



Ethics & Anti-Corruption Commission v Otieno & 5 others (Anti-Corruption and Economic Crimes Civil Suit 24 of 2018) [2023] KEHC 783 (KLR) (Anti-Corruption and Economic Crimes) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 783 (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 24 OF 2018
EN MAINA, J
FEBRUARY 9, 2023

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

BOB KEPHAS OTIENO 1ST DEFENDANT
CAROLYNE CHEPKEMOI SANG 2ND DEFENDANT
MAURICE ODIWUOR AMEK 3RD DEFENDANT
MICHAEL OWINO OORO 4TH DEFENDANT
JUDITH AKINYI OMOGI 5TH DEFENDANT
ISAAC OUSO NYANDEGE 6TH DEFENDANT

RULING

1. By the Notice of Motion dated August 16, 2022 the 6th Defendant/Applicant seeks orders for striking out of the suit against her. The application is expressed to be made under Article 159 (2) (d) of the [Constitution 2010](#), Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 2 Rule 15 of the [Civil Procedure Rules](#).
2. The gist of the application, as can be discerned from the grounds thereof and in the supporting affidavit, is that the 6th Defendant/Applicant was acquitted in a case (Homa Bay CMs CR Case No 1 of 2018) where she had been charged with corruption related offences involving the same funds which by this suit the plaintiff is seeking to recover from her. It is her contention that so far no appeal has been filed against her acquittal and as such this suit is without basis, frame or legs to stand on, that



the continuance of the suit against her is scandalous, vexatious, prejudicial and embarrassing and is otherwise an abuse of court and a waste of judicial time and resources.

3. The Plaintiff/Respondent vehemently opposed the application through the replying affidavit of Jarso Dida sworn on September 19, 2022. The said Jarso Dida deposes that he is an investigator with the Plaintiff/Respondent Commission; that he was in the team that investigated the allegations giving rise to this suit and hence conversant with the matters of fact therein; that the investigations revealed that the 6th Defendant/Applicant dishonestly received funds from the Homa Bay County Assembly with knowledge that she was not legally entitled to the same and is therefore liable for the loss of Homa Bay County Assembly funds in the sum of Kshs 1,300,000 attributable to fraudulent, corrupt conduct and/or negligence and further that the 6th Defendant/Applicant has not demonstrated that this suit is brought to perpetuate ulterior motives or is otherwise an abuse of the court process. He deposes that the application lacks merit and it should be dismissed.
4. On December 13, 2022 this court directed that the application would be canvassed by way of written submissions. However only the submissions of the 6th Defendant/Applicant were received. In the submissions Learned Counsel for the 6th Defendant/Applicant reiterated that the 6th defendant/Applicant having been acquitted of the charges the suit herein should be struck out for not disclosing a reasonable cause of action and has cited several decisions to his aid.

Analysis And Determination

5. The issues for determination are:-
 1. Whether the acquittal of the 6th Defendant/applicant in Homa Bay CMs Court Criminal Case No 1 of 2018 a bar to these recovery proceedings?
 2. Whether the acquittal renders this suit scandalous, frivolous, vexatious, embarrassing, an abuse of the court process or one that does not disclose a reasonable cause of action.
6. I have carefully considered the application, the affidavits, the submissions of the 6th Defendant/applicant, the cases cited therein and the law.
7. A reading of the Plaint brings to the fore that these are proceedings instituted by the Plaintiff pursuant to its mandate under Section 11(1)(j) of the *Ethics and Anti-Corruption Commission Act*. The said section mandates the Plaintiff to institute and conduct proceedings in court for purposes of the recovery or protection of public property. The cause of action against the 6th Defendant/Applicant as stated in paragraph 14 of the Plaint is that she received monies with knowledge that she was not entitled to the same; that she therefore committed a breach of trust or fiduciary duty to the County Government of Homa Bay and is therefore liable, individually, in the sum of Kshs 1,300,000 which the Plaintiff now seeks to recover from her. Her contention is that, that by dint of her acquittal she is not liable. It is however instructive that she has not annexed a copy of that judgment either to her supporting affidavit or to the submissions. This court is therefore not in a position to discern the reasons for the acquittal.
8. Be that as it may, it is my finding that even where a prosecution results in an acquittal a judgment of that trial does not absolve the person acquitted of civil liability. Indeed, the *Anti-Corruption and Economic Crimes Act* (ACECA) recognizes both criminal and civil compensation. (See Sections 50, 51 and 54 of the *Anti-corruption and Economic Crimes Act*) and Section 53(2) expressly states that nothing in Sections 51 and 52 of the ACECA affects any other liability a person may have meaning that the Plaintiff is not confined in its mandate to Sections 50 and 51. It is also evident from Section 45 of the *Evidence Act* that the judgment of acquittal while it would be relevant to this suit is not conclusive proof



of that which it states. As I have stated elsewhere the reasons for the acquittal have not been placed before this court and it might as well be that the same would not absolve the 6th Defendant/Applicant from civil liability. This is given that the burden of proof is different in both instances, that in criminal cases being beyond reasonable doubt and that in civil cases being on a balance of probabilities. I further find that while the law prohibits the trial of an acquitted person for the same offence that does not apply to proceedings for compensation (See Article 50(2) (o) of the Constitution.)

9. For the foregoing reasons it is my finding that the mere fact that the 6th Defendant/Applicant was acquitted of the charges facing her does not of itself render this suit one that does not disclose a reasonable trial. Indeed, in my view the suit raises triable issues and it would be unjust to strike it out. I must, however add the rider that a triable issue is not always one that must succeed. It is an arguable case which raises issues that must be allowed to be ventilated by the party bringing it.
10. The upshot is that the application by the 6th defendant/Applicant has no merit and it is dismissed but with an order that costs shall be in the cause.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY 2023

E N MAINA

JUDGE

