



**Ethics and Anti-Corruption Commission v Suppliers & 9 others; Kamau & another (Interested Parties) (Civil Suit E041 of 2022) [2023] KEHC 19906 (KLR) (Anti-Corruption and Economic Crimes) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19906 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES**

**CIVIL SUIT E041 OF 2022**

**EN MAINA, J**

**JULY 6, 2023**

**BETWEEN**

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

**AND**

**ALKHALIS SUPPLIERS ..... 1<sup>ST</sup> DEFENDANT**

**OCHOKI OMAIYO JOSEPH ..... 2<sup>ND</sup> DEFENDANT**

**SARAH KEMUNTO KERANDI ..... 3<sup>RD</sup> DEFENDANT**

**JAMES NYANG'AU GEKOBÉ ..... 4<sup>TH</sup> DEFENDANT**

**HUMPHREY WENDE ABOK ..... 5<sup>TH</sup> DEFENDANT**

**ISAAC BARASA WEKESA ..... 6<sup>TH</sup> DEFENDANT**

**MOSES JUMA SIRENGO ..... 7<sup>TH</sup> DEFENDANT**

**JOSEPH KAMAU MWANGI ..... 8<sup>TH</sup> DEFENDANT**

**MAGETO OMARI MIRIERI ..... 9<sup>TH</sup> DEFENDANT**

**JACK NYARIANGO OGAO ..... 10<sup>TH</sup> DEFENDANT**

**AND**

**ROSE NYAMBURA KAMAU ..... INTERESTED PARTY**

**LUCY MORAA NYARIANGO ..... INTERESTED PARTY**



## RULING

1. By the Notice of Motion dated October 19, 2022 which is brought under Section 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 39 Rule 5, Order 40(1), Order 51 Rule 1 of the Civil Procedure Rules the Plaintiff/Applicant seeks a temporary injunction to restrain the Respondents, their agents and/or servants or any other persons from alienating, selling, charging or further charging, leasing, wasting, transferring, disposing and/or in any other way dealing with motor vehicles registration numbers KCL 393R and KCK 295L pending hearing and determination of this case and that the costs of this application be provided for.
2. The Application is premised on the following grounds as stated on its face and in the supporting affidavit of Feiza Abdi sworn on October 19, 2022:
  - “ 1) The Applicant under section 11(1)(j) of the Ethics and Anti-Corruption Act, 2011 is mandated to undertake investigations to establish the extent of liability for the loss of, or damage to public property: and in appropriate cases, to institute civil proceedings against any person for the recovery/restitution of such 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.
  2. The Applicant received a report on allegations of abuse of office and irregular payments of Kshs 165,735,000/= by the State Department to seven (7) business entities owned by the 1st Respondent for goods not supplied.
  3. Investigations established the following:
    1. That during the financial years 2016/2017, 2017/2018 and 2018/2019 the 1st respondent received a total sum of Kshs 165,735,000/= from the State Department of Correctional Services (herein after "the State Department") on account of goods (food and rations) not supplied.
    2. It was established that fraudulent scheme perpetrated jointly by the Respondents involved making of false procurement documents to wit requisition forms, Local Purchase Orders (LPO), delivery notes, inspection and acceptance certificates, Invoices, S13 which were used to support payment vouchers.
    3. The Payment vouchers as supported by the falsified documents were then used by the 2nd -10th Respondents to actuate payments amounting Kshs 165,735,000/= to the 1<sup>st</sup> Respondent for goods not supplied as set out below:



NO	Companies/ Firms	Amount
1)	Almahir Suppliers	30,450,000
2)	Castro Suppliers	25,650,000
3)	Mobile Farm Ventures	23,200,000
4)	Stemu Suppliers	50,875,000
5)	Zombe Supplies	14,210,000
6)	Al-Alhi Suppliers	13,020,000
7)	Alkhalis Suppliers	8,330,000
	Grand Total	165,735,000

4. The Applicant has further established that some of the proceeds of corruption and economic crimes were used to acquire the following motor vehicles:
  - a. KCL 393R registered in the name of the 1s interested party acquired by 1<sup>st</sup> Respondent at Kshs 4,250,000/=
  - b. KCK 295 L registered in the name of the 2<sup>nd</sup> Interested party acquired by 1<sup>st</sup> Respondent at Kshs 2,650,000/=.
5. It is therefore just and fit to restrain/prohibit the Respondent's agents, servants or any other persons from alienating, selling, charging or further charging, leasing, wasting, transferring, disposing and/or in any other way dealing with the said motor vehicles pending the hearing and determination of this application and suit filed for recovery of the sum afore-stated.
  6. The money acquired through corrupt conduct contributed to the purchase of the said properties hence they are amenable to forfeiture to the state and/or ought to be held as security for satisfaction of the decree of the court upon conclusion of the suit filed herein.
  7. The investigations are now complete and the instant suit filed against the Respondents and if the orders of injunction sought herein are not granted then the efforts made to trace the said motor vehicles will be in vain.
  8. The Applicant is apprehensive that unless this application is heard urgently and the orders sought are granted, there is a real danger that the public will suffer great loss which may not be recoverable from the Respondents to the detriment of the public.
  9. 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 interests of justice that this Honorable Court grants the Orders sought in the application.
  10. In the absence of an order stopping the Respondents from dealing, transferring, disposing of or wasting the said motor vehicles or transferring the same, there is nothing to prevent the



Respondents from dealing with the properties in the intervening period to the detriment of the public.

11. The Applicant is apprehensive that the Is Respondent may attempt to dispose of the properties in a bid to defeat the execution of the decree that may be passed.
  12. Consequently, the suit herein will be rendered nugatory if the property both money and immovable found to constitute the proceeds of corruption and economic crimes are allowed to dissipate.
  13. The Respondents will suffer no prejudice if the orders sought are granted.
  14. The Applicant on the other hand shall suffer serious prejudice if the orders of injunction are not granted as it will affect the amount to be recovered in the recovery proceedings filed herein.”
3. Only the 2<sup>nd</sup> and 9<sup>th</sup> Defendants/Respondents filed replying affidavits in opposition to the Application. The rest of the Defendants elected not to participate in the application as they would not be affected by the order

### **Response by the 2<sup>nd</sup> and 9<sup>th</sup> Respondents**

4. The 2<sup>nd</sup> Defendant/Respondent deposed that he is an employee of the Kenya Prisons Service, a department in the Ministry of Interior and Coordination of National Government, holding the rank of Police Constable in the Department of Directorate of Logistics; That he has served in the said rank of Constable since his employment in the year 2008; that no investigations were conducted as claimed by the Applicant; that he has never perpetrated any fraudulent scheme of making false procurement documents including Local Purchase Orders, Delivery Notes, Inspection and acceptance certificates, invoices, S13 and a pre-qualified list of suppliers used to support payment vouchers; that he has never falsified any document to actuate payment and this Application is made in bad faith and is an abuse of the court process to procure an injunction.
5. On his part, the 9<sup>th</sup> Defendant/Respondent deposed that he worked in the State Department for Correctional Services in the Ministry of Interior and Coordination of National Government between the years 2016 and 2018; that he was not involved in the falsification of documents as alleged by the Plaintiff and this application is made in bad faith.
6. The application was to be canvassed by way of written submissions but none of the parties filed their submissions and hence the application will be determined on the affidavits filed.

### **Issue for determination**

7. The following issue arises for determination: Whether the Plaintiff/Applicant has met the threshold for grant of an interlocutory injunction.

### **Analysis and determination**

8. It is trite that an order for an injunction is granted at the discretion of the court. The test for the grant of an interlocutory injunction was set in the locus classicus case of *Giella v Cassman Brown* [1973] EA 358, the test is, whether the Applicant has established a prima facie case with a probability of success; whether irreparable injury would result should the injunction be declined and if in doubt of the above two tests whether the balance of convenience tilts in favour of the Applicant.
9. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court of Appeal held that the three-pronged test must be satisfied sequentially as distinct and separate logical hurdles



and where a prima facie case is not established, then the tests of irreparable injury and balance of convenience test would not arise for consideration. The court stated: -

“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.”

10. In this case the Plaintiff seeks to recover a sum of Kshs165,735,000 alleged to have been acquired fraudulently from the State Department of Correctional Services (State Department) on account of goods that were never supplied. The Plaintiff alleges that the State Department made irregular payments amounting to Kshs 450,138,000 to 17 companies and that out of the above funds, the Defendants irregularly received a total sum of Kshs 165,735,000 during the financial years 2016/2017, 2017/2018 and 2018/2019. The Plaintiff then particularizes the alleged fraud and illegality, abuse of office and conflict of interest against the 2<sup>nd</sup> to 10<sup>th</sup> Defendants as including that they falsified various accounting and procurement documents, uttered false documents and engaged in a fraudulent procurement practice contrary to the provisions of the Public Procurement and Disposal Act 2015. The Commission makes similar allegations against the 1<sup>st</sup> Defendant, and alleges that the fraud occasioned a loss of public funds in the sum of Kshs 165,735,000.
11. The Plaintiff alleges that the impugned motor vehicles Registration numbers KCL 393R and KCK 295L were acquired by the 1<sup>st</sup> Respondent from the funds which it is alleged were fraudulently acquired by the 1<sup>st</sup> Respondent from the State Department; that, the vehicles though registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties are intrinsically tied to the sum of Kshs 165,735,000 alleged to have been fraudulently paid to the 1<sup>st</sup> Respondent and are not severable from the claim.
12. It is my finding that the question as to whether the two vehicles, though registered in the names of the Interested Parties, were acquired by the 1<sup>st</sup> Respondent and whether they are traceable to the sum of Kshs165,735,000 which is alleged to have been fraudulently paid to the Defendants/Respondents is a bona fide issue triable by this court and this court finds therefore that the plaintiff has established a prima facie case. It is also my finding that were the vehicles to be lost, transferred or wasted and the Plaintiff/Applicant’s suit succeeds, it would have nothing to which it can trace the sum of Kshs 6,900,000 allegedly used to purchase the vehicles and it would suffer irreparable loss as a result.
13. It is also in the public interest that the properties are preserved pending the hearing and determination of the suit. Moreover, since the Plaintiff/Applicant would be the party most inconvenienced were the injunction to be denied and the case succeeds given that it would have to expend more of tax payers’ money to trace the property in order to satisfy the decree the balance of convenience tilts in its favour. Conversely, the Defendant/Respondents would be adequately compensated by an award for costs should the Plaintiff be unsuccessful in the main suit.
14. In the premises the application dated October 19, 2022 is merited and it is allowed as prayed.
15. Costs shall be in the cause.



**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 6<sup>TH</sup> DAY OF JULY 2023**

**E. N. MAINA**

**JUDGE**

