I cannot see, as Mr. Orengo suggests I should, that the other Applicants can be excluded from benefiting from this statutory right given that the claim against them arises from the same subject matter and circumstances as the claim against the Third Applicant. Indeed, the Respondent in paragraphs 16 and 21 of the OS admits that the Third Applicant is the nexus – the very fulcrum - between YaYa Centre and the other Applicants. The current owner of the property and any other party adversely affected by the Respondent's claim must be afforded an opportunity to explain how they acquired the property. After all, and in the words of Lord Woolf, CJ, in R V. Benjafield (supra), “ it will be far easier for a Defendant in the majority of circumstances to establish, on the balance of probabilities, that the assets in dispute have an innocent source.” Without substantial amendment to the OS, for which the Respondent has sought no leave, there cannot be a severance of claims as between the Third Applicant and the other Applicants. I so find and hold for the foregoing reasons and would allow the applications on these grounds.

This now brings me to the final issue to be considered in this ruling namely whether the OS should be dismissed or struck out. The Kenya Breweries case (supra) and Smart & Son vs Watts [1895] 1QB 219 at 222 cited by Mr. Ngatia are distinguishable because the

Appellants therein had already been tried and convicted. As the OS has not been heard and determined, the Applicants have suffered no prejudice other than the costs they have incurred to date. The Respondent on its part must, however, ensure that it does not violate the provisions of the Act or otherwise abuse the process of the court

in its enthusiasm to discharge its functions thereunder. As the Act sets out in very clear terms the steps the Respondent must take to discharge its statutory duty, the Respondent cannot fulfill that duty if it resorts to shortcuts as clearly appears to have been the case here.

In the particular circumstances of the applications before me, I do not consider that the Applicants have laid sufficient grounds for me to dismiss the suit and I decline the invitation to do so.

Accordingly, and having found and held that the Respondent breached its statutory duty under section 55(2) (b) of the Act by instituting these proceedings without affording the Applicants a reasonable opportunity to explain the unexplained assets, the OS is incurably defective and therefore incompetent. I would and do therefore allow the applications and order that the suit instituted by the Originating Summons dated and filed on the 14th May 2004 be and is hereby struck out with costs to the Second, Third, Fourth, Fifth and Sixth Defendants/Applicants. These Applicants will also have the costs of the applications.

Dated and delivered at Nairobi this Tenth day of December 2004.

P. Kihara Kariuki

Ag. Judge