



**Ethics & Anti-Corruption Commission v Buigut; Kewah Construction Ltd
(Interested Party) (Anti-Corruption and Economic Crimes Civil Suit E040 of 2023)
[2024] KEHC 5513 (KLR) (Anti-Corruption and Economic Crimes) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5513 (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

MAY 9, 2024

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

ALEX BUIGUT DEFENDANT

AND

KEWAH CONSTRUCTION LTD INTERESTED PARTY

RULING

1. By the Notice of Motion dated 18th December 2023 the Plaintiff/Applicant seeks a temporary injunction to restrain the Defendant/Respondent and the Interested Party whether by themselves, their servants and/or agents from selling, transferring charging or further charging, leasing, developing, subdividing, disposing, wasting or in any other way (howsoever described) alienating the following properties: -
 - i. Uasin- Gishu/Kimumu Scheme/5244 (undeveloped) valued at approximately Kshs. 2 million
 - ii. Uasin-Gishu/Kimumu Scheme/5241 (undeveloped) valued at approximately Kshs. 2 million.
2. The Plaintiff/Applicant also seeks an injunction to restrain the Defendant/Respondent from demanding the sum of Kshs. 5, 754,000 seized a search conducted in his house pursuant to an order issued in Misc. Criminal application No. E072 of 2017.
3. The application is brought under Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 40(1), Order 51(1) of the *Civil Procedure Rules* and all other enabling provisions of the law.



4. The gravamen of the application as can be discerned from the grounds on the fact of the application as well as the affidavit in support are that:-

- “ 1) That the Commission received a report that the Defendant/Respondent who was the erstwhile, Chief Officer Roads & Transport, County Government of Nandi and had accumulated assets whose value was disproportionate to his known legitimate source of wealth.
- 2) That upon receipt of the complaint, the Commission commenced investigations to establish whether there were reasonable grounds to suspect that Defendant was engaged in corruption and economic crimes as alleged between April 2015 and April 2018 and further whether he had acquired and/or accumulated assets that were disproportionate to his known legitimate source(s) of income irrespective of whether the suspect assets were held by himself or other parties.
- 3) That the Commission completed investigations and established during the period between April 2015 and April 2018 (hereinafter period of interest') the Defendant/Respondent exploited his official position of trust in the public service during his employ at Nandi County Government for private gain by involving himself in transactions that were in conflict with public interest.
- 4) That the Commission's investigations established that during the period of interest; -
 - a. The Defendant/Respondent exploited his official position of trust during his employment for private gain;
 - b. In particular, he took advantage of his position to influence the Award of tender No. NDCG/TN/STM/02/20-2016 for the completion of Kipchoge Keino Stadium Kapsabet Phase 2 that was awarded to the Interested Party for Kshs.95,469,450/=.
 - c. He is reasonably suspected of corrupt conduct by using privileged official information at the Nandi County Government for financial gain through the interested Party thus compromising his official duties for personal gain.
- 5) That from the investigations the Commission established that, during the period of interest in which the Defendant was reasonably suspected and found to have been engaging in corrupt conduct, he had accumulated wealth disproportionate to his legitimate sources of income to the tune of Kshs 93,746,203.65.
- 6) That during execution of search at the Defendant/Respondent premises in Nandi, an amount of Kshs 5,754,000 in cash was seized from his home. The source of the said cash could not be reasonably ascertained.
- 7) That consequently, the Commission in exercise of its powers under Sections 26 and 55 of *ACECA* as read together with Section 12 (c) of the *EACC Act* of 2011 issued a notice dated 8th September 2021, to the Defendant/Respondent



to explain in writing the disproportion between the assets and his known legitimate sources of income.

- 8) That the Commission received response from the Defendant/Respondent vide a letter dated 3rd October 2021, which response was considered and after analysis a cumulative assets of value of Kshs. 21,661/079.75 was found to have been satisfactorily explained leaving out an unexplained disproportion of Kshs. 72,085,123.90.
 - 9) That the Commission on 15th November 2023 issued a Demand Notice to the Defendant/Respondent to remit the above unexplained wealth of Kshs. 72,085,123.90.
 - 10) That the Commission pursuant to Section 55(2) of *ACECA* has instituted a suit (accompanying this Certificate & Application) seeking forfeiture of the above stated assets of Kshs. 72,085,123.90 that were acquired at a time the 1st Defendant/Respondent was reasonably suspected of corruption or economic crimes.
 - 11) That the Commission is reasonably apprehensive that the Respondent and/or their agents will transfer the properties listed in this application in order to frustrate and defeat any decree that may be passed against them.
 - 12) That in the alternative the Commission is seeking through the suit that where the said assets have been wasted or are otherwise unavailable for forfeiture, an order for payment of the assets' equivalent value in monetary terms to the Government of Kenya.
 - 13) It is therefore just and in the public interest to prohibit the Respondents there agents, servants and/or any other persons from transferring, alienating, disposing of, dissipating or otherwise wasting the suit properties pending the hearing and determination of this application and further pending the hearing and determination of the accompanying suit (Originating Summons) for forfeiture.
 - 14) That the Commission is not satisfied that an adequate explanation of the disproportion has been given and the assets should be forfeited to the Government of Kenya as prayed in the Originating Summons herein.”
5. The Respondent vehemently opposed the application through a replying affidavit sworn by himself on 30th January 2024 where he has deposed that:-
- “(i) That the application is an abuse of the court process filed with baseless and unfounded allegations.
 - ii. That I am advised by my advocates on record which advice I verily believe to be correct that, Section 55 of the *Anti-Corruption Economic Crimes Act*, No. 3 of 2003 (*ACECA*) and Section 11 (i) – (j) of the *Ethics and Anti-Corruption Act* (*EACC Act*) mandate the Plaintiff/Applicant herein to investigate allegations of corruption or economic crimes against persons whose value of assets is disproportionate with their legitimate source(s) of income.



- iii. That upon commencing its investigations, the Applicant/ Plaintiff had a 'Period of interest' within which its investigations was to be focused being the period between April 2015 and April 2018 during which I was working for the Nandi County Government as a Chief Officer for Transport and Infrastructure.
- iv. That before working for the County Government of Nandi, I worked for the National Irrigation Board between 1984 and 1987 before resigning to engage in farming and business which have had tremendous success and acquired a lot of assets before joining the County Government of Nandi.
- v. That pursuant to its notice dated 6th September 2021 seeking an explanation of my source of wealth, I issued the Plaintiff/Applicant with a clear and detailed account on the 3rd of October 2021 on how I acquired all of my wealth both within and without the scope of the period of interest of the investigations that were being conducted.
- vi. That the allegation that my wealth is unexplained is false and baseless and is meant to mislead this honourable court.
- vii. That during my tenor as the Chief Officer for transport and infrastructure, I served the County Government of Nandi with integrity, dignity, accountability, and in a manner that avoided any conflict between my personal interests and the public or official duties.
- viii. That despite having a clear and definite period of interest for the investigations, the Plaintiff/Applicant raided my home in an oppressive, degrading and inhuman manner and confiscated all of my property which was outside the said scope, and it has continued to hold the property till date which is almost 7 years since my home was raided.
- ix. That I am advised by my advocate on record which advice I verily believe to be correct that, the Plaintiff/ Applicant is mandated under Article 47 and 232 of the Constitution to execute its duties in a responsive, prompt, effective, impartial, equitable, expeditious, efficient, lawful, reasonable, and fair manner and provide written reasons for administrative actions.
- x. That I aver that the Plaintiff/Applicant, in conducting its investigations, erroneously considered property that belongs to my brother Stephen Buigut which was developed way before I started working for the County Government of Nandi.
- xi. That I aver that I received money from my brother Stephen Buigut to meet his commitments through cash, bank transfers, Western Union and Express money which was counted as part of the unexplained wealth. It is noteworthy that the receipts of the money received via the said union and express money were confiscated and my brother was interviewed during the investigations by the Plaintiff/Applicant.”



Submissions

6. Learned Counsels canvassed the application through written submissions. The plaintiff/Applicant is represented by Olga Ochola, Legal Counsel and the Defendant/Respondent and Interested Party by the firm of Nechesa Maina & Associates Advocates.
7. Learned Counsel for the Plaintiff/Applicant reiterated the brief facts of the case and grounds for the application and then urged this court to find that the Plaintiff/Applicant had not only demonstrated that it has a *prima facie* case but that it stands to suffer irreparable loss if the orders are not granted and also that the balance of convenience tilts in its favour and as such the application should be allowed. Counsel submitted that the most important consideration in an application for injunction is that the suit property is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold or that the defendant threatens or intends to remove or dispose he property. Counsel stated that the Defendant/Respondent was suspected and found to have engaged in corrupt conduct and accumulated unexplained wealth to the tune of Kshs.93,746,203.65 which is disproportionate to his legitimate sources of income; that in the absence of the temporary injunction sought there is nothing to prevent the Defendant/Respondent from disposing the properties herein to the detriment of the public. Counsel contended that the Plaintiff/Applicant has a genuine and arguable case with a high chance of success and if the injunction is not granted it will suffer irreparable damage and therefore the application should be granted.
8. To support her submissions Counsel relied on the following cases:-[Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others](#) [2022] eKLR.[Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya](#) [2020] eKLR.HCACEC/046/2022, [EACC v David Kinyae Isika & 3 Others.Gatirau Peter Munya v Dickson Mwenda Kibinji & 2 Others](#) [2014] eKLR.
9. On his part, Learned Counsel for the Defendant/Respondent relied on the same precedents cited by Counsel for the Plaintiff/Applicant. Counsel however discounted that the Plaintiff/Applicant has established a *prima facie* case as would entitle it to the injunction sought, given that there is no evidence that the Defendant/Respondent has violated or threatened to violate the applicant's rights or that there is imminent risk of transferring and/or disposing the properties. Counsel pointed out that the Plaintiff/Applicant has for the last seven years placed restrictions on the properties and that the said restrictions are in place courtesy of a ruling delivered by this very court. Further that even the money is not in the Defendant/Respondent's account; that as such it is indeed it is the Plaintiff/Applicant that has infringed the Defendant/Respondent's rights and should this court grant the orders it shall be aiding the Plaintiff/Applicant's breach of those rights.
10. On the issue of irreparable loss, Counsel submitted that as the Plaintiff/Applicant is in absolute control of all the property and legal documents that it confiscated from the Defendant/Respondent seven years ago and has also placed restrictions on the property the Defendant/Respondent has no access to the same and hence there is no threat that the property will be disposed or the funds withdrawn hence dissipating the property.
11. On the balance of convenience Counsel urged this court to find that the same tilts in favour of the Defendant/Respondent whose constitutional rights and freedoms have been violated for years by the Plaintiff/applicant. Counsel urged this court not to grant the injunction.
12. In addition to the cases cited by Counsel for the Plaintiff/Applicant, learned Counsel for the Respondent also placed reliance on the following cases: -[Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) [2018] eKLR.[Paul Gitonga Wanjau v Garbuti Tea Factory Company Ltd & 2 others](#) [2016] eKLR.[Amir Suleiman v Amboseli Resort Limited](#) [2004] eKLR.



Issues for Determination

(i) Whether the Plaintiff/Applicant has Met the Threshold for Grant of a Temporary Injunction

Analysis and Determination.

13. I have carefully considered the Notice of Motion, the grounds thereof, the supporting and replying affidavits, the rival submissions and the law.
14. The conditions for grant of a temporary injunction have been correctly laid by learned Counsel for the parties. These are that the Applicant must: -
 - a. Establish a *prima facie* case.
 - b. Demonstrate irreparable damage which cannot be compensated by an award of damages if the injunction is not granted.
 - c. Balance of convenience tilts in its favour.
15. The above conditions were first elucidated in the case of *Giella v Cassman Brown & Co.* [1973] EA 358 and restated in various cases including the case of *Nguruman Limited v Jan Bonde Nielsen and Anor* [2012] eKLR where the Court of Appeal held that an applicant must satisfy all three conditions sequentially in order to qualify.
16. Applying the above conditions to the facts of this case it is my finding that the Applicant has established a *prima facie* case meaning that “there is a serious issue for trial between the parties” as held in the case of *American Cyanamid Co. v Ethicom Limited* (1975) ALLER 504 cited with approval in the case of *RJR - MacDonald Inc. v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994], SCR 311 also cited by Mativo J, as he then was, in the case of *Juja Coffee Exporters Limited & Others v Bank of Africa Limited & another; Adam & 2 others (Interested Party)* (Commercial Civil Suit 57 of 2016) [2022] KEHC 9 (KLR) (25 January 2022) (Ruling). However, there are already in place restrictions/caveats in regard to the two parcels of land and the money the subject of the application which this court has held, through its ruling delivered on 14th March 2024, shall persist until this case is heard and Determined. As such the Plaintiff/Applicant is not likely to suffer any irreparable damage, as there is no likelihood that the properties which it seeks to forfeit in execution of the decree should the court find that the Defendant/Respondent and Interested Party are culpable of corrupt conduct, are in danger or risk of being disposed. In the premises I need not consider whether the balance of convenience tilts in favour of the Plaintiff/Applicant. I find that it would be superfluous to grant an injunction when there are already orders preserving the property.
17. Accordingly, I dismiss the application with an order that costs shall be in the cause.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF MAY, 2024.

.....

E. N. MAINA

JUDGE

