



**Ethics & Anti-Corruption Commission v Murage (Anti-Corruption and Economic Crimes Civil Suit E001 of 2023) [2023] KEHC 2261 (KLR) (Anti-Corruption and Economic Crimes) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2261 (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 E001 OF 2023  
EN MAINA, J  
MARCH 23, 2023**

**BETWEEN**

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

**AND**

**ROBERT THEURI MURAGE ..... DEFENDANT**

**RULING**

1. By the Notice of Motion dated 18<sup>th</sup> January 2023 the Plaintiff/Applicant seeks a temporary injunction under Order 40(1) of the *Civil Procedure Rules* to preserve funds in the Defendant/Respondent's account No. [Particulars Withheld] at Equity Bank Limited pending hearing and determination of this suit.
2. The application is premised on grounds that: -

“9. The Applicant is mandated under the *Anti-Corruption and Economic Crimes Act*, 2003 and section 11(l)(d) and (j) *Ethics and Anti-Corruption Commission Act*, 2011 to investigate any matter on suspicion of corruption or where facts disclose corrupt conduct any matter on suspicion of corruption or where facts disclose corrupt conduct in the management or execution of public or private affairs and make recommendations to the Director of Public Prosecution for the prosecution of culprits or take any other remedial measures as provided in the statute or any other law and institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption.



10. The Applicant received a credible report regarding allegations of embezzlement of public funds and abuse of office against the Respondent herein being Accountant I, Job group K at the National Treasury.
11. The Applicant undertook investigations establishing that the period between January 2020 and 30<sup>th</sup> June 2022 established that the Defendant irregularly and fraudulently received allowances amounting to Kshs. 20,318,000.00 disguised as taskforce/committee, extraneous, entertainment and other undefined allowances as tabulated below:

S/NO.	TYPE OF ALLOWANCE	TOTAL AMOUNT (Kshs)
1)	Taskforce/committee allowances	1,820,000.00
2)	Extraneous allowance	14,763,000.00
3)	Entertainment allowance	785,000.00
4)	Unspecified allowances	2,330,000.00
5)	Meal Allowances	620,000.00
Grand Total	20,318,000.00	

12. To preserve some of the funds deposited in the Respondent's Bank Account, the Applicant, on 19<sup>th</sup> July, 2022, successfully obtained preservation orders vide ACEC Misc. No, E036 of 2022 preserving Kshs.11,078,601.83 in the Respondent's Equity Bank account number 0120100294747 for a period of six months.
13. The Applicant has since concluded investigations and through a Plaint filed contemporaneously with this Application, instituted recovery proceedings for the total sum of Kshs. 20,318,000.00 irregularly paid to the Respondent.
14. The above stated orders issued on 19<sup>th</sup> July, 2022 shall lapse on 19<sup>th</sup> January, 2023 after which there shall be no orders preserving the money, being Kshs.11,078,601.83 in the Respondent's Equity Bank account number 0120100294747.
15. In the absence of orders barring the Respondent from withdrawing or transferring the said Kshs. 11,078,601.83 in the Respondent's Equity Bank account number 0120100294747, there is nothing to prevent the Respondent



from withdrawing or transferring the said funds in the intervening period to the detriment of the public.

16. The Applicant is reasonably apprehensive that the hitherto preserved assets may be disposed of or transferred to third parties before the present suit is heard and determined thereby rendering the pursuit of the recovery of the illegally acquired assets otiose and/or to defeat the execution of the decree that may be passed.
  17. The balance of convenience tilts in favour of the Applicant since the matter is one of great public interest as it involves public funds; it is, therefore, only fair and in the interest of justice that this Honourable Court grants the orders sought in the application,
  18. It is, therefore, just and fit to restrain/prohibit the Respondent, his agents, servants or any other persons from withdrawing, transferring, disposing or in any Other way dealing with the funds in the Respondent's Equity Bank account number [Particulars withheld] pending the hearing and determination of this Application and the suit filed for recovery of the sum afore-stated.”
3. The grounds for the application are reiterated in the Supporting Affidavit sworn on 18<sup>th</sup> January, 2023 by Paul Macharia, an Investigator with the Plaintiff/Commission.
  4. In opposition to the application the Defendant/Respondent filed a Replying Affidavit sworn on 27<sup>th</sup> January, 2023 in which he deposes that the applicant has not met the threshold for grant of the order sought; that the suit herein and this application is laden with discrimination, malice, ill will and utmost bad faith for reasons that:-
    - a) There is nowhere in the pleadings or indeed in the Application and Supporting Affidavit where the deponent has shown that he interviewed me to explain to him the source of the funds in my Account during the investigation before the 5<sup>th</sup> July 2022 when the Chief Magistrate granted Orders in Misc. Criminal Application No. E2299 of 2022 freezing my account.
    - b. After the Applicant was granted Orders for the preservation of my Account and its contents on the 19<sup>th</sup> July, 2022, the Commission woke up 6 months later demanding that I refund them money amounting to Kshs. 22,000,000.00 and directing me to attend an interview. These letters are dated 11<sup>th</sup> and 12<sup>th</sup> January, 2023. (Appended hereto and marked RM 1 and RM 2 respectively)
    - c. The Applicant does not deign to explain why they took 6 months to decide to invite me for an interview/ interrogation about the source of the funds in my account or whether the same was there legally or otherwise.
    - d. Upon receipt of their letters, I attended the Commission on the 16<sup>th</sup> January, 2022 when I met the deponent of the Supporting Affidavit and recorded a statement. The following day I delivered my response to the letter dated 11<sup>th</sup> January, 2022 (exhibit RM2). In my response I informed the Applicant that I did not understand their claim. (Appended hereto and marked RM 3 is a copy of my letter dated 17<sup>th</sup> January, 2022)



- e. Sadly, neither the Affidavit sworn on the 18<sup>th</sup> January, 2022 nor the pleadings in the main suit have clearly demonstrated what the claim is and/ or how they arrive at the claim.
- f. In the suit herein dated the 18<sup>th</sup> January, 2023 the Applicant claims Kshs. 20,318,000.00. In the Application dated 5<sup>th</sup> July, 2022 the Applicant claims Kshs. 24,000,000.00. In the Application dated 15<sup>th</sup> July, 2022 the Applicant claims 26,578, 352.00. Whereas, in the Applicant's letter dated 11<sup>th</sup> January, 2023 they claim Kshs.22,000,000.00
- There is absolutely no indication as to how and why there are disparities in the claim(s) nor is there any indication how the Applicant was able to distinguish the legal, or illegal or fraudulent receipt of payment.
- g. In the paragraph numbered as 18 of the Affidavit sworn on 18<sup>th</sup> January, 2022, the deponent alleges that he established that the sums in the table were irregularly and fraudulently received by myself; he then proceeds to append what he calls an "analysis of the payment vouchers" and the payment vouchers.
- h. The deponent deliberately fails to explain to the court how he came to the conclusion that: -
- i. the payments into my account were "irregular and fraudulent";
  - ii. of all the payments made of allowances to numerous officers as is evident in the payment vouchers only the payments made to me were "irregular and fraudulent".
  - iii. the payments were made for no work done by me or the other persons named in the schedules attached to the payment vouchers or that among all the persons named in the payment vouchers, I was not properly appointed to the various committees or task forces and/or was not assigned any of the duties for which I was paid.
- i. The deponent also fails to disclose that I was not the person who drew up the Payment Vouchers or approved the payment of the allowances or that the said allowances were paid by the Accounting Officer who was satisfied that I, as a member of the different teams, performed the duties assigned.
- j. The deponent also fails to disclose that during the investigation, the Applicant became seized of information and documents that conclusively prove that I legally earned the allowances I received. Sadly, the bulk of this information is deliberately concealed and not disclosed.
- k. The Deponent deliberately fails to inform the Court why they abandoned ACEC Misc. Application No. E036 of 2022 in favour of this suit and application. I have been informed by my Counsel on record, which information I verily believe to be true, that Section 56 (1) of the *Anti-Corruption and Economic Crimes Act* effectively gives the Court unfettered power to grant the Applicant an Injunction for the preservation of property suspected to have been acquired in a corrupt manner.



- l. I am further informed by my Counsel on record, which information I verily believe to be true, that Section 56 (3) allows the Applicant to file an Application seeking the Extension of the earlier order for a period to be determined by the court.
  - m. It is manifest and apparent that this present suit is an absolute abuse of the Court Process given the fact that on 19<sup>th</sup> July, 2022 this Court Ordered that ACEC Misc. Application No. E036 of 2022 be Mentioned on the 6<sup>th</sup> February, 2023. This therefore means that there are 2 parallel proceedings involving the same parties over the same property brought on the same grounds pending simultaneously before the same court.”
5. The Defendant/Respondent accordingly urges this court not only to dismiss the application but to vacate the orders granted by this court on 5<sup>th</sup> July, 2022 in Misc. Cr. Application NO. E2299 of 2022; orders issued on 19<sup>th</sup> July 2022 in ACEC Misc. Application No. E036 of 2022 and the order granted by this court on 19<sup>th</sup> January 2023.
  6. Learned Counsel for the parties canvassed the application by way of written submissions.

### **Analysis and Determination**

7. I have considered the pleadings, the rival submissions, the cases cited thereat and the law.
8. At this stage this court must be careful to stay clear of the merits of the main suit and only set out to determine whether the Plaintiff/Applicant has met the three conditions for grant of a temporary injunction as laid in the celebrated case of *Giella v Cassman Brown & Company Limited* [1973] EA and which were restated as follows in the case of *RJR Macdonald v Canada (Attorney General)* cited with approval in the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR:-
  - i. Is there a serious issue (*prima facie* case) to be tried?
  - ii. Will the applicant suffer irreparable harm if the injunction is not granted?
  - iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called “balance of convenience.”)
9. In its submissions the Plaintiff/Applicant enumerated how it came to the conclusion that the payments of allowances which comprise the sum of Kshs.20,318,000 which it is claiming from the Defendant/Respondent was irregular and also stated that the allowances were paid in contravention of the Public Service Human Resource Policies and Procedures Manual and the Salaries and Remuneration Commission circulars/guidelines and that it therefore has a *prima facie* case against him. The Plaintiff/Applicant also argues that since this case concerns alleged suspected corruption and embezzlement of public funds through illegal and irregular payment of allowances the nature of the injury which is, *inter alia*, loss of public trust in government systems, impunity and increased corruption, the loss is so grave that it cannot be quantified by payment of damages and is hence irreparable. Learned Counsel urged this court to take judicial notice of the sustained fight against graft in Kenya and find that damages would not be an adequate remedy.
10. Counsel also argued that the balance of convenience tilts in favour of the Plaintiff/Applicant in that should the application be refused the funds would most likely dissipate and the Plaintiff/Applicant if successful would not have anything to recover. Counsel submitted that on the other hand even were the



Plaintiff/Applicant to be unsuccessful the money would be available to the Defendant/Respondent and hence no prejudice would be occasioned to him. Counsel also urged this court to consider the public interest as the funds in issue are public funds.

11. Learned Counsel for the Defendant/Respondent however negated that the Plaintiff/Applicant has met the conditions for a temporary injunction and urged this court to dismiss the application with costs to the Defendant/Respondent.
12. Having considered the pleadings, submissions and the law, I am however persuaded that the Plaintiff/Applicant has demonstrated that it has a prima facie case with a likelihood of success as would warrant this court to grant it the temporary injunction sought. It is trite that a *prima facie* case is never one that must necessarily succeed. As was stated in the case of *RJR Macdonald v Canada Attorney General* cited with approval in the case of *Paul Gitonga Wanjau v Gatbuti Tea Factory Company Ltd & 2 others* (Supra) it is merely one that discloses that there is a serious issue to be tried. In the case of *Nguruman Ltd v Jan Bonde Nielsen and 2 others* [2014] eKLR the Court of Appeal defined a *prima facie* case as follows: -

“..... The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to rise as to the existence of the rights which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.....”
13. It is the Plaintiff/Applicant’s contention that the monies sought to be preserved are public funds which the Defendant/Respondent acquired unlawfully as they were not sanctioned by the Human Resource Manual and the Salaries and Remuneration Commission guidelines. It is my finding that that being a matter that can only be determined upon hearing evidence by both sides, the Plaintiff/Applicant has demonstrated, on a preponderance, that it has “a fair and bona fide question to raise” in regard to the funds and it ought to be allowed to do so. The issue whether the relevant notices were issued to the Defendant/Respondent during the investigations is one to be determined at the trial but not at this interlocutory stage.
14. I am further satisfied that the Plaintiff/Applicant also meets the test of irreparable damage. The Defendant/Respondent’s averment is that no such loss will accrue as the funds were lawfully acquired. As I have already stated that issue is what must go for trial: It is a *bona fide* triable issue which cannot be determined at this stage. As has been held in a long line of cases, irreparable loss is one which were the injunction to be refused and the suit succeeds, cannot be adequately compensated by an award for damages.
15. In the case of *Joseph Ntombura v Godfrey Simiyu & 4 others* [2018] eKLR the court stated:-

“The test should be whether the person applying for the injunctive relief will suffer irreparable harm. The test is not whether the person against whom the order is to be made will suffer irreparable harm.”
16. The submission by Learned Counsel for the Defendant/Respondent that it is the Defendant/Respondent but not the Plaintiff/Applicant that shall suffer irreparable loss if the injunction is granted, cannot hold.



17. In the case of *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 others* [2008] eKLR the court held that: -

“Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

The argument that the injunction should not issue because the money can always be paid is also not tenable.

18. Given that the funds the subject of this case are alleged to be public funds it is also my finding that it would be in the public interest to preserve the same so as not to waste more public funds in executing the decree should the Plaintiff/Applicant’s case be successful. My so saying finds support in the case of *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* [2011] eKLR where it was held that: -

“An order of forfeiture can only be made if the property was still available for such forfeiture and it follows therefore that if there was no conservatory order, the property may well have ceased to exist thus rendering the success of the appeal pyrrhic.”

19. It is my finding therefore that based on all the foregoing the Plaintiff/Applicant has, on a balance of probabilities, demonstrated that its application for a temporary injunction is merited. The application is therefore allowed and it is hereby ordered that: -

“3. Pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the Defendant/Respondent by herself, her servants, agents, or any other person from transferring and/or disposing of, howsoever described, the following assets:-

Monies In Bank Accounts

i. Funds in bank Account held at Equity Bank Kenya Limited, account number [Particulars Withheld].”

20. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**

**E N MAINA**

**JUDGE**

