



Ethics and Anti-Corruption Commission v Haria & another (Environment and Land Miscellaneous Application E016 of 2024) [2025] KEELC 385 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEELC 385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E016 OF 2024**

M SILA, J

FEBRUARY 6, 2025

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPLICANT

AND

BHAVESH NEMCHAND HARIA 1ST RESPONDENT

DIAMOND TRUST BANK KENYA LIMITED 2ND RESPONDENT

RULING

(Applicant seeking orders for preservation of property on the basis that it needs to investigate the title thereof as it could have been public property acquired through corrupt means; initial application amended and the amended motion supported by an ‘amended supporting affidavit’; whether there can be an amendment to an affidavit or to an application; court of opinion that an application can be amended to correct errors but not to make substantial changes that would alter the character of the application; in the case herein the correction was a clerical error that is permissible; an affidavit cannot however be amended and it was a misnomer to purport that the affidavit is amended; no prejudice however caused to respondents; on merits prima facie material that the suit property may have been meant to be retained as Government land; application allowed)

1. Before me is an amended Originating Motion dated 17 July 2024 and said to be brought pursuant to Section 56 (1) of the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003. The applicant is the Ethics and Anti-Corruption Commission (EACC) and she seeks an order prohibiting the respondents from dealing with the land parcel Kisii Municipality/Block II/127 for a period of six (6) months.
2. The application is supported by the affidavit of Augustine Mukwekewe, who has deposed that he is an investigator with EACC. He has deposed that EACC received information that the land parcel Kisii Municipality/Block II/127 (the suit property) was exchanged with government property Kisii Municipality/Block II/140 by its initial owner Dr. Charles Gekonde Otara. It is averred that the suit



property was irregularly, illegally and fraudulently transferred to the 1st respondent, who charged it to the 2nd respondent, and the 2nd respondent has advertised it for sale by public auction. He has deposed that EACC has commenced investigations into the circumstances upon which the suit property was transferred to the 1st respondent despite having been exchanged with the Plot No. 140 belonging to the Government of Kenya. He states that subject to the outcome of the investigations, EACC intends to recover the suit property, and/or the Plot No. 140, and revert it to the public. The applicant is apprehensive that unless restrained the respondents may deal with the suit property in a manner that is prejudicial to the investigations and the intended recovery proceedings. He has annexed various documents in support of the application.

3. The 1st respondent filed a preliminary objection that the application is supported by an ‘amended affidavit’ which is irregular in law and should be expunged, in which event the application will stand bare and should be dismissed.
4. The 2nd respondent has opposed the application through the replying affidavit of Faith Ndonga, a Legal Officer with the 2nd respondent. It is averred that upon due diligence, including undertaking of official searches, the 2nd respondent established that the suit property is owned by the 1st respondent and on that information took the suit property as security for financial facilities offered to the 1st respondent. She avers that there was default and the 2nd respondent advertised the suit property for sale. She contends that the 2nd respondent is an innocent chargee.
5. I have taken note of the foregoing together with the submissions filed.
6. There is of course contention that the whole application is defective for being supported by a defective affidavit in name of an “amended affidavit”. I agree that in law you cannot amend an affidavit, for reason that an affidavit comprises of evidence. To amend an affidavit would mean that one swore a false affidavit in the first place. What one needs to do is only file a supplementary affidavit or an additional affidavit for purposes of clarification or elaboration of the first affidavit.
7. I was also referred to the decision in the case of Jaribu Credit Traders vs Fidelity Bank Limited & Another (Commercial Case No. 647/2015 (2024) KEHC 3412, where Sifuna J was of the view that even an application cannot be amended. That decision does not bind me. On my part I think an application may be amended if the amendment is to correct errors that do not change the character of the application, say, to correct a clerical mistake. But where the whole body and prayers are being amended, then it is preferable that the application be withdrawn and a fresh application be made, because now we are no longer dealing with the same application but a completely different one. Where there is minor correction, an affidavit to support the amended motion may be filed. This cannot be an ‘amended affidavit’, as I have already demonstrated that you cannot amend an affidavit, but is simply an affidavit to verify the correction in the body of the application, and probably affirm that the previous affidavit stands in support of the amended application, since the amendment would be expected to be minor so that there is no need of deposing to the same facts afresh.
8. In our case, there was amendment to the title number from Kisii Municipality/Block I/127 to Kisii Municipality/Block II/127 in the application and which led to the filing of an amended motion. I think this amendment is merely to correct a typing error. All parties indeed are aware that the correct parcel is Kisii Municipality/Block II/127 and not Kisii Municipality/Block I/127. I am at a loss as to why the applicant thought of filing an “amended supporting affidavit” which in fact has no new deposition at all in the body thereof. That title i.e “amended supporting affidavit” is a misnomer. It ought merely to have been titled “supporting affidavit” for it is a replica of the initial affidavit. As I have said even a short affidavit to merely depose of the correction and affirm the first affidavit would have sufficed.



9. But given that there is no “amendment” (I say this carefully as you cannot amend the affidavit) in the body of the affidavit, I will treat the title “amended supporting affidavit” as a mere technicality and will not read too much into it despite it clearly being an offending title. I will let it stand as it is save that it should be considered to be “supporting affidavit to amended motion” and not “amended supporting affidavit” and will move to the substance of the application.
10. As I stated the application is brought pursuant to Section 56 (3) of the [Anti-Corruption and Economic Crimes Act](#). The whole of Section 56 provides as follows :
56. Order preserving suspect property, etc.
- (1) 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 if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.
 - (2) 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.
 - (3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission.
 - (4) A person served with an order under this section may, within fifteen days after being served, apply to the court to discharge or vary the order and the court may, after hearing the parties, discharge or vary the order or dismiss the application.
 - (5) The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.
 - (6) A person who is served with an order under this section and who contravenes it is guilty of an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.
11. It will be seen from the above, that the EACC may make an ex parte application to court to prohibit the transfer or dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct. The court may hear the application ex parte, but that does not mean that in appropriate circumstances, the court cannot direct that the application be served for hearing inter partes which is the direction that I gave in this instance. I have taken note of the replies made. I have to exercise caution here so as not to delve into the question of title of the 1st and/or 2nd respondents which can only be determined after a full hearing. What I need to be satisfied is that the applicant has presented some material that supports its contention that the suit property may have been corruptly acquired and that there is reason to preserve the property as the Commission investigates the matter.
12. On this issue I am persuaded that there is some prima facie material to warrant an order of prohibition and to allow the Commission time to investigate. There is material presented which appears to demonstrate that the suit land may have been intended to be surrendered to the Government in exchange for the Plot Kisii Municipality/Block II/140. That alone is sufficient to warrant this court issue an order of prohibition to allow for investigations. I will say no more since this is not the proper forum to fully interrogate the title of the 1st respondent nor the subsequent charge to the 2nd respondent.



13. I am therefore moved to allow this application. I will issue an order of prohibition prohibiting the respondents from advertising for sale, selling, or in any other way dealing with the title to the Plot Kisii Municipality/Block II/127 for the next six (6) months.

14. There will be no orders as to costs.

15. Orders accordingly.

DATED AND DELIVERED THIS 6 DAY OF FEBRUARY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in presence of :

Ms. Yator h/b for Mr. Kyeli for the applicant

Mr. Soire for the 1st respondent

Ms. Nimo Aden for the 2nd respondent

Court Assistant : Michael Oyuko

