REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO 1111 OF 2003

KENYA ANTI-CORRUPTION COMMISSION ……..….PLAINTIFF

VERSUS

KAMLESH MD PATTNI & OTHERS……..... DEFENDANTS

RULING

I have before me several *ex-parte* applications which were filed after I gave an *ex-parte* order on 30th October, 2003 in pursuance of a Chamber Summons filed in a suit brought in by way of originating summons. Both these applications were also dated 30th October, 2003. Originating summons is filed by the plaintiff who is the Kenya Anti-Corruption Commission established under the Anti-corruption and Economic Crimes Act, 2003. (hereinafter referred to as "the Act'). It is brought under section 55 of the Act. The plaintiff alleges therein *inter alia* that the first defendant Kamlesh MD Pattni acquired interests in properties and shareholdings in the several defendants by money acquired as a result of corrupt conduct.

The plaintiff supported its averments by contents of an affidavit sworn by Joseph Kamau, a deputy commissioner of police, who is the head of the investigations at the Judicial Commission of Inquiry popularly known as "Goldenberg Inquiry."

The application for interim orders was provised under order XXXVI rule 12 Civil Procedure Rules, Order XL rules 1 to 4 of the same rules as well as under section 56 of the Act. From the evidence presented to the Court in the above applications and keeping in mind, as well, that it is an *ex parte* order and that, at that stage

I had to look into interest of both the parties involved, I made the temporary interim orders the intention whereof was to preserved the properties during interim stage.

After service of the proceedings and the order, all the parties have rushed to the court by filing applications seeking *ex-parte* orders. However, the plaintiff's counsel was around and it was then agreed that I only deal with the legal issues raised without going into the merits of the applications, as well as make judicial orders as per exigency.

During these hearings, weighty and well advanced submissions were made. I am, and shall be, however, reminding and cautioning myself that I have to determine those issues at an *ex-parte* stage. It is an arduous task and I shall refrain myself from going out of the defined demarcation between *ex-parte* and *interparte* hearings, although counsel did cross the border at times.

In my interim ruling delivered on 7th October, 2003, I stayed my orders of 30th October, 2003, as against 9th, 10th , 13th & 16th Defendants until further orders. I reserved my findings on some of the legal issues raised by counsel for interested parties, who joined in as regards their interests in 9th & 10th defendants as well as by counsel for 13th defendant and 16th defendant.

I shall thus deal with legal issues, which were kind of preliminary issues to be determined in limine, raised in all the applications namely the application on behalf of the interested parties as regards 9th & 10th Defendants, the application by 16th defendant, the application by 3rd defendant, that by 5th, 6th, 7th, 11th, 14th, 15th, & 17th, defendants, that made by 8th, 9th & 10th defendants and that made by 16th defendants. All of them were mainly provised under section 56 (4) of the Act as well as several other relevant procedural laws and also under section 3A of the Civil Procedure Act.

If I summarise various issues raised, they can be stated as under:-

(1) The filing of the suit by way of Originating Summons is fundamentally defective in procedure and is fatal rendering it a nullity or void *ab initio.*

(2) The chamber application filed under the said suit thus falls with it.

(3) The orders issued by the Court also follows the same consequences having been made without jurisdiction.

(4) The chamber summons which does not annex an affidavit is fatally defective and the orders made are thus null and void.

(5) The plaintiff does not have *locus standi* to file the suit.

(6) The orders prayed for are in excess of court's power as contained in or provided for in section 56(1) of the Act.

To support and oppose these issued, very strong submissions were made by all the counsel appearing before me. I should be pardoned if I do not enumerate them individually. I must state herein that I am deeply appreciative and indebted for their valued assistance given in the matter which is to be tested for the first time in our legal history and which is enunciated from the Act which is enacted for the preservation, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith. These objects are provided in the preamble of the Act.

Now I venture, with all humility, on the issues raised and enumerated by me herein before.

All learned counsel for the Defendants submitted and echoed each other's submissions that the matter brought before the Court is so brought, under a wrong procedure of the law and is a nullity. They argued that the procedure of filing the suit by way of Originating Summons is limited only to the matter involving simple issues and cannot be used when the matter is complex and weighty like the one before the Court is. They cited several authorities of this court and those of Court of Appeal. I must hasten to point out that these authorities dealt with the matters which were filed under order XXXVI of Civil Procedure Rules which provides for several matters which could or should be filed by way of Originating

Summons. The provisions of several rules under the order are specific and which, on perusal thereof, show that the issues involved are simple and thus could be dealt with by simple procedure. But one may not ignore the provisions of section 10 of the same order which gives power to the Court to treat an Originating Summons as a plaint as per the exigency of the circumstances of the mater before it.

In the case of *Floriculture International Limited and Central Kenya Ltd & 3 others* (CA No 121 of 1995 unreported), the Court of Appeal was dealing with a matter wherein the validity of a mortgage was challenged and was in issue. Considering the provisions of order XXXVI rule 3A, the Court rightly observed that as the plaintiff's claim was that there was no valid mortgage, it was not a matter upon

which an Originating summons can be based under rule 3A of order XXXVI of Civil Procedure Rules.

Considering the matter brought under order XXXVI of Civil Procedure

Rules, the Court of appeal rightly observed that

"the procedure of Originating Summons is designed to deal with simple matters which may be decided without the exposure of bringing in an action and was not intended for determination of matters which involved a serious question on contested facts."

Following this, I shall now refer to the case of *Kenya Commercial Bank v Osebe* [1982] KLR 296 wherein the Court of Appeal referred to observations made in two earlier cases of *Official Receiver v Sukhdev* [1970] EA and *Standard Chartered Bank Ltd v Walker* LS Gazette September, 15, 1985, 135. The observations were to the effect that matters of fact, if disputed, should not be resolved on affidavit evidence, and that summary judgment should not be given where the defendants made the allegations in their affidavits and further that they raised triable issues of fact.

As per my understanding, the principle behind these observations and holdings by the highest Court of our land is that the cases specifically provided under order XXXVI of Civil Procedure Rules are to be filed by way of Originating Summons and are intended to be resolved by affidavit raising simple issues. In other words where the evidence has to be tested in face of disputed facts, ie where oral evidence with all its consequence is required, the procedure by way of Originating Summons cannot be adopted and if a party goes to the Court basing the claim on issues, not provided for in the said order, it is improper. In other words it means that the statute has specifically provided which issues to be determined under the said procedure.

In the background of these observations, I shall now peruse section 55 of the Act. After providing in section 55 (3) that the proceedings under this section shall be commenced by way of Originating Summons, section 55

(4 stipulates as under:

"Section 55(4):

In proceedings under this section:

(a) The Commission shall adduce evidence that the person has unexplained assets,

and

(b) The person whose asssets 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."

This specific provision dispels any doubt, in my humble opinion, as to the procedure to be followed and it clearly shows that the Act intended and prescribed the procedure by way of Originating summons in the matters which were not to be determined by affidavit evidence or by summary procedure.

Once the Act does provide, I cannot, at this stage find that the suit filed by way of Originating Summons is a nullity.

Then, it was submitted that section 55 of the Act only deals with the public officer and not other persons. It was contended further that none of the defendants is a public officer and thus section 55 does not apply to this case and because of that also, the suit filed by originating summons is a non-starter.

It cannot be gain-said that section 55 is placed under part VI of the Act, which is entitled "Compensation

and Recovery of Improper Benefits."

It starts with imposing a liability on a person who has done anything that constitutes corruption or economic crime against anyone who has suffered a loss as a result for an amount that would be full compensation for the loss suffered.

The Commission has been conferred with power to seek and recover the compensation on behalf of the public body which has suffered such loss.

(See section 53(3)).

Section 55 begins with definition of corrupt conduct. Its marginal note reads:

"forfeiture of unexplained assets". I do warn myself not to give too much weight on those words as it is generally accepted that these marginal notes are put in by the draftman and is not a apart and parcel of the Act. Subsection (2) of the said section reads and I quote.

"(2) The commission may commence proceedings under this section against a person who is, or was a public officer if……."

I must note that the word "may" is used in this sub section which has eight elaborate sub-sections. The words used in all other provisions of the section is "person". One may not ignore that even subsection (2) the word "a person." If the intention of the Parliament was that section 55 only applies to the public officer, it could have specifically stated so. But it has not. The use of words "The Commission may commence proceedings……" in my humble opinion mean that it includes also the public officer but it does not exclude other persons.

I shall read the section, under the circumstances, as applicable to all persons who have done anything that constitutes corruption or economic crime.

The legislature in its wisdom *inter alia*, or as an option has thought it fit to include a public office in the category of persons who could be sued under the provisions of section 55. I say so, as there are various provisions under respective Acts of Parliament to deal with wrong-doings of a public officer. In any event, I do find that the section 55 is inclusive and not exclusive as all the learned defence counsel shall like me to observe. I cannot but observe that the defence counsel on the same breath were all agreeable to the suggestion that section 56 of the Act, which is placed under the same part of the act, includes a public officer. I may not need to add anything further.

However, even if I am wrong in my aforesaid finding and has to perceive that no procedure is provided for under section 56 of the Act, I shall observe as under;

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 *Olive Casey Jaundo & Attorney General of Guyana* (1971) AC 972 to support his contention. At page 983 thereof the following observation by Warrington J in *Re Meister Lucious and Bruuning Ltd* (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 In Re *Pritchand* [1963] 1 All ER 873 and adopted in the case of *U Kafuma v Kimborva Builders & Contractors* (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 he 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.

The issue of the validity of the chamber summons dated 30th October, 2003 because it does not have an affidavit, may be out of the scope of this ruling.

However, with the said reservation, I may only observe that the application is not provised under order XXXIX of the Civil Procedure Rules. I also look at provisions of order L rule 7 of the Civil Procedure Rules which stipulates:

" Every summons shall state in general terms the grounds of the application being made and shall be heard in chambers and, where any summons is based on evidence by affidavit, a copy of the affidavit shall be served."

The provision does not state the annexure of the said affidavit in the application. But in all humility, I find that the issue raises mixed questions of facts and law and I shall not be properly advised if I determine the said issue at this stage and accordingly decline to do so.

It is now admitted that my order in question did not appoint a receiver. If so, and I am glad it is so, I shall also advisedly refrain from making my findings on the issue whether under section 56 of the Act the power of the court extends to appointing a receiver. I am aware that very stimulating and serious submissions were made on the issue, but I am not the fortunate judge to determine the same. I shall leave that task to a judge who shall be asked to hear the applications *interparte*.

Similarly, I shall also not dwell fully and finally on the *locus standi* of the plaintiff to bring in the proceedings. I shall only make the following observations: Indisputably the plaintiff is established as a body corporate under the Act having perpetual succession and a common seal (section 6). It has several far reaching powers and functions as per section 7, Part IV & Part VI, of the Act. Under section 53 (3) it has a right to recover the loss on behalf of the public body. This phrase is defined under the Act and adequately covers the subject-matter of the proceedings. It has a right to institute civil proceedings in its name against the persons who are alleged to have acquired properties or assets as a result of corruption and economic crime. I shall refrain at this stage, to find that only because a director is not appointed as provided under the Act, the plaintiff is a shell and is devoid of its establishment and its power as a body corporate having perpetual succession and its functions. In view of issues of facts and law raised, I cannot and shall not oust a party at this stage from the seat of litigation who has come before the Court with serious issues.

What I did was to exercise my power as a court under the provisions of

section 56, which stipulates:

"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."

The learned defence counsel submitted very vehemently that this power can only be exercised after the investigation as prescribed under the Act is carried out and as John Kamau is not an investigator under the

Act, he does not have any authority to swear an affidavit on behalf of the

Commission (see sections 23 of the Act).

A contention was also raised that this application can only be filed after a person is proved guilty, after due investigation, prosecution and determination by a court of law.

With respect, that is too narrow an interpretation of the provisions of the section and the word "evidence" appearing therein.

The deliberate omission of the word 'investigation' and inclusion of the word "evidence" in the section clearly shows the intention of the Parliament to confer the court with power of prevention of further action in respect of corrupt conduct.

If the Parliament would have intended what is contended by learned counsel, then nothing would have been easier for the Legislature to use the word 'on investigation under the Act'. But it has not done so and the Legislature has advisedly used the word'"on evidence" in the section. To take the view contended by the defence counsel obviously shall frustrate the remedy intended to suppress the mischief under the Act.

I also gain support in my aforesaid observations from well established principle of Laws of Interpretation and I quote from chapter 6 entitled "construction to prevent evasion or abuse" from the *Interpretation of statutes by Maxwell* 12th Edition. On page 137 it is stated 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 Court thus should not narrow the language and spirit of a statute. I have stated earlier the intention of the Legislature as declared in preamble of the Act.

The effect of the narrow interpretation will result in the Commission being helpless in its aim of prevention of the corrupt conduct and preserving the assets which are suspected. It shall be totally against the object of the Act to allow the wrong doers to enjoy their ill gotten assets till the protracted machineries of proof of guilty is exhausted.

I add here, that the application which is expressly enjoined to be made *exparte* under the Act seals with approval the above observations and interpretation.

The evidence which is gathered and deponed by John Kamau, in my humble opinion, can be sued as evidence by the Commission to support the *ex-parte* application by the Commission under section 56 of the Act.

This brings me to the final leg of my ruling, which is the prayers of stay, discharge or variance of my order of 30th October, 2003. It is sought under section 56 (4) & (5) of the Act. Without going deep into the merits of the respective applications which shall be undergone at the *interpartes* hearing, I shall consider following aspects of the matter, Viz:

The amount alleged to have been involved is quite substantial. There are various and protracted litigations pending which are initiated by the 1st defendant herein. The 1st defendant herein has claimed to have acquired substantial interest by way of share-holdings in several of the defendant companies. Out of those defendants I have made my orders against 9th, 10th, 13th & 16th defendants. I also now observe that the 3rd defendant is a court appointed receiver of Grand Regency Hotel and not that of the 2nd defendant and that he is also a receiver of 8th, 9th, 10th & 12th defendants, that even on cursory glance, all the defendants are connected directly or indirectly with each other and that there are several disputes concerning several defendants between 1st defendant and 5th defendant, that allegations of involvement

of the amount perceived to have been received by corrupt misconduct is made in respect of property with rival contentions. I may once again reiterate that at this stage, it is the Court's duty to preserve the assets and to balance the interest of both the parties till the matter is heard for further orders at any stage.

The learned counsel for 3rd & 4th defendants has proposed, during their submissions in rejoinder, that in the interim they shall give accounts of the companies connected with them to the plaintiff. Doing the best under this complex situation, I order that:

(1) There shall be stay of my orders of 30th October, 2003 against 2nd, 3rd, 4th , 8th, & 12th defendants until further orders under condition that they shall prepare and send weekly accounts to the plaintiff as regards their businesses which are mentioned and undertaken by them. If there is a query thereon the plaintiff and those defendants have liberty to apply.

(2) There shall be stay of my order dated 30th October, 2003 against 1st, 6th, 7th, 10th, 11th, 12th, 14th & 15th, defendants till further orders under condition that they shall not transfer, or dispose their respective assets.

(3) The orders made against other defendants vide my ruling dated 7th November, 2003 are reiterated.

(4) The parties to bear their own costs considering the complexity and sensitive nature of the matter.

Dated and delivered at Nairobi this 12th day of November, 2003

K. H. RAWAL

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JUDGE