



Ethics and Anti-Corruption Commission v Otieno & another (Anti-Corruption and Economic Crimes Civil Suit 4 of 2018) [2023] KEHC 1459 (KLR) (Anti-Corruption and Economic Crimes) (2 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1459 (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 4 OF 2018**

EN MAINA, J

MARCH 2, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

BOB KEPHAS OTIENO 1ST DEFENDANT

EVELINE AWINO OGUTU T/A NYANGUME ENTERPRISE . 2ND DEFENDANT

JUDGMENT

1. The Plaintiff is a body corporate established under Section 3 of the *Ethics and Anti-Corruption Commission Act* and mandated under Section 11(1)(j) to institute and conduct recovery proceedings for the protection of public property. The Plaintiff has instituted these proceedings on behalf of the County Assembly of Homa Bay, a public body created under Part III of the County Government Act, to recover Kshs.26,272,460 alleged to have been fraudulently and illegally acquired by the Defendants between the period August 2016 to February 2017.
2. The 1st Defendant was at all material times the Clerk of the County Assembly of Homa Bay while the 2nd Defendant is or was alleged to be the wife of the 1st Defendant and the sole proprietor of a business known as Nyangume Enterprise situated in Kisumu.
3. The Plaintiff prays for Judgment against the Defendants for:
 - a. Kshs. 26,272,460.00/- (Kenya Shillings Twenty-Six Million Two Hundred and Seventy-Two Thousand Four Hundred and Sixty).
 - b. Costs incidental to this suit.



- c. Interest on (a) and (b) at court rates.
 - d. Any other or further relief that the court may deem fit to grant.
4. The 1st Defendant filed a Statement of Amended Defence dated 18th March 2012 and the 2nd Defendant a Statement of Defence dated 17th April 2018 through which they both vehemently resisted the claim against them by the Plaintiff. They also filed witness statements and documents.

The Plaintiff's case

5. The Plaintiff called four witnesses whose testimonies are summarized hereunder: - PW1 Tobias Oomo Manyala testified that at the material time he worked at Homa Bay County Assembly as a procurement clerk. That the Homa Bay County Assembly had advertised for bidders for the tender for supply of goods and services for the years 2015 to 2017; that the 2nd defendant did not apply and neither was she prequalified for any tender with the Homa Bay County Assembly in her name or that of Nyangume Enterprises during that period.
6. PW2: Titus Okore testified that he was the Principal Procurement officer for the County Assembly of Homa Bay at the material time; that he was involved in developing the tender notice for the period and its subsequent advertisement in the newspapers. He confirmed that Evelyne Awino Ogutu T/ A Nyangume Enterprises (the 2nd Defendant) was not prequalified for any tender in the County Assembly and was not awarded any tender at the County Assembly. He stated that from 2014 to 2018 he sat in the tender committees as secretary by virtue of his office.
7. PW3: Ishmael Nyamache, an investigator with the Ethics and Anti-Corruption Commission Forensics Department testified that the Commission received information/reports of corruption concerning the County Assembly of Homa Bay through its data center; that the reports indicated that the employees of the Executive and the County Assembly were trading with the County Government and the County Assembly respectively through their companies or companies owned by their proxies; that, in regard to this case it was alleged that the 1st Defendant, an employee of the County Assembly of Homa Bay was doing business with it through his wife the 2nd Defendant then a health Administrator in the County Government of Homa Bay; that investigations established that the 2nd Defendant, the proprietor of Nyangume Enterprises, received Ksh. 35,132,592/= from the County Assembly in a span of six months from August 2016 to February 2017; that the funds were paid into a bank account No. 098026694429 held at Equity Bank Homa Bay branch, as evidenced by a copy of the account statements which was produced as (Exh P- 6). He testified that out of the Ksh.35,132,592/= deposited into this account 26,272,460/= was directly deposited from Homa Bay County Assembly on the authority and approval of Otieno Bob Kephias (the 1st Defendant) who by virtue of being the Clerk of the Assembly was its A.I.E (Authority to Incur Expenditure) Holder. PW3 testified that the said sum was traced to the bank account of Nyangume Enterprises and documents to that effect were exhibited in court. PW2 further testified that the 2nd Defendant confirmed, in her statement recorded with the EACC on 27th March 2017 (Exb.P 217), that she had never been awarded any tenders by the Assembly.
8. PW3 testified that investigations also established that in his capacity as Clerk of the Assembly and also the A.I.E holder the 1st Defendant authorized Equity Bank, through various Letters of Authority, to pay various companies among them Nyangume Enterprises (Exh. P-9). The payments made to the 2nd Defendant totaled to a sum of Ksh.26,277,460/=. PW3 further testified that Nyangume Enterprises received this money without supplying any goods or rendering any services to the Assembly; that her firm was not a prequalified supplier as evidenced by the register (Exh. P-1); that the Plaintiff obtained a search warrant to conduct a search in the offices of the County Assembly and home of the 1st defendant



whereupon an inventory was drawn up. That the 1st defendant is the husband of Eveline Awino Ogutu the 2nd defendant and she was the only signatory to the account to which these monies were paid and the conclusion from the investigations was that the 1st and 2nd defendants colluded to defraud the County Assembly of Homa Bay of the funds. That the 1st Defendant unlawfully authorized the payments and the 2nd defendant through her firm Nyangume Enterprises fraudulently acquired public funds amounting to Kshs.26,272,460/=.

The Defendants' case

9. DW1: Otieno Bob Kephias (1st Defendant) testified that as a Clerk of the County Assembly he was entitled to salaries, per diems, allowances and other benefits which included a mortgage and car loan. He stated that his local per diem was Ksh.16,500/= while the international per diem depended on country of travel as provided in the relevant Salaries and Remuneration Commission circular. He stated that his car loan entitlement was Ksh.4 million and the mortgage Ksh.20 Million, making a total of Ksh.24,000,000/=. He testified that he purchased a house costing Ksh.22 million inclusive of stamp duty; that the mortgage committee managed the mortgage and car loan; that both staff and elected Members of the County Assembly were entitled to the car loan and mortgage depending on their cadre. He testified that once an application was made the mortgage committee would determine if funds were available but that the government did not always allocate sufficient funds to the Assembly and so the mortgage would be paid in bits. He stated that the mortgage funds were deposited in his wife's account, in the name of Nyangume Enterprises and that they purchased a house LR 10/585 Milimani Kisumu, from one Oscar Obondo Oluma who at all material times transacted with his wife, the 2nd Defendant. He stated that the mortgage was recovered through his pay-slips. On being cross-examined he confirmed that the issue of the mortgage and car loan was not mentioned in the statement he recorded with the Ethics and Anti-Corruption Commission. He also confirmed authorizing the payments totaling to about Kshs.26 million to the 2nd Defendant.
10. The 2nd Defendant testified that at the material time she was working at the County Government of Homa Bay as a Health Administrative Officer. She disowned that the documents filed by her previous Advocate, MMA Advocate, and stated that they should be expunged; she also testified that the 1st Defendant received a mortgage from the County Assembly which was deposited in her account; that the payment was staggered but in total it amounted to Kshs.26million; that they purchased a house in the husband's name as is the norm in her community. In cross-examination she confirmed receipt of the funds. She also confirmed that she had not traded with the County Assembly of Homa Bay.
11. Learned Counsel for the parties summed their cases up through written submissions dated 10th November 2022 and 7th November 2022 respectively.

Issues for determination

12. The following issues arise for determination:-
 - i. Whether the Defendants are liable to pay to the Government the sum of Kshs.26,272,460.00/- together with interest.
 - ii. Whether the Plaintiff has discharged its burden of proof.
 - iii. Costs.



Analysis and determination

Issue (i): Whether the Defendants are liable to pay to the Government the sum of Kshs.26,272,460 together with interest.

13. It is not in dispute that the 2nd Defendant received a sum of Kshs.26,272,460 from the County Assembly of Homa Bay. The sums were credited into the account of Nyangume Enterprises, a sole proprietorship, No. 098026944240 held at Equity Bank of Kenya. The sums were paid into the account on various days upon the authority of the 1st Defendant. The Defendants admit that at the time the funds were paid, the 2nd Defendant had not supplied any goods or rendered any services to the County Assembly of Homa Bay. It was their case however that she rendered services to the County Government of Homa Bay and that the Assembly and the County Government are distinct and separate entities in the devolved government. The 2nd Defendant admitted the testimonies of the Plaintiff's witnesses that she was never prequalified as a supplier for goods or services to the County Assembly as would have entitled her to bid for any tender. Indeed, it is the Defendant's case that the monies credited in her account was the mortgage and car loans entitlements of the 1st Defendant who was an employee of the County Assembly.
14. The Plaintiff refuted the Defendants' assertions and contended that the 1st Defendant, as the Clerk of the County Assembly of Homa Bay and hence its agent as provided in Section 42(3) of the [Anti-Corruption and Economic Crimes Act](#), unlawfully authorized payments of Kshs.26,272,460/= to Nyangume Enterprises as it had not supplied any works, goods or services to the County Assembly and that there was evidence that out of the sum of Kshs.26,272,460/= a sum of Kshs.750,000/= was transferred to the 1st Defendant. It was submitted that the 1st Defendant breached his fiduciary duty and also procurement and public finance laws under Sections 148(4) and 149 of the [Public Finance Management Act](#) by approving payments to the 2nd Defendant in a deliberate scheme to defraud the County Assembly of Homa Bay.
15. Having considered the evidence by both sides it is my finding that there is no doubt that the 1st Defendant approved and authorized the payments to the 2nd Defendant in his capacity as Clerk of the Count Assembly of Homa Bay and that the amounts were received in the account as follows:-
Kshs. 4,000,000 on 17/8/2016
Kshs. 1,240,000 on 24/8/2016
Kshs. 2,200,000 on 9/9/2016
Kshs. 4,000,000 on 4/10/2016
Kshs. 2,000,000 on 14/10/2016
Kshs. 2,500,000 on 18/11/2016
Kshs. 5,532,460 on 7/12/2016
Kshs. 3,000,000 on 21/12/2016
Kshs. 1,800,000 on 24/1/2017
Total: Kshs. 26,272,460/=



16. Section 149 of the [Public Finance Management Act](#) requires the accounting officer designated under Section 148(4) of the [Public Finance Management Act](#), and the 1st Defendant was such an officer, to ensure that public funds and resources are used in a lawful and authorized manner. The section states:

“Responsibilities of accounting officers designated for county government entities.

149. An accounting officer is accountable to the county assembly for ensuring that
- (1) the resources of the entity for which the officer is designated are used in a way that is—
- (a) lawful and authorised; and
 - (b) effective, efficient, economical and transparent.
- (2) In carrying out a responsibility imposed by subsection (1), an accounting officer shall, in respect of the entity concerned—
- (a) ensure that all expenditure made by the entity complies with subsection (1);
 - (b) ensure that the entity keeps financial and accounting records that comply with this Act;
 - (c) ensure that all financial and accounting records that the entity keeps in any form including in electronic form are adequately protected and backed up;
 - (d) ensure that all contracts entered into by the entity are lawful and are complied with;
 - (e) ensure that all applicable accounting procedures are followed when acquiring or disposing of goods and services and that, in the case of goods, adequate arrangements are made for their custody, safe guarding and maintenance;

17. The 1st Defendant was therefore bound by the law to ensure that the public funds allocated to the County Assembly of Homa Bay were lawfully utilized for the purposes intended. Any unlawful use of public funds is an offence both under the [Public Finance Management Act](#) and the [Anti-Corruption and Economic Crimes Act](#). Sections 45(2) (ii) & (iii) and 46 of the [Anti-Corruption and Economic Crimes Act](#) state as follows:-

- “45. Protection of public property and revenue, etc.
-
- (2) (a) fraudulently makes payment or excessive payment from public revenues for—
- ...
- (ii) goods not supplied or not supplied in full; or
 - (iii) services not rendered or not adequately rendered.
46. Abuse of office



A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

Also Section 198(1) of the *Public Finance Management Act* states:-

“ 198. Other offences by public officers

(1) A public officer commits an offence if that officer—

- a. takes possession of public funds or assets without lawful authority;
- b. misappropriates public funds or assets;
- c. conceals information on public finances to obtain a financial benefit either for the officer or another person; or
- d. engages in a corrupt act.”

18. Section 45(1)(a) of the *Anti-Corruption and Economic Crimes Act* makes it an offence for one to fraudulently acquire public property or a public service or benefit. Receiving a payment from public entity without having rendered any services or supplied any goods to it, would in my view, amount to fraudulent acquisition of public property.
19. Having carefully considered the evidence adduced by the parties I find it a fact that payment of the sum of Kshs. 26,272,460/= to the 2nd Defendant by the 1st Defendant was unlawful. As already stated the defendants did not dispute that the money was paid to her. Neither did they dispute that she had not rendered any services or supplied any goods to the County Assembly of Homa Bay. They both disowned the averment in paragraph 9 of the 2nd Defendant’s written Statement of Defence dated 17th April 2018 where she had pleaded that the sums paid were for services or goods supplied to the County Assembly and contended that she had traded only with the County Government of Homa Bay. The former is a distinct entity from the County Assembly and as such the payments due to her would have been from the County Government but not the County Assembly. Moreover, any payment to her by the Assembly for services rendered or goods supplied to the County Government would still have been unlawful as public funds are not fungible in that manner.
20. It is also my finding that the testimonies of the Defendants that the funds were the 1st Defendant’s car loan and mortgage is not convincing. To begin with it is instructive that this averment did not appear in the initial Statement of Defence of the 1st Defendant dated 19th April 2018 and filed herein on 20th April 2018, where as a matter of fact, he had stated that the payments were for services rendered or goods supplied to the County Assembly of Homa Bay (See paragraph 7 of that defence). Secondly in his Amended Defence filed herein on 27th March, 2022, with leave, the 1st Defendant merely made a general averment that he received legitimate payments being allowances, salaries, loans and other duly authorized payments. Nowhere in that Amended Defence does he state that the sum of Kshs.26,272,460/= paid to the 2nd Defendant was his mortgage and car loan. On her part the 2nd Defendant did not amend her defence that the payment received by her firm was for goods and services supplied to the County Assembly. The allegations of the defendants were therefore not only a departure from their pleadings, something impermissible in law, but it was also not proved on a balance of probabilities. While the 1st Defendant may have been entitled to a car loan and mortgage it is common knowledge that such benefits are paid upon an application being made by the beneficiary. No such applications were produced by the Defendants in this case. Moreover, even though it is common



knowledge that the Government may not always allocate sufficient funds, as was alleged by the 1st Defendant, it is unlikely that it would allocate a car loan and mortgage in bits as the 1st Defendant would want this court to believe. It is also unlikely that such funds would be paid to any other person other than the beneficiary as was the case here. How then would the public entity collect the funds. For a mortgage, one would also expect that there would be documents such as a sale agreement, transfer and a subsequent charge detailing not only the details of the property purchased, the name of the vendor and purchaser and evidencing whether the mortgage was secured. It is noteworthy that no such documents were tendered in this case. There was also nothing to show that the funds paid to the 2nd Defendant came from funds allocated for car loans and mortgages. The allegation that the Defendants purchased a house in Milimani Kisumu did not sufficiently prove that the funds paid to the 2nd Defendant T/A Nyangume Enterprises were the 1st Defendant's car loan and mortgage. Indeed, looking at the documents detailing the authority to pay issued by the 1st Defendant to Equity Bank nothing can be further from the truth. If these monies were for a car loan and mortgage, then the 1st Defendant, an accounting officer, should have known better and included that narration in the instructions.

21. It is my finding therefore that the Defendant's evidence does not offer any rebuttal to the Plaintiff's evidence that the payments made to the 2nd Defendant by the 1st Defendant was unlawful. As stated earlier what the 1st Defendant did not only constitute an offence under Section 198 (1)(a) & (c) of the Public Finance Management Act but also under Section 45(2) (a) (ii) and (iii) of the Anti-Corruption and Economic Crimes Act. It was also an offence under Section 45(1)(a) for the 2nd Defendant to have received a benefit from the County Assembly of Homa Bay without having sold any goods or rendered any services to it. The Defendants are therefore liable to compensate the County Assembly of Homa Bay for what they unlawfully paid and acquired. That is the law as is prescribed in Sections 51 and 53 of the Anti-Corruption and Economic Crimes Act and Section 203(1)(a) of the Public Finance Management Act which states that ("A public officer is personally liable for any loss sustained by a county government that is attributable to — (a) the fraudulent or corrupt conduct, or negligence, of the officer") and also Article 226(5) of the Constitution which states that "if the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.)"

Issue (ii):- Whether the Plaintiff has discharged its burden of proof.

22. Like in all civil claims the burden of proof lies with the Plaintiff and the standard of proof is on a balance of probabilities. It would also be an affront to the general code of ethics that no public officer shall unjustly enrich him/herself or any other person.
23. There is no dispute that the Plaintiff is vested with the mandate to pursue recovery or compensation of lost public funds under Section 11(1)(j) of the Ethics and Anti-Corruption Commission Act, which law provides that:

“In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall...

- (j) 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, or the payment of compensation, or other punitive and disciplinary measures.”



24. The plaintiff is also empowered under Article 252 of *the Constitution* to conduct investigations on its own initiative or on a complaint made by a member of the public. The Plaintiff is also the body charged with the responsibility of ensuring compliance with the *Leadership and Integrity Act* and the Public Officers Ethics Act. The onus fell upon it to prove the allegations made against the 1st and 2nd Defendant.
25. As I have allegedly stated the 1st Defendant fraudulently and illegally authorized payment of the funds to the 2nd Defendant and the 2nd Defendant thereby fraudulently acquired the funds. Accordingly, it is my finding that the Plaintiff has discharged the burden placed upon it to prove the case against the Defendants on a balance of probabilities.
26. In regard to interest Regulation 3 of the Anti-Corruption and Economic Crimes Regulations, 2003 states:-
- “Interest on compensation, etc.
- (1) The interest rate prescribed for the purposes of section 53(1) of the Act is twelve per cent per year.
- (2) For the purpose of subsection 53(1) of the Act, for each amount for which a person is liable under section 51 or 52 of the Act in relation to a loss suffered or a benefit received, interest is payable from the date the loss was suffered or the date the benefit was received.”
27. Having found that the Plaintiff has proved its case against the Defendants on a balance of probabilities and having found the Defendants liable to compensate the County Assembly of Homa Bay for the loss occasioned to it, I enter judgment for the Plaintiff against the Defendants jointly and severally in the sum of Kshs.26,272,460/= together with interest as calculated in Regulation 3 set out above and costs of the suit. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 2ND DAY OF MARCH 2023.

E N MAINA

JUDGE

In the presence of:-

Ms Wairimu Kamau for the Plaintiff

Mr. shikhu for the Defendant

Court Assistant - Potishoi

