



**Ethics and Anti-Corruption Commission v Waititu & 8 others (Anti-Corruption and Economic Crimes Civil Suit E020 of 2022) [2023] KEHC 3923 (KLR)
(Anti-Corruption and Economic Crimes) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3923 (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 E020 OF 2022**

EN MAINA, J

MAY 4, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

FERDINAND NDUNGU WAITITU 1ST RESPONDENT
SUSAN WANGARI NDUNG’U 2ND RESPONDENT
SAIKA TWO ESTATE DEVELOPERS LIMITED 3RD RESPONDENT
BIENVENUE DELTA HOTEL 4TH RESPONDENT
BINS MANAGEMENT SERVICES LIMITED 5TH RESPONDENT
MAISIWA AND SPARE PARTS 6TH RESPONDENT
LEXIS INTERNATIONAL LIMITED 7TH RESPONDENT
EILEEN WANJIKU MBUGUA 8TH RESPONDENT
EQUITY BANK (KENYA) LIMITED 9TH RESPONDENT

RULING

1. Before me is the Plaintiff’s application dated 27th May, 2022 in which it is sought that this court issue a temporary injunction to restrain the Defendants and Interested parties as follows:-

“1) Spent.



- (2) That this Honourable Court be pleased to issue an order of injunction restraining the Defendants and interested parties, their agent, servants and/or any other persons from selling, transferring, charging, disposing, wasting or in any other manner alienating the following properties pending the hearing and determination of this application.



Landed Properties	
House No. 110 on LR No. 12825/195	Kencom Sacco - Runda
LR No. 209/168	Lakisama
LR No. 29059 (Plots G 906 & G907)	Migaa Estate
LR No. 7785/311	Runda Grove
Nairobi/Block 105/8848 & 8849	Embakasi Ranching
Nairobi/Block 105/8851 & 8850	Embakasi Ranching
LR No. 28428/80	Thindigua
LR No. 28428/77	Thindigua
Nairobi/Block 187/485 & 484	Kayole
LR Kabete/ Lower Kabete/4318	Kabete
Subdivision 43923 Kajiado/ Kitengela/84909	Kitengela
Kajiado/ Kitengela/66165	Kitengela
Kajiado/ Kitengela/66166	Kitengela
LR No. 209/2582	Bienvenue Delta Hotel



LR No. 209/4357	Biashara Street
LR No. 209/2540/01	Jamii Bora Bank
LR No. 209/4292	Solar house
Nairobi block 168/940	

- (3) That this Honourable Court be pleased to issue an order of injunction restraining the Defendants and interested parties, their agent, servants and/ or any other persons from transferring, disposing, wasting or in any other manner alienating the following motor vehicles pending the hearing and determination of the suit.

Motor Vehicles Registration Numbers	
KCP 200A	Toyota Land Cruiser
KCJ 665X	Toyota D/Cabin
KCJ 549X	Toyota Probox
KCJ 548X	Toyota Vits
KCC 333F	Toyota Land Cruiser
KCK 784C	Toyota Ractis
KHMA572J	Caterpillar

- (4). That pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order directing the Defendants to surrender motor vehicles together with the log books to the plaintiff within 7 days of the order for purposes of conducting a valuation and failing which the Plaintiff be at liberty to seize, tow and detain the motor vehicles for purposes of preservation.
- (5) Further and in the alternative to prayer No. 4 above, pending the hearing and determination of this suit, this Honourable court be pleased to grant an order appointing a licensed auctioneer to seize and sell by way of public auction all motor vehicles enumerated hereinabove and to deposit the proceeds less auctioneer's expenses and fees in a joint interest earning account in the name



of both the plaintiff and a nominated defendant, for purposes of preservation of the current value of the said motor vehicle.

- (6) In the alternative to order No. 5 above, pending the hearing and determination of this suit, this Honourable court be pleased to grant an order against the Defendants to deposit in a joint interest earning account in the name both the Plaintiff and a nominated Defendant as security the sum of Kshs. 24,600,000/- being the value of cited motor vehicles.
- (7). In The Alternative to 6 above, pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order against the Defendants to deposit with the Plaintiff security in form of a bank guarantee for Kshs.24,600,000/- being the current value of all motor vehicles cited.
- (8) That pending the hearing and determination of this suit, the Defendant be restrained from collecting income generated from Bienvenue Delta Hotel, the 4th Defendant, and leave be granted to the Plaintiff to appoint a receiver for collection of the income, management, control and possession of the 4th Defendant under the provisions of Section 56A of the *Anti-Corruption and Economic Crimes Act*.
- (8) This Honourable Court be pleased to issue an order of injunction restraining the Defendants and Interested Parties, their agents, servants and/or any other persons from selling, transferring, charging, disposing, wasting, or in any other way alienating the properties listed in paragraph 2 and the developments thereon pending the hearing and determination of the Originating Summons.
- (10) This Honourable Court be pleased to issue any other or further orders it deems fit and just for preservation of the suit properties pending determination of this suit.
- (11) The costs of this application be provided for.”

2. The gravamen of the application is that the properties in issue in this suit are suspected to have been acquired by the 1st Defendant when he held a state office; that the Plaintiff received information that between 2015 and 2020 the 1st Defendant exploited his position of trust as Member of Parliament, Kabete Constituency and Governor, County Government of Kiambu for private gain by involving himself in transactions which were in conflict with public interest and amassed wealth that was disproportionate to his known legitimate sources of income; that consequently the 1st Defendant accumulated assets with Kshs.1,937,709,376.54 which is disproportionate to his known legitimate sources of income; that the Plaintiff also established that there were reasonable grounds to suspect that the 1st Defendant had, during the period acquired assets the subject properties engaged in corrupt conduct and economic crime within the meaning of Section 2 of the *Anti-Corruption and Economic Crimes Act* and is currently facing criminal proceedings; that the plaintiff is apprehensive that unless the orders sought herein are granted the Defendants will transfer or dispose the assets in order to defeat the course of justice and further that the Defendants will continue to enjoy property and income generated from proceeds of corruption in the event that they are not restrained from collecting income generated therefrom.
3. It is submitted that the Plaintiff has demonstrated that it has a prima face case against the Defendants and also that it is in the public interest that the orders are granted.



4. It is also argued that no prejudice shall be suffered by the Defendants which cannot be compensated by an award for damages and that the balance of convenience tilts in favour of the Plaintiff since the matter is of great public interest as it involves abuse of a public position of trust for private gain.
5. The 1st Defendant opposed the application through a replying affidavit sworn by himself on 21st July, 2022. It is his contention that he acquired the properties in issue lawfully; that the Originating Motion and this application are scandalous, frivolous, vexatious and an abuse of the court process for being a political witch-hunt and a judicial persecution; that there are other similar applications before other tribunals and competent courts and hence are res judicata and subjudice and further that they are not justiciable as there is in effect no tenable issue for determination raised. The 1st Respondent also deposes that the applicant has not adduced any or any credible evidence to prove any of the serious allegations set out in the application and that the applicant has not met the threshold to warrant grant of the orders sought.
6. The 2nd and 3rd Respondents did not file any response to the application.
7. The 4th and 5th Respondents' Replying Affidavit is dated 15th July 2022. The same is sworn on their behalf by the 1st Respondent. He deposes inter alia, that the application is a non-starter in that the Applicant has failed to appreciate that the 4th and 5th Defendants are separate legal entities from the 1st Respondent; that there is no nexus between the affairs of the 4th and 5th Respondent companies and the 1st Respondent and the allegation that they are aiding him to conceal corruptly acquired public funds is misplaced and misconceived; that the Applicant filed these proceedings before according them an opportunity to explain the disproportion between the assets and their known legitimate sources of income; that the application is in that regard premature; that the Applicant breached the provisions of Sections 26 and 27 of the *Anti-Corruption and Economic Crimes Act* for failing to issue them with a notice and to accord them time to furnish the required information; that there is no proof that the funds sought to be preserved are proceeds of crime; that the 4th and 5th defendants are engaged in legitimate business and the allegations are mere suspicions not backed by evidence; that the Applicant has not established that it is likely to suffer irreparable harm, injury or loss if the orders are not granted and that the balance of convenience does not favour the Applicant. It is contended that inconvenience will be caused to the 4th and 5th Respondents as no ground has been established that the funds held in their bank accounts are proceeds of corruption; that the application is wholly misconceived, misplaced, bad in law for being premature and an abuse of the court process and hence it should be dismissed.
8. The 4th Interested Party filed a replying affidavit sworn by Kariuki Kingori on 8th September 2022 in which it is contended that the property known as LR No. 209/2582 Delta Hotel was acquired through a loan of Kshs.200,000,000 which it advanced to the 1st Respondent and as such it was not corruptly acquired; that the 1st Respondent defaulted and the loan now stands at Kshs.246,675,513.38 and it should be allowed to exercise its statutory power of sale to recover the loan.
9. Learned Counsel for the parties consented to canvass the application through written submissions.
10. I have considered the application, the responses thereto, the rival submissions, the cases cited thereat and the law. At this stage the Applicant is merely required to demonstrate that it has a prima facie case against the Respondents, that the temporary injunction is not granted and the suit succeeds it shall suffer irreparable harm that cannot be compensated by an award for damages. It is only if the court is in doubt of the above conditions that it resorts to the balance of convenience – see the case of *Giella v Cassman Brown* (1973) EA 358.
11. The Applicant's case is that the properties in issue were acquired as a result of corrupt conduct. On their part the Respondents dispute that allegation and contend that they are engaged in legitimate



business and hence the funds were lawfully acquired. The 1st Respondent also contends that the case against him stem from a witch hunt. Whether or not the properties were acquired corruptly or whether they are unexplained or not or whether these proceedings are a political witch hunt are issues that can only be determined at the trial but not at this stage.

12. As to the allegation that the proceedings herein are sub judice or res judicata I have had occasion to look at the other cases referred to by the 1st Respondent. One is a criminal case in the Chief Magistrate's Anti-Corruption court which though it may be directly or indirectly be related to these proceedings cannot sustain the doctrine of res judicata or sub judice. Section 193A of the Criminal Procedure Code provides that the pendency of criminal proceedings is not a bar to civil proceedings. The other file concerns parties other than those mentioned in this case and as such neither sub judice nor res judicata applies.

13. A prima facie case has been defined as one that must not necessarily succeed but one which raises issues that are arguable and which therefore warrant to go for hearing (See the case of Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others Civil Appeal No. 39 of 2002 where the court stated that

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

And the case of Nguruman Ltd v Jan Bonde Nielsen and 2 others [2014] eKLR where the Court of Appeal stated that:

“..... The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise 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.....” (Emphasis mine)

14. I am satisfied from the material placed before me that the Applicant has demonstrated that it has a prima facie case against the Respondents herein. As regards the claims by the interested parties those claims shall be determined upon hearing evidence from all the parties which evidence shall then be put to the test by way of cross examination. It would be premature at this stage to make a determination on the same.

15. I do also find that the Applicant has satisfied the condition of irreparable harm. The properties in issue are capable of being easily disposed and should that happen the Applicant would have nothing to forfeit. The loss that would be occasioned to the Applicant were that to happen is not capable of being compensated by an award for costs. It is also in the public interest that the properties be preserved pending hearing and determination of the case. 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.”

That the Defendants/Respondents shall be inconvenienced if the orders are granted cannot be the basis to deny the Applicant the orders.



16. Similarly, 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.”

17. Further, in the case of *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* [2011] eKLR it was also 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.”

18. In the premises the application dated 27th May 2022 is allowed and it is ordered that:-

- a. A temporary injunction shall issue restraining the Defendants and interested parties, their agent, servants and/or any other persons from selling, transferring, charging, disposing, wasting or in any other manner alienating the following properties pending the hearing and determination of the suit.



Landed Properties	
House No. 110 on LR No. 12825/195	Kencom Sacco - Runda
LR No. 209/168	Lakisama
LR No. 29059 (Plots G 906 & G907)	Migaa Estate
LR No. 7785/311	Runda Grove
Nairobi/Block 105/8848 & 8849	Embakasi Ranching
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LR No. 28428/80	Thindigua
LR No. 28428/77	Thindigua
Nairobi/Block 187/485 & 484	Kayole
LR Kabete/Lower KAbete/4318	Kabete
Subdivision 43923 Kajado/Kitengela/84909	Kitengela
Kajado/kitengela/66165	Kitengela
Kajado/Kitengela/66166	Kitengela
LR No. 209/2582	Bienvenue Delta Hotel
LR No. 209/4357	Biashara Street
LR No. 209/2540/01	Jamii Bora Bank
LR No. 209/4292	Solar house



Nairobi block
168/940

- b. That a temporary injunction shall issue restraining the Defendants, their agents and servants from transferring, disposing, wasting and/or in any other way dealing with the following motor vehicles pending the hearing and determination of the suit.

Motor Vehicles Registration Numbers	
KCP 200A	Toyota Land Cruiser
KCJ 665X	Toyota D/Cabin
KCJ 549X	Toyota Probox
KCJ 548X	Toyota Vits
KCC 333F	Toyota Land Cruiser
KCK 784C	Toyota Ractis
KHMA572J	Caterpillar

- c. That it is ordered that the Defendants shall within seven (7) days of this order surrender to the Applicant the said motor vehicles and their log books for purposes of conducting a valuation failing which the Applicant shall be at liberty to seize, tow and detain the vehicles.
- d. That in the alternative to order No. (b) above, the Defendant do deposit in a joint interest deposit earning account in the name of both the Plaintiff and a nominated Defendant as security the sum of Kshs. 24,600,000/- being the value of the cited motor vehicles pending the hearing and determination of this suit.
- e. That in the alternative to order No. (c) above, the Defendant do deposit with the Plaintiff security in form of a bank guarantee for Kshs. 24,600,000/- being the current value of all motor vehicles cited pending the hearing and determination of this suit.
- f. That the Defendant be and is hereby restrained from collecting income generated from Bienvenue Delta Hotel, the 4th Defendant, and leave be and is hereby granted to the Plaintiff to appoint a receiver for collection of the income, management, control and possession of the 4th Defendant under the provisions of Section 56A of the [Anti-Corruption and Economic Crimes Act](#).
- g. That the costs of the application shall be in the cause.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 4TH DAY OF MAY, 2023 .

E N MAINA

JUDGE

