



**Ethics & Anti-Corruption Commission v Buigut; Kewah Construction Ltd
 (Interested Party) (Anti-Corruption and Economic Crimes Civil Suit E040 of 2023)
 [2024] KEHC 2774 (KLR) (Anti-Corruption and Economic Crimes) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2774 (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 E040 OF 2023**

**EN MAINA, J
 MARCH 14, 2024**

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

ALEX BUIGUT DEFENDANT

AND

KEWAH CONSTRUCTION LTD INTERESTED PARTY

RULING

1. Before me is the Defendant’s application dated 30th January 2024 in which he seeks orders for a stay of this case/proceedings pending the determination his Petition filed in the High Court at Eldoret, Constitutional and Human Rights Division, Petition No 5 of 2023; That this court be pleased to issue an order compelling the Respondent/Plaintiff to avail all the documents seized from his residence and office for cross-checking with the inventory; an order compelling the Plaintiff/Respondent to surrender to this court the money seized from him and to render accounts of the same and an order compelling the Plaintiff/Respondent to release to him all the documents and property seized and confiscated outside the period of interest in this case and further an order that the Plaintiff/Respondent remove any restrictions and caveats placed on his properties and those of his relatives. That costs be in the cause.
2. The application was filed upon the Plaintiff filing this Originating Summons for a determination of whether a sum of Kshs.67,633,804.65 transacted through the Defendant’s bank and Mpesa accounts constitute unexplained asset under Section 55 of the *Anti-Corruption and Economic Crimes Act* (ACECA); whether the said sum of money ought to be forfeited to the government; whether a



sum of Kshs.5,754,000 seized during a search of the Defendant's premises constitute unexplained assets under Section 55 of the ACECA and whether the same ought to be forfeited and whether the Defendant should pay to the Government of Kenya a sum of Kshs. 4,000,000/- being the value of landed properties he allegedly acquired in the period of interest and which are suspected to constitute unexplained assets within the meaning of Section 55 of the ACECA.

3. The gist of the application is that the Defendant has filed a Constitutional Petition in the High Court of Eldoret (Petition No.5 of 2023) on the question of whether the actions of the Plaintiff culminating in this Originating Motion, are a violation of his fundamental rights and freedom in the bill of rights.
4. The Defendant contends that on the 19th of May 2017 and the 11th June 2018, the Plaintiff invaded, raided, searched and seized documents and other valuable property including cash from the Defendants home and private office in Langas Estate in Eldoret; that no explanation was given by the Plaintiff for the search and seizure; that what the Plaintiff did was to grab whatever it felt was valuable enough to cause panic and instill fear to the Defendant; that despite that the search and seizure was conducted in 2017, the Applicant was never informed of the reasons until 6th September 2021 well over four years later when he received a Notice from the Plaintiff to explain the disproportion between the assets he owned and his known legitimate source of income; that no explanation was given for the delay in not notifying him the reasons yet the property was his source of livelihood; that despite having tendered a written explanation regarding his source of wealth, the Plaintiff refused to respond to the Defendant and chose to once again cause anxiety and panic to him as he did not understand what exactly the Plaintiff intended to do; that the Plaintiff callously continued holding his property and documents a clear manifestation not only of arrogance but an exemplification of impunity and heavy-handedness; that this suit is malicious and is filed with complete disregard to the administration of justice in our judicial system for having been filed almost 7 years since the raid of his property.
5. It is also the Defendant's contention that despite having a definite and clear period of interest for the conduct of its investigations and despite having received prompt response from the Applicant of how he had acquired his wealth over the years, the Plaintiff has continued to act with procedural impropriety by holding onto property that was acquired long before he started working for the County Government of Nandi; that the Respondent has been unlawfully handling the property including changing the "old" confiscated money to the current currency without obtaining a court order or informing him; that whereas *the Constitution* and relevant statutes mandate the Respondent to carry out investigations, the law does not afford it the carte blanche to carry out investigations as it pleases; that the Plaintiff has come to this court with dirty hands; that its actions are calculated to humiliate, harass and put him in fear and the prosecution of this suit is actuated by extreme malice and improper motive; that impunity should not allow an investigative agency such as the Respondent to carry out a raid or swoop on a person's or entity's premises to close and cart away the person's property or documents and continue to hold the property for years on claims that they are still investigating; that the Applicant has the right to presumption of innocence but the Plaintiff has already declared him guilty.
6. As for the inventory, the Defendant states that it is in the interest of justice that the Respondent be ordered to do an accurate inventory of all the items, property and documents it seized from him to ensure none was lost in the seven years it has had them.
7. The Defendant/Applicant further states as between two equities, the first in order of time should prevail and hence it is in the interest of justice that the Petition in the High Court in Eldoret be determined first before this suit proceeds.



8. The Plaintiff opposed the application through a replying affidavit sworn by Justus Wagia on 9th February 2024. Thereafter the application was canvassed by way of written submissions.

Submissions

9. Learned Counsel for the Defendant/Applicant reiterated the factual background of the application and the reason for filing the Petition in Eldoret. Counsel then submitted that Section 3A of the Civil Procedure Act gives this court inherent power to stay this suit. Counsel also cited Sections 6 and 63(e) of the Civil Procedure Act which state:

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation. — The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

“63(e) Make such other interlocutory orders as may appear to the court to be just and convenient.”

10. Counsel argued that the order of stay of proceedings sought shall avoid parallel proceedings touching on the same issues between the parties. Counsel pointed out that the Petition in Eldoret has been heard and is due for judgment on 12th April 2024; that the petition challenges the search and the seizure of the property outside the period of interest; the manner of the investigations; the time taken to bring this suit which are all issues that are substantive in this suit and hence the judgment in the petition will have a bearing in this case. Counsel argued therefore that this is a suitable case for stay, not only because of the aforesaid reason, but also because being the second in time justice demands that it awaits the determination of the Petition. Further, that this case should be stayed to avoid the absurd situation where the courts may grant contradictory orders arising from conflicting decisions. Counsel urged this court to exercise its wide and unfettered discretion and grant the order for stay of this suit.
11. On whether the Plaintiff/Respondent ought to render an account of the cash and properties seized from the Defendant’s house, Counsel submitted that it is only just that an order be made to that effect. Counsel pointed out that the seizure occurred in 2017/2018 when the old currency was in use and that the Plaintiff did not seek the leave of this court or notify the Defendant of its conversion to the new currency. Counsel also asserted that the Defendant requires documents held by the Plaintiff to prepare his defence and it is therefore prudent that they be surrendered.
12. Counsel also urged this court to remove the restrictions and caveats placed on the Defendant’s and his relatives’ properties as provided in Section 78 (2) of the Land Registration Act and pursuant to his right to property under Article 40 of the Constitution. Counsel argued that there is no evidence that due process was followed when the caveats were placed; that their continued existence is prejudicial as the Defendant and his relatives no longer have quiet enjoyment and that in any event that property has no connection to this case. Counsel asserted that it is illogical for the Plaintiff to continue holding on to the Defendant’s property that is outside the period of interest on grounds that it will be used to satisfy the decree should there be a judgment in the Plaintiff’s favour. Counsel contended that should this continue the Plaintiff will be investigator, prosecutor, judge and executioner of its own case. Counsel



also argued that the continued holding of the properties is akin to adjudging the Defendant guilty of all the allegations levelled against him before the trial is held. Counsel submitted that holding the Defendant's relatives' properties yet they have no connection to this case is an abuse of power. Counsel urged this court to allow the application and grant the orders sought. Counsel relied on the following cases:-

1. *Harnam singh and others vs Mistri* 1971 E.A 122
2. *BM Logistics Ltd v Kenya Bureau of Statistics & Another* [2013] eKLR.
3. *Kenya Wildlife Service v James Mutembei* [2019] eKLR.
4. *David Morton Silverstein v Atsango Chesoni* [2002] eKLR.
5. *Director of Public Prosecutions v Marias Pakine Tenkewa t/a Naresho Bar Restaurant* [2017] eKLR.

The Plaintiff/Respondent's submissions

13. On the issue of stay of proceedings, learned Counsel for the Plaintiff/Respondent submitted that the subject matter of this case and the reliefs sought are different and distinct from those in the constitutional Petition in Eldoret HCCC Petition No.5 of 2023 as such the doctrine of sub judice does not apply.
14. Counsel submitted that this suit is brought under Sections 26 and 55 of the ACECA as an action in rem against the properties of the Defendant/Applicant whereas the Eldoret Petition challenges the manner in which the Plaintiff obtained search warrants hence the two cases are different.
15. Counsel asserted that the warrants were obtained lawfully under Sections 118, 118A and 119 of the *Criminal Procedure Code* and as the right to property does not extend to property that is unlawfully acquired this court ought not to order the release of the property seized. Counsel stated that the Petition in Eldoret has been overtaken by events as there is, now in this case, a substantive suit for unexplained wealth; that the delay in bringing this suit is not inordinate as the documents seized from the County Government and the Defendant/Applicant were voluminous and required time to analyse before a decision on how to proceed was made; that the operations of the Plaintiff/Respondent were also slowed down by the Covid 19 – pandemic and further that the Defendant/Applicant has not demonstrated the substantial loss he is likely to suffer if the orders he seeks are not granted; that in any event the case is still in its initial stages and the Defendant/Applicant's rights are still guaranteed.
16. Counsel further submitted that the Defendant/Applicant has not demonstrated that this suit is sub judice and as such a stay of proceedings should not issue and also that the principles of public interest and good governance militate against the grant of the orders and hence the Defendant/Applicant's application dated 30th January 2024 should be dismissed with costs.
17. In support of her submissions Counsel for the Plaintiff relied on the following cases:
 1. *Ephraim Miano Thamaini V Nancy Wanjiru Wangai & 2 Others* [2022] eKLR.
 2. *Republic V Paul Kihara Kariuki, Attorney General & 2 Others Exparte Law Society of Kenya* [2020] eKLR.
 3. HCACEC/E046/2022, *EACC V David Kinyae Isika & 3 Others*.
 4. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR.



Issues for determination

18. Having considered the application, the grounds thereof, the affidavits in support and in reply, the rival submissions, the cases cited and the law, I am of the view that the issues for determination are:-
- a. Whether this case is sub judice and whether this court should grant stay of the same to await determination of the Eldoret High Court Constitutional Petition No. 5 of 2023.
 - b. Whether the caveats and prohibitions placed on the properties placed on the properties of the Defendant/Applicant and his relatives that are outside the period of interest ought to be lifted.
 - c. Whether the documents seized by the Plaintiff/Respondent ought to be returned to the Defendant/Applicant and also whether the Plaintiff/Respondent should be ordered to bring forth all the items seized for comparison with the inventory.
 - d. Who shall bear the costs of this application.

Analysis and determination

Issue (a):- Whether this case is sub judice and whether this court should grant stay of the same to await determination of the Eldoret High Court Constitutional Petition No. 5 of 2023.

The threshold for stay of proceedings is well set out in a passage in the *Halsbury's Law of England, 4th Edition* Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

19. Whereas the Defendant/Applicant did not annex the pleadings of the Eldoret Petition, it is clear from his supporting affidavit and submissions that the case in Eldoret is a constitutional petition respecting the violation of rights. At paragraph 8 of the submissions his Counsel contends that he filed the petition to seek redress following the continuous violation of his constitutional rights to property, privacy and dignity. On the other hand, what we have here are proceedings in respect to unexplained wealth brought under Section 55 of the *Anti-Corruption and Economic Crimes Act*. In my view the facts in issue in the two cases are totally different and so are the issues of law applicable in both cases. Indeed, the procedure governing the two cases are totally different as the constitutional petition is brought under *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) while the proceedings herein being civil in nature, are brought under the Civil Procedure Rules. In my view whereas the cases concern the same parties the issues both cannot



be said to be directly or substantially the same as to warrant a finding of sub judice. My so saying finds support in the decision of the Court of Appeal in the case of *Kidero v Ethics and Anti-Corruption Commission* *§ 13 Others* (Civil Application E003 of 2022) [2023] KECA 62 (KLR) (3 February 2023) where in determining a similar issue the Court stated:-

“23) We have read the Petition filed in ACEC No 30 of 2019. The prayers sought in the said Petition are all directed at the Chief Magistrates Criminal Case No ACEC 8 of 2019. There is no single averment in the Petition or a prayer relating to ACEC Civil Suit No E008 of 2021. The two suits are totally independent and distinct. The Petition challenges the warrants permitting investigations into the petitioner’s bank accounts, his arrest and prosecution in the criminal case. He seeks to halt the criminal proceeding citing constitutional invalidity of the warrants, arrest, prosecution and the charges. The civil suit seeks to recover the money claimed. The civil suit was instituted by the 1st respondent pursuant to section 11(1) (j) of the *Ethics and Anti-Corruption Commission Act* which permits the Commission to institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds "corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.

24) The boundary between the constitutional Petition and the civil suit is not blurred. The two suits stand on different legal thresholds. There is no danger or prejudice of conflicting decisions nor has it been demonstrated that the outcome of the civil suit will have a bearing on the petition. Civil proceedings, as distinguished from constitutional Petition, are adjudicated and concluded by adopting different yardsticks. In a constitutional petition, the onus is to cite the constitutional provisions alleged to have been violated and to prove the alleged infringement. (See *Anarita Karimi* Case). In the civil suit, the threshold is to prove the property sought to be recovered is public property and or proceeds of corruption. The two processes can exist concurrently and independent of each other. The outcome of one cannot injure the other. It has not been claimed that the applicant will not be afforded a fair trial in the petition. Based on the prayers sought in the application before us, and the submissions before us, we find and hold that the applicant has not established that he has an arguable appeal. On this ground alone, the application collapses.”

20. Issue (a) is therefore answered in the negative as in any event should the petition or this case be determined first and if there be conflicting decisions the purport and effect of one judgment over the other would have to be determined in light of the provisions of Part VIII of the *Evidence Act* because after all not all judgments of one court are binding on another.

Issue (b):- Whether the caveats and prohibitions placed on the properties of the Defendant/Applicant and his relatives that are outside the period of interest ought to be lifted.

21. Whether any of the properties seized by the Plaintiff/Respondent fall outside the period of interest in this case, is a matter of fact and evidence. In my view no evidence has been placed before me as would



enable me to determine which those properties are. Accordingly, I am of the view that this issue can only be determined upon hearing the case. I accordingly decline to grant this prayer at this stage.

Issue (c):- Whether the documents seized by the Plaintiff/Respondent ought to be returned to the Defendant/Applicant and also whether the Plaintiff/Respondent should be ordered to bring forth all the items seized for comparison with the inventory.

22. Similarly, there is no material placed before me as would enable me to determine this issue. Moreover, the inventory which the Defendant/Applicant himself deposes to in paragraph 7 of his affidavit in support of the application should tell him what was seized during the search. Further should he, during the hearing, require documents seized by the Plaintiff/Respondent he can always make an application for discovery as it is within his right under Section 22 of the Civil Procedure Act and at the pretrial case management conference under Order 11 of the Civil Procedure Rules. He shall not therefore be prejudiced by this court not granting him the order.
23. I am also not persuaded as is alleged, that by conducting a search, seizing documents and other properties and filing this suit the Plaintiff/Respondent is playing the role of a prosecutor, judge and executioner in its own case, as it is within its mandate under the Constitution and Section 11(1)(j) of the Ethics and Anti-Corruption Commission Act to do so in the public interest.
24. The upshot is that the Defendant's application is not merited and it is for dismissal.

Issue (d):- Who shall bear the costs of this application.

25. Costs follow the event and in this case the order that best commends itself to me is that costs shall be in the cause.
26. Accordingly, the Notice of Motion dated 30th January 2024 is dismissed but costs shall be in the cause.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF MARCH 2024.

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E N MAINA
JUDGE

