



REPUBLIC OF KENYA



**Ethics & Anti-Corruption Commission v Maitai & 13 others (Anti-Corruption and Economic Crimes Civil Suit 8 of 2020) [2024] KEHC 2700 (KLR)  
(Anti-Corruption and Economic Crimes) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2700 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 8 OF 2020**

**EN MAINA, J**

**MARCH 14, 2024**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**CHARLES NDERITU MAITAI ..... 1<sup>ST</sup> DEFENDANT**  
**CHARLES TANUI ..... 2<sup>ND</sup> DEFENDANT**  
**CHARLES OUKO ..... 3<sup>RD</sup> DEFENDANT**  
**FREDRICK OGENGA ..... 4<sup>TH</sup> DEFENDANT**  
**EMILIO MWAI NDERITU ..... 5<sup>TH</sup> DEFENDANT**  
**SAMSON ODOYO MIKWA ..... 6<sup>TH</sup> DEFENDANT**  
**NICHOLAS GITOBU ..... 7<sup>TH</sup> DEFENDANT**  
**PHILIP KIMELU ..... 8<sup>TH</sup> DEFENDANT**  
**BRAMWEL WANYALIKA ..... 9<sup>TH</sup> DEFENDANT**  
**FRANCIS MUTHAIGA MURAYA ..... 10<sup>TH</sup> DEFENDANT**  
**PETER MACHUA ..... 11<sup>TH</sup> DEFENDANT**  
**JANE NAKODONY ..... 12<sup>TH</sup> DEFENDANT**  
**ALLIED INSPECTION & TESTING ..... 13<sup>TH</sup> DEFENDANT**  
**AERO DISPENSER VALVES LIMITED ..... 14<sup>TH</sup> DEFENDANT**



## RULING

1. This is a ruling on the 12<sup>th</sup> Defendant's application to be struck out as a defendant in this case. The application was filed *vide* a Notice of Motion dated 8<sup>th</sup> January 2024 and is expressed to be brought under Sections 1A, 1B, 3A, 59 (1C and e) of the *Civil Procedure Act*, Order 1 Rule 9 and 10 of the *Civil Procedure Rules* Article 10(1)(2), Article 27(1), Article 159(2)(c), (e) of *the Constitution*, International Good Practices and all other enabling provisions.
2. The gravamen of the application is that as this case has continued to progress it has become apparent that there is no cause of action against the 12<sup>th</sup> Defendant; that she was wrongly and/or improperly enjoined to the case; that she and the Plaintiff have been negotiating a settlement under Article 159 of *the Constitution*; that this case arose from Anti-Corruption Criminal Case No. 50 of 2018 but the charges against her have since been dropped and hence the substratum upon which this suit was premised no longer exists; that the 12<sup>th</sup> Defendant has had her suspension lifted and she has since resumed her employment pursuant to Section 62 (3) of the *Anti-Corruption and Economic Crimes Act* and that having received an assurance from the director of Public Prosecutions and the Plaintiff Commission she has a legitimate expectation, within the meaning of Article 10 of *the Constitution*, which has been violated. It is also contended that this court has under Order 1 Rule 10 of the *Civil Procedure Rules* power to strike out a party at any stage of the proceedings; that this suit violates the principles and values of *the Constitution* and is hence an abuse of the court process and further that striking out the 12<sup>th</sup> Defendant shall not prejudice any of the stakeholders in the suit. It is also argued that it is in the interest of justice that the application is allowed.
3. The application was vehemently opposed by Learned Counsel for the 1<sup>st</sup>, the 6<sup>th</sup> and the 11<sup>th</sup> Defendants. It is their contention that firstly, the application is incompetent for being brought under the wrong provisions of the law; that whereas it is true that the criminal charges against the 12<sup>th</sup> Defendant were withdrawn she was only discharged but not acquitted; that she was never called as a witness in the criminal case although that had been advanced as the reason for dropping the charges; that whatever she did is what the other defendants did and striking her out of this case would be discriminatory of the other defendants and a violation of their right to equal protection and equal benefit of the law; that the 12<sup>th</sup> Defendant cannot isolate herself from the other members of the Tender Committee meeting (TCM24) unless she can demonstrate otherwise and that can only be demonstrated through evidence but not by affidavits; that the principle of legitimate expectation does not apply to this case and the 12<sup>th</sup> Defendant has not demonstrated any ground to that effect; that the 12<sup>th</sup> Defendant has not, other than citing the provisions of *the Constitution*, demonstrated how her rights have been violated.
4. The defendants also argue that an application under that Order 1 Rule 10 (1) of the *Civil Procedure Rules* can only apply in the case of the wrong plaintiff but there is no provision for an aggrieved defendant to move the court so as to be excused from the proceedings; that an application under Order 1 Rule 10(2) of the *Civil Procedure Rules* can only be filed by a plaintiff upon realizing they have sued the wrong defendant; and, that this application has not met the threshold and it should be dismissed.
5. On its part the Plaintiff consented to the 12<sup>th</sup> Defendant's application. The written consent though not dated was filed in this court on 9<sup>th</sup> February 2024. Although Counsel for the Plaintiff requested for time to file a response to the application she did not do so. In her oral submissions Counsel for the Plaintiff intimated that she was fully in support of the submissions of Counsel for the 12<sup>th</sup> Defendant



as there was nothing to stop the Plaintiff to withdraw its case, if the Plaintiff has resolved its dispute with the 12<sup>th</sup> Defendants.

6. I have considered the application, the rival submissions, the cases cited and the law.
7. It is indeed correct that Order 1 Rule 10(1) of the *Civil Procedure Rules* only applies to striking out of a Plaintiff by the court upon being satisfied that the suit was through a bona fide mistake, instituted in the name of the wrong party.
8. Order 1 Rule 10(2) however vests power in the court to strike out the name of a defendant. That power may be exercised at any stage of the proceedings either upon or without application of either party. My reading of the provision however, is that before exercising its discretion in that manner, the court must be satisfied that the Defendant was improperly joined to the proceedings. It is therefore clear in my mind that a Defendant can apply to have his/her name struck out the only condition being that he/she can demonstrate that they were improperly joined. For that reason, the argument that the 12<sup>th</sup> Defendant's application is not therefore properly before the court must fail.
9. The gravamen of the 12<sup>th</sup> Defendant's application is that the criminal charges preferred against her in the Anti-Corruption court were withdrawn. It is however instructive that this is not an ordinary suit but one for recovery of monies which it is alleged were corruptly acquired. The law in this area is that civil forfeiture proceedings are not dependent on the outcome of criminal proceedings. This position was explained in the case of *Biswanath Bhattacharya v Union of India & Others* AIR 2014 SC 1003 (cited with approval by our Court of Appeal in the case of *Pamela Aboo v Assets Recovery Agency & Ethics and Anti-Corruption Commission* Civil Appeal No. 452 of 2018 (unreported)) where the court cited an Article by Anthony Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds' (2004), *Journal of Financial Crime*, where he conceptualized the civil forfeiture regime in the following words:

“Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behaviour but at removing the 'trophy' of past criminal behaviour and the means to commit future criminal behaviour. While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that 'half a loaf is better than no bread'.”

10. It is also for that same reason that civil forfeiture proceedings can exist concurrently with a criminal prosecution. To that end in the case of *Anti-Corruption Commission v Herman Stevens Chavera and Boniface Okerosi Misera* HCACEC Suit No. 21 of 2016 (unreported) the court held: -

“44. Under section 53(3) of ACECA, the plaintiff is empowered to institute civil proceedings for recovery of any money lost by any public body through corrupt dealings. Further, under Section 193A of the criminal procedure, criminal and civil proceedings can be instituted concurrently in respect of the same. For avoidance of doubt, Section 193A provides as follows;

“Concurrent criminal and civil proceedings-

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not



be a ground for any stay, prohibition or delay of the criminal proceedings".

45. In view of the above provisions, I have no doubt that the plaintiff had the power to institute these proceedings the pendency of criminal proceedings over the same subject matter notwithstanding. See *Ethics and Anti-Corruption Commission v Stephen Sanga (supra)*.”

11. From the above cases it becomes evident that the 12<sup>th</sup> Defendant cannot state that she is entitled to be excused from these proceedings merely on the ground that the criminal charges against her were withdrawn. The submissions by Mr. Ondieki, Learned Counsel for the 12<sup>th</sup> Defendant, that the withdrawal of the charges affected the substratum of this case, is accordingly and with due respect, misconceived.
12. On the consent filed by the Plaintiff and the 12<sup>th</sup> Defendant my finding is that it is also misconceived given that it came only upon the application filed by the 12<sup>th</sup> Defendant. The procedure to be followed by a Plaintiff who wishes to withdraw and discontinue its case is provided for in Order 25 of the [Civil Procedure Rules](#). There is no such application before this court.
13. Moreover, the Plaintiff is in these proceedings, bound by Section 56B of the [Anti-Corruption and Economic Crimes Act](#) which gives it power to enter into an out of court settlement. Section 56B (4) of the Act requires the Commission to register in court a settlement reached in the negotiations. Again no such settlement has been registered in this case. In my view therefore, the consent signed by the Plaintiff is a short cut intended to circumvent the provisions of Order 25 of the [Civil Procedure Rules](#) and Section 56B (4) of the [Anti-Corruption and Economic Crimes Act](#) which Section in any event takes precedence in this case. I am not therefore persuaded that the application is merited.
14. The upshot is that the application is dismissed. Costs shall be in the cause.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 14<sup>TH</sup> DAY OF MARCH 2024.**

**E N MAINA**

**JUDGE**

