



Ethics and Anti-Corruption Commission v Kinyae & 5 others (Anti-Corruption and Economic Crimes Civil Suit E027 of 2022) [2023] KEHC 3573 (KLR) (Anti-Corruption and Economic Crimes) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3573 (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 E027 OF 2022**

EN MAINA, J

APRIL 20, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

DAVID ISIKA KINYAE 1ST DEFENDANT

JOYCE WAIRIMU 2ND DEFENDANT

URBANUS KIOKO MBITHI 3RD DEFENDANT

WANGA TECH GENERAL ENTREPRISES LIMITED 4TH DEFENDANT

**DAVINKA SUPPLIES AND GENERAL MERCHANTS LIMITED 5TH
DEFENDANT**

**BRUCE ISIKA KINYAE T/A BRYCEN SMART INNOVATIONS 6TH
DEFENDANT**

RULING

1. By the Complaint dated August 4, 2022, the Plaintiff seeks Judgment against the defendants for a sum of Kshs 233,486,767.95, and for an order for forfeiture of Kshs 10,000,000 and Kshs 1,965,407.21 held in account No 011504877xxxx and account No 011484877xxxxx, both domiciled at the Cooperative Bank of Kenya Limited in the name of the 4th Defendant.
2. Simultaneously with the Complaint, the Plaintiff/Applicant filed a Notice of Motion dated December 14, 2022.

Seeking orders as follows:-



- 1) Spent
 2. Spent
 3. That pending the hearing and determination of this suit this Honourable Court be pleased to issue an order of injunction restraining the 4th defendant/respondent, its agents, servants and/or any other persons from withdrawing, transferring, disposing, wasting, or in any other way (howsoever described) dealing with funds held in the following bank Accounts: -
 - (a) Bank Account No011484877xxxxx held at Co-operative Bank Kenya Limited in the name of Wanga-tech General Enterprises Limited.
 - (b) Bank Account No 011504877xxxx held at Co-operative Bank Kenya Limited in the name of Wanga-tech General Enterprises Limited.
 4. That the costs of this application be provided for.
3. The Application is premised on grounds *inter alia* that:-The Plaintiff/Applicant obtained Preservation orders in ACEC Misc Application Number E025 of 2021; EACC v David Kinyae Isika and Wanga-Tech General Enterprises Limited on August 26, 2021 prohibiting the Defendants/ Respondents jointly and severally, their agents, servants or any other persons from withdrawing, transferring, disposing or in any other way dealing with the funds held in the bank accounts listed below to enable the Commission to complete its investigations before instituting recovery proceedings:
- a. Bank Account No 011484877xxxxx held at Cooperative Bank Kenya Limited in the name of Wanga-tech General Enterprises Limited
 - b. Bank Account No 011504877xxxx held at Co-operative Bank Kenya Limited in the name of Wanga-tech General Enterprises Limited.

The Preservation Orders were to enable the Plaintiff/Applicant complete its investigations before instituting recovery proceedings, which investigations established that the 1st Defendant/Respondent, a public officer at Nairobi Metropolitan Development and State Department of Housing used the 4th, 5th and 6th Defendants/Respondents whose directors and proprietor included his relatives and associates, as vehicles to further his personal and private interest by illegally receiving public funds in the aggregate sum of Kshs 233,486,767.95. The Preservation Orders shall lapse on December 30, 2022 after which there shall be no orders preserving the assets and the Plaintiff/Applicant is reasonably apprehensive that the assets may be disposed of or transferred to third parties before the present suit is heard and determined thereby frustrating any decree that may be passed against the said Respondents. The Plaintiff/Applicant has now instituted recovery proceedings in this Suit - ACEC No E027/2022 - necessitating the present application to prohibit the disposal of the assets in question pending the hearing and determination of this suit, which the Plaintiff/Applicant reasonably believes to be proceeds of corruption so as not render these proceedings nugatory. The grant of the orders herein will take precedence over the preservation orders as the investigations have been finalized and recovery proceedings commenced. It is therefore just and in the public interest to prohibit the Defendants/ Respondents their 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 suit.

4. In response to the Application, the Defendants filed a Replying Affidavit sworn by the 1st defendant on January 31, 2023. They are vehemently opposed to the application.



The Applicant's case

5. The Applicant submitted that they have met the threshold for the grant of an injunction set out in the case of *Giella v Cassman Brown*; That they have established a prima facie case with a probability of success; That the 1st Defendant/Respondent, through his positions as a Senior Supply Chain Management Officer in the Nairobi Metropolitan Development and State Department of Housing acted in conflict of interest by awarding companies directly associated with him and his associates high value tenders and/or contracts in contravention of Sections 33 of the [Public Procurement and Asset Disposal Act, 2005](#)(repealed), and Section 66 of the [Public Procurement and Asset Disposal Act, 2015](#) and Section 42 of the [Anti-Corruption and Economic Crimes Act](#). Further that an analysis of the 4th Defendant's bank account No 011484877xxxxx at Co-operative Bank of Kenya revealed that since opening the said account in the year 2014, the sole source of income was the Nairobi Metropolitan Development and State Department of Housing, where the 1st Defendant/respondent is employed as a Senior Supply Chain Management Officer; that a summary of the transactions of the said account showed that the bank account was purposely opened to receive monies from Nairobi Metropolitan Development and State Department of Housing as no other substantial amounts of monies has ever been received from other sources. On whether the Applicant is likely to suffer irreparable harm should the order be denied, the Applicant submitted that the applicant instituted this suit to recover public funds furtherance of its statutory mandate under Section 11(1) (j) of the [Ethics and Anti-Corruption Act](#); that this suit involves suspected corruption and misappropriation of public funds in the award of tenders through conflict of interest; that those cases involving misappropriation of public funds and corruption lead to loss of public trust in systems of Government and that it is only an injunction that can prevent the threat of irreparable damage as in the absence of an injunction the general public shall suffer irreparable injury as the Applicant will have nothing to recover in furtherance of the recovery suit.
6. Learned Counsel for the applicant placed reliance on a decision of the Court of Appeal in the case of [Joseph Ntombura v Godfrey Simiyu & 4 others](#) (2018) eKLR where 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 orders is to be made will suffer irreparable harm”
7. Counsel also relied on the case of [Director of Public Prosecutions v Nairobi Chief Magistrate's Court & another](#) [2016] eKLR where the court held:

“The nature of corruption and bribery is that they are indeed crimes against the entire population in Kenya. Similarly, the crimes complained about have an effect on the entire Kenyan population as they consist of loss of public trust in the Government's structures.”
8. Also, in the case of [Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & another](#) [2016] eKLR where relying on the decision in [Konway v Limmer](#) /1968 I All ER 874 the court stated:-

“there is the public interest that harm shall not be caused to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.”



9. Lastly, on whether the balance of convenience tilts in their favour, Counsel submitted that the public has a high stake and stands to suffer more harm than would the Defendants/Respondents should the injunction be denied.

The Respondents' case

10. The respondents opposed the Application in its entirety. First, they contended that an interlocutory injunction cannot issue in vacuo and that the Plaintiff did not seek a prayer for a permanent injunction in the main suit. In this regard Counsel cited the case of *Josphine Chebet Ruto v Stanley K Chepkwony & Another* [2017] eKLR.
11. Further, they contended that in order for the application to succeed the plaintiff is obligated to demonstrate the following to the court on a *prima facie* basis:-
- (a) The Tender Numbers and documents which were subject of the funds,
 - (b) the Contract Numbers and documents which were subject of the funds,
 - (c) minutes or documents or professional opinion where the 1st Defendant is said to have participated in the procurement process and
 - (d) payments made to the 1st Defendant.
12. They submit that the Plaintiff has not exhibited any of the above documents; That the fact that the 1st defendant was never charged in court lends credence to the defence by the defendants that the proceedings herein are in bad faith and malicious and hence the plaintiff cannot be said to have established a prima facie case with a probability of success.
13. Learned Counsel for the Respondent's cited the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, where the court stated: -
- “.....So what is prima facie case? I would say that in civil cases, it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
14. It was further contended that the Plaintiff has come to equity with unclean hands and is therefore not deserving of the order sought; that based on the plaintiff's advice the 1st defendant has been confined to an indefinite suspension; that the 1st Respondent was as at the date of this application on an illegal suspension for a period of sixteen months. Counsel also cited the case of *Showing Industries v Guardian Bank Limited & Another* (2002) 1 EA 284 where the court held that:-
- “.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Appellant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or has been defeated by laches.”

Issues for determination

15. Whether the Applicant has met the threshold for the grant of the injunctive relief sought



Analysis and determination

16. The threshold for the grant of an interlocutory injunction was well settled in the case of *Giella v Cassman Brown* [1973] EA358. The Applicant must establish a prima facie case with a probability of success, demonstrate irreparable injury if a temporary injunction is not granted and if the court is in doubt as to the first two conditions, the application ought to be determined on a balance of convenience.
17. In the case of in *Joseph Ntombura v Godfrey Simiyu & 4 others* [2018] eKLR the Court of Appeal reiterated the principles as follows:

“24. The threshold for an interlocutory order is well stated in the case of *Giella v Cassman Brown & Co Limited* [1973] EA 358. First, an applicant must show a prima facie case with a probability of success; second, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and third, if the court is in doubt, it will decide an application on the balance of convenience. Those principles were further considered by this Court in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014]eKLR, as follows; -

“These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd v Afraha Education Society* [2001] Vol 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If Prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit leap frogging” by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

18. The plaintiff's case is that the 1st defendant, being a public officer, abused his position and awarded tenders and contracts to companies associated with him in conflict-of-interest contrary to the provision of the *Anti-Corruption and Economic Crimes Act* and that as a result of the said alleged corrupt practice the Defendants received public funds totaling to a sum of Kshs 233,486,767.95. The Applicant has



attached documents detailing the alleged receipt of public funds by the 1st Defendant from the Nairobi Metropolitan Development and State Department of Housing and has also sought to prove that the funds were paid through companies the 1st Defendant is associated with by virtue of his spouse being a director thereof. From an assessment of the pleadings and evidence filed, I find that the Plaintiff has established a prima facie case with a likelihood of success bearing in mind the definition of what constitutes a prima facie case as set out in the case of *Mrao v First American Bank of Kenya* (supra).

19. On the second principle of whether the Applicant shall suffer irreparable harm, the Applicant contends that there is a threat of irreparable injury given that should the funds held in the 4th defendant/respondent's account at Co-operative Bank Kenya Limited is not preserved, the Defendants will transfer, waste or dispose or in other way deal with the funds in ways that will render the recovery of proceeds nugatory and an award of damages will not be adequate; That, the Applicant will have nothing to recover in furtherance of its statutory mandate as was held in the case of *Ethics and Anti-Corruption Commission v Jimmy Mutuku Kiamba & 4 others* [2016] eKLR. It is my finding that taking into account the circumstances of this case, there subsists an imminent threat of dissipation of the funds in the impugned accounts should the same not be prevented by an injunction. The loss of public property cannot be of course compensated by an award for damages and as such I find that the Plaintiff/Applicant has met the threshold set out in the first two limbs.
20. Further, the balance of convenience tilts in favour of the Respondent. The Applicant has expended resources in the investigations and institution of these proceedings and should this application be rejected and the suit succeeds, the taxpayer will expend more resources to recover the funds sought to be forfeited a scenario which would not be in the public interest.
21. The upshot is that the Plaintiff/Applicant's Notice of Motion Application dated December 14, 2022 is successful and is allowed as prayed. Costs shall be in the cause.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 20TH APRIL, 2023.

E. N. MAINA

JUDGE

