



REPUBLIC OF KENYA



Ethics and Anti-Corruption Commission v Kaino & 4 others (Anti-Corruption and Economic Crimes Civil Suit 22 of 2019) [2023] KEHC 18617 (KLR) (Anti-Corruption and Economic Crimes) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18617 (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 22 OF 2019

EN MAINA, J

JUNE 15, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

NICHOLAS KIPROP KAINO 1ST DEFENDANT

ROSE ROTICH 2ND DEFENDANT

ALISON ODERA MKANGULA 3RD DEFENDANT

BENARD ABSALOM SANYA 4TH DEFENDANT

MORRION PAULYNE DOME 5TH DEFENDANT

JUDGMENT

1. The Plaintiff is a body corporate established under the *Ethics and Anti-Corruption Commission Act*. It brought this suit against the Defendants pursuant to its powers under Section 11 of the *Ethics and Anti-Corruption Commission Act*.
2. The 1st Defendant was the Principal, of the Chebororwa Agricultural Training Center and one of the signatories of the bank account for the Chebororwa Agricultural Training Centre Demonstration Farm Fund held at the Kenya Commercial Bank (KCB) Limited – Kapsowar Branch.
3. The 1st Defendant was also together with his wife 2nd Defendant herein a proprietor of Rotkan Investments, a business enterprise registered under the *Registration of Business Names Act*.



4. The 3rd Defendant was the Accountant – Marakwet West within whose jurisdiction the Chebororwa Agricultural Training Centre fell and one of the signatories to its Demonstration Farm Fund bank account at the KCB Bank.
5. The 4th Defendant was the proprietor of Wagabi Enterprises a business name registered under the [Registration of Names Act](#).
6. The 5th Defendant was the proprietor of Jergens Enterprises and Forgil Agencies both of which were business names registered under the [Registration of Business Names Act](#).
7. In the plaint dated 27th August 2019 the Plaintiff averred that between 23rd February 2017 and 19th May 2017 when the 1st and 3rd Defendants were signatories to the Chebororwa ATC Demonstration Fund Account No. 1103288334 they fraudulently paid out a sum of Kshs. 11,493,000/= to themselves personally and to entities associated either with themselves or their co-defendants; that the fraudulent payments were made through cheques signed by themselves yet the persons to who the payments were made had not supplied any goods or rendered any services to the Chebororwa ATC Demonstration Fund; that as a result of the payments they and their co-defendants fraudulently earned a benefit from a public institution unjustly and that the institution suffered a loss of Kshs. 11,493,000/= which the defendants ought to be ordered to make good.
8. The Plaintiff prays for judgment against the Defendants as follows:-
 - a. A sum of Kshs. 4,663,000.00 from the 1st and 3rd Defendants;
 - b. A sum of Kshs.2,830,000.00 from the 1st 2nd and 3rd Defendants;
 - c. A sum of Kshs. 2,596,000.00 from the 1st 3rd and 5th Defendants;
 - d. A sum of Kshs. 1,404,000.00 from the 1st, 3rd, 4th and 5th Defendants;
 - e. In the alternative, a sum of Kshs. 11,493,000.00 against the Defendants jointly and severally;
 - f. Costs of the suit with interest on the liquidated claim from the date of filing suit;
9. The claim was vehemently resisted by all the Defendants. The 1st and 2nd Defendants filed a joint statement of defence wherein they controverted all the averments in the plaint save for the fact that they were at all material times proprietors of Rotkan Investments. At paragraph 21 of the Defence the 1st Defendant averred that he ceased being the Principal of the Chebororwa ATC on 11th November 2016 and was re-deployed to Moiben Sub County while in paragraphs 23, 24, 25, he concedes that he participated in the re-activation of the Demonstration Fund's Account which had become dormant but states that he merely acted on the instructions of Rebacca Biwott (PW3) who was the District Accountant at the time.
10. The 3rd, 4th and 5th Defendants filed separate statements of defence in which they denied the Plaintiff's claim in total. However, on 29th April 2020 the 3rd Defendants' defence was struck out and judgment was entered in favour of the Plaintiff against him for a sum of Kshs. 5,746,500/=. The court (Mumbi Ngugi J, as she then was) found that the 3rd Defendant had admitted the Plaintiff's claim and that by his admission the 3rd Defendant had also compromised the case as against the 4th and 5th Defendants. This judgment on admission followed the Plaintiff's application dated 1st November 2019 whereupon the Learned Judge then directed that only the claim against the 1st and 2nd Defendants was to go for hearing.
11. The above being the case what remains is the Plaintiff's claim against the 1st and 2nd Defendant as the rest of the claim was ordered to be borne by the 3rd, 4th and 5th Defendants.



The Plaintiff's case

12. At the hearing the Plaintiff called eight (8) witnesses. It was confirmed that the 1st Defendant was indeed the Principal of Chebororwa Agricultural Training Centre until 11th November 2016. The Court heard that the Agricultural Training Centre was previously (before devolution) operated by the National Government and its financial management was placed under one of the sub counties of Elgeyo Marakwet. However, after devolution it was transferred to the Uasin Gishu County Government. Reuben Kiplagat Seroney (PW1) testified that he was the Principal who was appointed to take over the ATC from the 1st Defendant. He stated that at the time he took over, on 11th November 2016 the ATC had three bank accounts as namely:-
- i. A Revenue account held in the name of the Chebororwa Demonstration Farm Fund Account No. 1151866997 at Kenya Commercial Bank Eldoret with a credit balance of Kshs. 4,537,367/20.
 - ii. Operation Account No. 1163800198 Kenya Commercial Bank, Eldoret with a credit balance of Kshs. 2,034,015/=.
 - iii. Revenue Account at KCB Bank Kapsowar Branch Account No. 1103288334 which had a credit balance of Kshs. 11,403,601/20.
13. PW1 stated that all the above accounts were created under the Exchequer Act and no monies could be drawn therefrom without authority from the District Treasury. As such the District Accountant was a signatory to the account together with the Principal of the Agricultural Training Centre (ATC); that when he took over the monies belonging to the ATC were still under the National Government and so to get access, he had to seek authority from the National Treasury through the relevant Uasin Gishu County Executive Committee Member, one Willy Bet. He stated that a letter seeking transfer of the funds from the KCB Kapsowar Branch account was then written but it was not until 8th May 2017 that he got a response authorizing transfer of the funds and expenditure thereon. He stated that on 1st November 2017, following receipt of the letter, he visited the KCB Bank Eldoret Branch and requested for a statement of account only to learn that there was zero balance in the Account No. 1103288339. His written request to that branch for an explanation on the transactions leading to the zero balance however elicited a referral to the Kapsowar Branch. By a letter dated 2nd November he communicated these happenings to his superiors at the County Government before visiting the Kapsowar KCB Branch and requesting a statement of the account only to later be told, in writing, that he could not be given that information as he was not yet a signatory to the account. PW1 stated that the signatories were still the 1st defendant and the Kapsowar District Accountant who was the custodian of the cheque books. PW1 denied that he took part in any of the transactions concerning the ATC accounts as at that point and that he communicated this to the County Executive Committee member in charge of the ATC through a letter dated 15th November, 2017 and it was that County Executive Committee together with the County Secretary reported the matter to the Plaintiff, Commission.
14. The court heard that upon receipt of the report the plaintiff instituted investigations which revealed that as the transition concerning the ATC was taking place its account at the KBC, Kapsowar fell dormant culminating in the bank writing, through Joseph Barmao (PW4) its then Acting Branch Manager, to Rebecca Biwott (PW3) the District Accountant and signatory to the account, to reactivate the account. It was following the letter by PW4 that Rebecca Biwott (PW3) and the 1st Defendant who were the signatories to the account filled a form (Exb P. 10) to re-activate the account. At the same time the 1st Defendant also introduced Vincent Kemboi as a signatory to the account. Joseph Barmao



- (PW4) testified that as at 3rd October 2016 when the account was reactivated it had a credit balance of Kshs. 11,493,401/= and that after the reactivation the District Accountant who was replacing Rebecca Biwott (PW3) one Alison Omukangala was introduced to the account as a signatory. The letter and forms by which the signatory was introduced were produced in evidence as Exb. P 11 and EXB. P. 12. Thereafter the new signatories to the ATC's account became Alison Mukangula; Nicholas Kaino (1st Defendant) and Vincent Kemboi. According to PW4 the mandate was that any of the three could sign but Alison Mukangula's signature was mandatory.
15. PW4 stated that the account also had a known agent whose name was Stephen Kurtebe Kiprotich. The agent was allowed to collect cash, cheque books, bank statements and to check the balances in the accounts. PW4 further stated that between 23rd February 2017 and May 2017, a period of less than three months, there were eight withdrawals from the account. He stated that eight cheques drawn in favour of the 1st defendant were presented and encashed by Stephen Kurtebe and that the same were paid upon confirmation from Alison Mukangula. The witness stated further that the other eight other cheques were paid to Jergens Enterprises, Forgil Agencies, Wagabi Enterprises and Rotkan Investments. It was his evidence that at the sixteen the cheques were all signed by the 1st defendant and Alison Mukangula. The cheques amounted to a sum of Kshs. 11,493,000/= therefore depleting all the monies in the account. PW4 told the court that he relayed this information to the Commission pursuant to a Warrant to Investigate issued to the bank by the Chief Magistrate's Court at Eldoret. That warrant was exhibited and produced in evidence as Exb P 14. Copies of the sixteen cheques through which the monies in the account of the Chebororwa ATC Demonstration Farm Fund were withdrawn were produced as Exb P 17 (i) to xvi). PW4 confirmed that sometimes in late July 2017 PW1 went to the bank to inquire into the account and stated that he did not give him any information as he (PW1) was not a signatory to the account. PW4 stated that it was the 1st defendant who paid the fee of Kshs. 200/= to reactivate the account and that it was thereafter that the warrant to investigate was served upon the bank.
 16. The court heard that once the documents required by the plaintiff under the warrant were supplied investigations commenced. The investigations involved obtaining warrants to investigate the accounts of the persons and entities to who payments were made (EXB P 20, 21, 24) and to obtain statements of their accounts (EXB P23, 25 and 26). It also involved recording statements from witnesses.
 17. Stephen Kiprotich Kurtebe (PW6) confirmed that at the material time, to wit between 2015 and 2017, he worked at the Marakwet West District Treasury as a cashier and was a known Agent in regard to the Chebororwa ATC Demonstration Farm Fund account no. 1103288334. He also confirmed that he was not a signatory to the account and further that he in fact prepared the sixteen cheques all totaling Ksh. 11,493,000/= drawn in favour of the Principal Chebororwa ATC, Jergens Enterprises, Forgil Agencies, Wagabi Enterprises and Rotkan Investments. He identified those cheques the ones produced as exhibits 16(i) to xvi). He stated that after preparing the cheques he took them to the 1st Defendant and to Alison Mukangula who were signatories to the account and they signed the same. The eight cheques drawn in favour of the entities were then taken by the 1st Defendant while he (PW6) went and encashed the cheques drawn in favour of the Principal Chebororwa ATC and handed over the money to the 1st Defendant. He stated that he prepared the cheques based on vouchers which were however no longer available to him as they had to be surrendered to the District Treasurer at the close of the relevant financial year.
 18. The plaintiff also called Charles Kiprotich Bii (PW5) a bank officer at the Kenya Commercial Bank (KCB) Eldoret who confirmed that he supplied information regarding the bank accounts in regard to Wagabi Enterprises and Forgil Agencies. He also supplied their bank statements. This was pursuant to warrants to investigate served upon the bank - (Exb P. 20 and 24). The other witness Jacob Oduor



Mogeni (PW7) a Forensic Document Examiner, gave evidence that the cheques in issue were indeed signed by the 1st Defendant and the 3rd Defendant.

19. Maleya Omondi (PW8) testified that he is a Forensic Investigator with the Plaintiff, Commission; that his work entails investigations and asset tracing; that he was the lead investigator in this matter; that the matter involved embezzlement of funds amounting to Kshs. 11.4 million belonging to Chebarorwa ATC; that his investigations revealed that the 1st and 3rd defendants conspired to embezzle Ksh. 11,493,000/= belonging to the Chebarorwa ATC Demonstration Farm Fund. He testified that out of the sixteen cheques eight cheques worth Ksh. 4,663,000/= were encashed in favour of the 1st defendant and three cheques worth Kshs. 2,830,000/= were drawn in favour of Rotkan Investments where the 1st Defendant and his wife, the 2nd Defendant were proprietors. He produced a warrant (Exb P 29) which he obtained in regard to Rotkan Investments and stated that he obtained documents (account opening forms) which confirmed that the signatories to the account were the 1st and 2nd defendant. He also obtained bank statements confirming that the three impugned cheques were indeed deposited in that account. He stated that his investigations led him to conclude that the payments made to Rotkan were unjustified as there were no vouchers to demonstrate that it had supplied any goods to or rendered any services to Chebororwa ATC. He stated that he issued notices to the defendants to explain why they had received the payments but the explanations he received were not plausible. He therefore issued demands and notices to sue (Exh. P 40) to the defendants but there were no refunds made hence this suit. He urged this court to order the defendants to pay the embezzled funds to the Commission on behalf of the public.

The Defendants' Case

20. The 1st Defendant testified that he hails from Elgeyo Marakwet County but he resides in Kapsowar and also in Moiben in Uasin Gishu County; that until 1st December 2017 when he was suspended he was a civil servant; that he is currently a farmer; that he was the Principal of Chebororwa ATC until 11th November 2016; that the issues concerning the impugned funds arose after he left the institution; that he knew nothing about the alleged cheques; that he handed over all his responsibilities including as signatory to the account to the incoming Principal and was redeployed to the Uasin Gishu County; that he does not know anything about the Ksh. 4,663,000/= which Stephen Kurtebe allegedly encashed from the account and paid to him. That it was Kurtebe's evidence that he gave the funds to the Principal at the bank and that he was not the Principal at the time. He vehemently disputed that he embezzled funds belonging to the institution and was emphatic that he did not involve himself with the account after he left Chobororwa.
21. In regard to Rotkan Investments the 1st Defendant conceded that the business entity belonged to himself and the 2nd defendant and that she is his wife. He stated that some cheques were drawn in favour of Rotkan but stated he could not remember if Rotkan had provided any services to the institution; that by the time he left no services that had been rendered to the institution remained unpaid; that as a public officer he could not have carried out any business with Chebororwa; that any business between Rotkan and Chebororwa would have been illegal; that Rotkan received Ksh, 2,830,000/= from Chebororwa between February 2017 and May 2017; that he and the 2nd defendant withdrew those monies; that the signatures on the cheques concerning the money paid to Rotkan and indeed the entire Kshs. 11,493,000/=, resembled his signature and further that the funds benefitted the 3rd, 4th and 5th defendants as well and that he did not know if Jergens, Forgil and Wagabi rendered any services to Chebororwa. He confirmed that monies drawn from the Chebororwa account were paid to those entities as well.
22. The 2nd defendant did not adduce any evidence.



23. Counsel for the parties consented to summing up their cases through written submissions but by the time of writing this judgment only those of the plaintiff had been received. I have considered these submissions alongside all the pleadings and the evidence adduced by the plaintiff and the defendants.

Analysis and Determination.

24. There is no dispute that at all material times to this dispute Chebororwa Agricultural Training Centre was a public institution which received public funds from the exchequer. My understanding is that those funds are what were used at the Chebororwa ATC Demonstration Farm. The same was christened the Chebororwa ATC Demonstration Farm Fund. There is also no dispute that the 1st Defendant was the Principal of the institution until 11th November 2016 when it was devolved to the County Government of Uasin Gishu. Upon its devolvement PW1 became its Principal. The 1st Defendant admitted that as the Principal of the institution he was one of the signatories of the institution's bank accounts. Evidence was also adduced that as at 11th November, 2016 the accounts had credit balances with account no. 1103328334 at KCB Kapsowar Branch having a balance of Kshs. 11,493,601/=. There was also evidence that between 23rd February 2017 and 19th May 2017, a period when the 1st Defendant had ceased to be the Principal of the ATC, sixteen cheques were issued and encashed thereby depleting the funds in the account. It is alleged that the 1st defendant personally benefited from those funds to the tune of Ksh. 4,663,000/= while Rotkan Investments, a business entity owned by himself and his wife the 2nd Defendant, benefitted to the tune of Kshs. 2,830,000/= . Whereas the 1st defendant vehemently disputed that he personally received any funds from the Chebororwa ATC he readily admitted that Rotkan Investments received a sum of 2,830,000/= from Chebororwa and that he together with the 2nd Defendant they withdrew those funds.
25. There is no doubt in my mind that the plaintiff has the locus to bring these proceedings under Section 11(1) (i) of the *Ethics and Anti-Corruption Commission Act*. The issues for determination therefore are:
- “(a) Whether payments in the sum of Kshs. 4,663,000/= were made from the Chebororwa ATC Demonstration Farm Fund to the 1st defendant personally and whether such payments were irregular and fraudulent.
 - (b) Whether the payments admittedly made to Rotkan Investments in the sum of Kshs. 2,830,000/= were paid fraudulently.
 - (c) Whether the 1st and 2nd defendants are liable to compensate Chebororwa ATC for the loss if any.
 - (d) Who should bear the costs of this suit.”

Issue a: Whether payments in the sum of Kshs. 4,663,000/= were made from the Chebororwa ATC Demonstration Farm Fund to the 1st defendant personally and whether such payments were irregular and fraudulent.

26. Having considered and evaluated the evidence adduced by both sides. I am satisfied that the plaintiff has proved on balance of probabilities that a sum of Kshs. 4,663,000/= was paid to the 1st Defendant from the Chebororwa ATC Demonstration Farm Fund Account No. 1103288334 held at the KBC, Kapsowar Branch. There is credible and cogent evidence that as at the time the 1st Defendant formally left the institution to be redeployed to the County Government of Uasin Gishu the account had a credit balance of Kshs. 11,493,000/=. This was confirmed not just by Reuben Kiplagat Seroney (PW1), the person who took over from the



1st Defendant as Principal, but also by Vincent Kipyego Kemboi (PW2) who was the Acting Deputy Principal, Rebecca Biwott (PW3), who was the outgoing District Accountant and a signatory to that account and by Joseph K. Barmao (PW4) who was the Acting Branch Manager of the KCB Kapsowar Branch. It is also my finding that the account which had become dormant was re-activated by the 1st defendant together with Rebecca Biwott (PW3) upon being required to do so by the Branch Manager (PW4). It is my finding that it was upon the re-activation of that account that cheques were issued that led to the depletion of the account. By then Rebecca Biwott (PW3) had been replaced as District Accountant by the 3rd defendant. It is also my finding that the cheques used were all sixteen in total a fact that was confirmed by PW4 and also by Stephen Kiprotich Kurtebe (PW6) a known Agent of that account. It was PW6's evidence that it was he who prepared (wrote) the cheques. It was also his evidence that after writing the cheques he took them to the 1st and the 3rd Defendants to sign as they were the signatories of the account a fact that was corroborated by PW4 through the account opening and mandate forms produced as exhibits P11. This court also finds it a fact from the evidence that out of the sixteen cheques eight were drawn in favour of the Principal Chebororwa; that those cheques were encashed by PW6 on various dates and that PW6 then passed over the monies to the 1st Defendant. PW6 knew the 1st Defendant very well as they had previously worked together and it is my finding that he had no reason to lie against the 1st Defendant as being the person to who he handed over the cash. Moreover the admission that three cheques were drawn in favour of Rotkan and that the funds in those cheques were credited to Rotkan's account and the same withdrawn by himself and his wife, renders PW6's evidence in regard to these other eight cheques more probable than not.

27. As to whether the payments were fraudulent the prosecution adduced evidence that as at the time those payments were made to the 1st Defendant he was no longer the Principal of Chebororwa ATC. In his own words he ceased being the Principal on 11th November 2016. The Plaintiff also adduced evidence that the eight cheques through which he received the sum of Kshs. 4,633,000/= were written by PW6 and signed by the 1st Defendant and the 3rd Defendant. It is my finding that the 1st Defendant should have ceased being a signatory to the Chebororwa ATC bank accounts as at 11th November 2016. He lost capacity to operate the account as at that date and the mandate now fell upon the new Principal (PW1). Indeed, it was the 1st Defendant's evidence that that was the position. It is therefore my finding that first, signing the cheques and, secondly receiving the cash from PW6 was not only irregular but also fraudulent. The funds did not go to the use of the institution but benefitted him personally which amounted to theft and embezzlement of public funds.

Issue No (b): Whether the payments made to Rotkan Investments in the sum of Kshs. 2,830,000/= were fraudulent.

28. . The 1st Defendant admitted that him and his wife are the proprietors of Rotkan Investments; that a sum of Kshs. 2,830,000/= was paid to Rotkan Investments from the Chebororwa ATC Demonstration Farm Fund in the period in issue and that together with his wife they withdrew the funds. The funds therefore benefitted him and his wife. In cross examination he was hard pressed to demonstrate that Rotkan had supplied goods or rendered services to Chebororwa as would have justified the payment. It was his evidence that he could not remember. Although PW6 alluded to some payment vouchers as supporting the payments Maleya Omondi (PW8) testified that there were no such vouchers; that he did not find any such vouchers in the course of his investigations. It is my finding that no such vouchers existed as otherwise the 1st Defendant as proprietor of Rotkan or his wife (2nd Defendant) would have produced copies



of the same as required of them by Section 112 of the *Evidence Act* given that these were facts within their special knowledge. It is also unlikely that whether the entity had rendered services or supplied goods to Chebororwa would have escaped the 1st Defendant's mind. It is my finding that in the absence of documents supporting the payments there was no justification for the payments to Rotkan Investments. Moreover, as conceded by the 1st Defendant even had such evidence been found or adduced the payments to Rotkan would have been unlawful as being an employee in charge of Chebororwa it would have been unlawful for the 1st Defendant to trade with it. It is also evident that there was no conflict of interest disclosure. The payments to Rotkan were in my view, clearly unjustified and unlawful. They were made in furtherance of a scheme by the 1st and 3rd Defendants to embezzle funds from the Chebororwa ATC funds.

Issue No. (c): Whether the 1st and 2nd defendants are liable to compensate Chebororwa ATC for the loss.

29. The 1st Defendant's conduct amounted to what would be an offence under Section 46 of the *Anti-Corruption and Economic Crimes Act* – Abuse of office. The 1st Defendant is therefore under Section 51 of the *Act* liable to compensate Chebororwa ATC for that loss. So is the 2nd Defendant who also benefitted from the unlawful payment to Rotkan Investments. Section 53(3) of the *Anti-Corruption and Economic Crimes Act* places the duty to claim the funds on the Plaintiff.

Disposition

30. This court finds that the Plaintiff's claim against the 1st and 2nd Defendants has been proved on a balance of probabilities. Accordingly Judgment is entered for the Plaintiff as follows:-
- a) Against the 1st Defendant for a sum of Kshs. 4,663,000/=
 - b) Against the 1st and 2nd Defendants jointly and severally for a sum of Kshs. 2,830,000/=
 - c) Final judgment for the Plaintiff against the 3rd Defendant, on admission, for the sum of Kshs. 5,746,500/=
 - d) Whereas the Plaintiff prays for interest from the date of filing interest shall be calculated at 12% pa from the date of the loss occasioned to Chebororwa ATC until payment in full as provided in the Anti-Corruption and Economic Crimes Regulations, 2003.
 - e) Costs follow the course and the 1st, 2nd and 3rd Defendants shall bear the costs of the suit.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 15TH DAY OF JUNE 2023

E N MAINA

JUDGE

