



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC SUIT NO. E025 OF 2021

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

VERSUS

BENSON MUTETI MASILA.....1ST DEFENDANT/RESPONDENT

ZIPPORAH MWONGELI MUTETI.....2ND DEFENDANT/RESPONDENT

MUMBE JUNIOR ACADEMY LIMITED.....3RD DEFENDANT/RESPONDENT

MUMBE BOYS HIGH SCHOOL LIMITED.....4TH DEFENDANT/RESPONDENT

MUMBE GIRLS HIGH SCHOOL LIMITED.....5TH DEFENDANT/RESPONDENT

MUMBE HARDWARES AND SUPPLIES LIMITED...6TH DEFENDANT/RESPONDENT

SKAI (KENYA) LIMITED.....7TH DEFENDANT/RESPONDENT

RULING

Introduction

1. The Plaintiff/ Applicant commenced these proceedings by way of an Originating Summons dated 16th July 2021 which seeks forfeiture of properties belonging to the Defendants which were allegedly acquired at a time the Defendants were reasonably suspected of corruption or economic crimes. The suit is supported by an affidavit by Feiza Abdi sworn on even date. Contemporaneous with the suit, they filed a Notice of Motion dated 16th July, 2021 which was also supported by the affidavit of Feiza Abdi sworn on the same date.

2. The application is brought under **Section 1A, 1B & 3A of the Civil Procedure Act, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules 2010**. The Application seeks a temporary injunction restraining the Respondents, their agents, servants or any other person from selling, transferring, charging or further charging, leasing, developing, subdividing, disposing, wasting or in any other way alienating the assets set out in prayers 2 to 6 of the Notice of Motion Pending the hearing and determination of the suit.

3. In summary the Application is premised on the grounds that the Ethics and Anticorruption Commission (the "Applicant") has credible information that Engineer Benson Muteti Masila, the 1st Defendant in the suit and Regional Manager for the Kenya Rural Roads Authority (KeRRA) Coast Region, routinely demanded and received bribes and kickbacks from contractors and awarded tenders for the supply of public works, goods and services in the Coast region in abuse of his office; That, the Commission through its investigations also established that in the period of interest, the 1st Respondent exploited his position of trust in the public service for private gain by involving himself in transactions that were in conflict with the public interest; That the 1st Respondent took undue advantage of his position of trust to confer a benefit to himself though awarding several tenders to Skai Kenya Limited, the 7th Defendant/Respondent, a company that is directly associated with him through his brother in breach of **Section 33 of the Public Procurement and Disposal of Assets Act and Section 42 of the Anticorruption and Economic Crimes Act** and that once the 7th Respondent received payment from KeRRA the funds were electronically transferred to the 3rd, 5th and 6th Respondent companies whose directors are the 1st and 2nd Respondents. It is also the Applicant's contention that the 3rd to 6th Respondents were nascent private establishments which the 1st Respondent used as conduits to receive, hold or conceal illegitimately acquired funds. The Applicant also contends that as a Resident Engineer the 1st Respondent illegally

received technical allowances from contractors and also unlawfully retained payments due to staff working under him for various projects.

4. The Commission further alleges that the 1st to 6th Respondents had accumulated assets worth Kshs. 1,193,122,779.90 spread across landed properties, bank and Mpesa deposits, motor vehicles, listed shares and insurance policies which assets were disproportionate to their known legitimate sources of income. The value of the specific properties for each Respondent are particularized as follows:-

1st Respondent Kshs. 648,283,451.19

2nd Respondent Kshs. 84,936,042.95

3rd Respondent Kshs. 245,049,723.57

4th Respondent Kshs. 102,185,900.72

5th Respondent Kshs. 25,113,819.57 and

6th Respondent Kshs. 87,553,841.90.

5. The commission/Applicant states that on 14th and 15th November 2019 it issued notices to the Respondents under **Section 55 (2) of the Anticorruption and Economic Crimes Act** and invited them to explain the disproportion in the assets and received responses on various dates between 4th December 2019 and 12th July 2020 it received responses and upon analyzing the same assets worth Kshs. 952,363,824.99 were found to have been unsatisfactorily explained. The Applicant identifies the value of the unexplained assets for each Defendant/Respondent as follows: -

1st Respondent Kshs. 597,418,943.00

2nd Respondent Kshs. 80,764,894.95

3rd Respondent Kshs. 174,830,670.57

4th Respondent Kshs. 2,062,202.00,

5th Respondent Kshs. 17,886,849.57

6th Respondent Kshs. 79,400,266.90

6. The Commission states that it has instituted this suit for forfeiture of the unexplained assets valued at Kshs. 952,363,824.99 or in the alternative, for an order for payment of the assets' equivalent in monetary value.

7. The Applicants contend that the Respondents have in the past engaged in schemes to conceal the assets in family members' business fronts and corporate entities and it is therefore urgent to prohibit any dealings whatsoever with the said assets to obviate their dissipation as this would render the forfeiture proceedings nugatory. It is the Applicant's contention that it is just and in the public interest that the application be allowed.

8. The Applicant also relies on the Further Affidavit of Feiza Abdi sworn on 14th September, 2021 and written submissions dated 30th September 2021.

The Respondents' case

9. The Defendants/ Respondents opposed the application vide their joint Replying Affidavit sworn on 27th August, 2021 by Benson Muteti Masila, the 1st Defendant/Respondent.

10. The 1st Respondent depones that he is a qualified Engineer and was employed by the Ministry of Public Works as an Assistant Engineer on 21st July, 1993. That he worked in various projects in different parts of the country and rose through the ranks to the position of Superintending Engineer in the year 2007. That he was appointed as Manager, Roads at KeRRA on 23rd February 2009 and was posted to Makueni on 17th September 2009 as the Regional Manager. That he subsequently worked as Regional Manager in various regions including Kilifi and Mombasa and during the period of interest he was the Regional Manager Mombasa.

11. The 1st Respondent depones that on 20th December 2018 officers from the Commission conducted searches at his residential and business premises and seized original copies of documents and records belonging to the Respondent including inter alia Title Deeds, Lease Agreements, Purchase Agreements, Motor Vehicle Log Books and Insurance Policies. He depones that through six notices dated 8th November 2019 the Commission sought explanations from the 1st to 6th Respondents in regard to assets acquired between February 2009 and December 2018 but despite their responses the Applicant issued them a demand notice ref. EACC/AT/INQ/38/2018 dated 27th October 2020

for the sum of Kshs. 1,114,353,601.71 and demanded payment of the amount within 7 days. The 1st Respondent states that they submitted additional responses to the Applicant on 14th December 2020 through their advocate which were however returned to them. He deposes that the responses were re-submitted via 5 different letters sent to the Applicant between 19th March 2021 and 2nd August 2021. The 1st Respondent avers that the Applicant did not respond to those responses nor did it request for more information but instead threatened through a letter dated 8th July, 2021 to file a suit against the Respondents for the recovery of an undisclosed amount of money. The 1st Respondent asserts that in the responses dated 14th December 2020 and through subsequent responses, the 1st to 6th Respondents explained with supporting evidence each and every financial transaction carried out by themselves. The 1st Defendant/Respondent listed various bank accounts owned by the respective Respondents and stated that the Applicant has not controverted their evidence hence proving that their transactions are legitimate. He contends that the Applicant did not specify which particular deposits in the bank accounts were illegitimate but completely disregarded the explanations in support of the transactions, which action is contrary to the rights of the Respondents under **Article 47 of the Constitution as read with Section 4 of the Fair Administrative Action Act.**

12. The 1st Respondent further states that the Applicant's supporting affidavit is vague and full of general allegations of corrupt conduct, that the Applicant has also not identified any single accuser of the alleged corruption, alleged bribery and kickbacks demanded by himself. The Respondents further deny that the properties set out below were acquired during the period of interest:

i. Kasuvi Rural Residence Home - 15 acres, acquired on 5-2-1994 valued at Kshs.2,872,000.00 but purportedly valued by the EACC at Kshs.6,500,000.00

ii. Kasuvi Farmland, Makindu - 20 acres, acquired on 26 -05-2002 valued at Kshs.150,000.00 but purportedly valued by the EACC at Kshs.1,800,000.00

iii. Kasuvi Farmland – Makindu - 15 acres acquired on 22-6-2003 valued at Kshs. 150,000.00 but purportedly valued by the EACC at Kshs.750,000.00

iv. Makindu Kisingo 209 - 5.4 acres acquired on 26-4-2009 valued at Kshs. 120,000.00 but purportedly valued by the EACC at Kshs. 500,000.00

v. Mumbere schools in Makindu - 12 acres acquired on 2002 – 2004 valued at Kshs. 24,466,550.00 but purportedly valued by the EACC at Kshs. 50,000,000.00

vi. Royal Inn Guest House - 0.09 acres acquired on 5/8/2002 valued at Kshs. 760,000.00 but purportedly valued by the EACC at Kshs. 5,000,000.00

vii. Dandora Plot W41 - 0.04 acres acquired on 2001 valued at Kshs. 1,385,000.00 but purportedly valued by the EACC at Kshs. 6,000,000.00

viii. Apartment D8, Kiboko Court, Imara Daima LR No. 209/19451 original no. 209/17516 &17517 acquired on 2/2/2009 valued at Kshs.4,750,000.00 but purportedly valued by the EACC at Kshs.4,700,000.00.

ix. Motor Vehicle KWH 098 Peugeot although registered in the year 2010, the actual purchase of the vehicle took place in 1998 valued at Kshs.250, 000 but purportedly valued by the EACC at Kshs.850,000.00.

x. CFC FS STOCK BROKING CDS account no 8505390 opened on 1/4/2008 valued at Kshs. 1,400,000.00 but purportedly valued by the EACC at Kshs. 2,240,000.00

xi. The 1st Respondent asserts that the cumulative value of the above assets is Kshs.36,303,550.00 but they were purportedly valued by the EACC at Kshs. 78,340,000.00

13. They aver that the 3rd to 6th Respondents were not shell companies used to launder funds but were legitimate businesses owned by the 1st and 2nd Respondents and incorporated as follows:

i. Mumbere Junior Academy and Mumbere Boys High School were registered on 6th July 2005 before the period of interest

ii. Mumbere Girls High School was registered on 15th January 2018 but had already commenced operations on 9th February 2016 with the support of Mumbere Junior and Mumbere Boys High Schools.

14. In regard to the CDS Account No. xxxxxxxx, the 1st Respondent asserted that he invested therein on 10th August, 2009 before his deployment to KeRRA from the Ministry. With respect to payments made into his account by his brother Nenard Muthoka, the 1st Respondent contended that the same were loan repayments for funds advanced to him over a period of three years between 2013 and 2017 and that these were staggered repayments for the loans. The 1st Respondent asserted that the Respondents gave written explanations on the source of funds in KCB Makindu Branch Bank Account No. 11xxxxxxx, KCB Kibwezi Branch Bank Account No.11xxxxxxx, KCB Wote Branch Bank Account No. 11xxxxxxx, KCB Kilifi Branch Bank Account No. 11xxxxxxx, KCB Makindu Branch Bank Account No.11xxxxxxx, KCB Makindu Branch Bank Account No. 11xxxxxxx, National Bank Harambee Avenue Branch Account No. 12xxxxxxx, Barclays Bank Eldoret Branch Account No.38xxxxxx, Cooperative Bank Co-operative House Branch Account No. 10xxxxxxx, Safaricom Mpesa Account No. 700xxxxxx and Safaricom Mpesa Account No. 722xxxxxx. He contended further that the allowances drawn by the 1st Respondent from contractors were provided for in the Bill of Quantities in the Contract documents and were not

unlawfully obtained.

15. The Respondent averred that the period when he served KeRRA as Regional Manager Kilifi and Regional Manager Mombasa is 25th June 2014 and 1st February 2016 respectively and any properties acquired outside this period should not be preserved as the complaint of alleged corrupt conduct received by the Commission only relates to the period of his deployment to the Coast Region. He avers that the properties outside of that period are: **Kariobangi Plot No 1/350 (Mumbe Villa), Kariobangi Plot No 24 (Mumbe Plaza), Mathare North Plot No 16B (Metro Plaza), Mathare North Plot No 150B (City Plaza), Mathare North Plot No 26B (Royal Villa), Misongeni Makindu Plot No 7, LR NO. 27409 Superior Homes Original No 8785/2 deed Plan 266370 IR No.166801, KBM 522Q Toyota Corolla, KBZ 465C Toyota Van and two insurance policies at Madison Insurance SMI45xxxx and SMI45xxxx all valued at Kshs. 87,490,782.00 but purportedly valued by the EACC at Kshs. 226,390,000.00.**

16. The 1st Respondent also deposes that the purported valuations by the EACC Investigator in support of the Originating Summons are fictitious.

Submissions of the Applicant

17. Counsel for the Applicant submitted that the issues raised in the application are threefold:

i. Whether the Applicant has demonstrated a prima facie case with a likelihood of success.

ii. Whether the Applicant has demonstrated irreparable damage which cannot be compensated with an award of damages.

iii. Whether the balance of convenience tilts in favour of the Applicant.

18. Counsel submitted that the common thread which runs through this case is that the 1st Respondent is a public officer who was the Coast Regional Manager KeRRA, the 2nd Respondent is the 1st Respondent's spouse and that the 1st and 2nd Respondents are directors and beneficial owners of the 3rd, 4th, 5th, and 6th Respondent while the 7th Respondent, a limited liability company has a Mr. Benard Muthoka who is a brother of the 1st Respondent as a director.

19. On whether the Applicant has established a prima facie case Counsel for the applicant submitted that the applicant has concluded investigations against all the Respondents and has established that the Respondents were in possession of assets grossly disproportionate to their income, that the Commission issued notices to the Respondents to explain those assets and on receipt of their responses the commission let off some assets which were explained but at the tail end there still remained assets which were not explained as required under **Section 82 of the Anti-Corruption and Economic Crimes Act** hence these forfeiture proceedings. Counsel for the Applicant submitted that whereas the known income of the 1st Respondent during the period of interest cumulatively amounted to Kshs.27,642,215.60 he was found to have acquired landed assets amounting to Kshs. 247,440,000.00 mpesa deposits amounting to Kshs.397,588,714.35, Motor vehicle valued at Kshs.3,550,000.00, listed shares of Kshs.2,240,000.00, insurance policies valued at Kshs.25,106,952.44 hence unexplained assets of Kshs.648,283,451.19. Counsel submitted that it was also established that the 2nd Respondent a teacher at one of their school cumulatively earned Kshs.584,600 but she was in possession of assets valued at Kshs.85,520,642.95 hence a disproportion of Kshs. 84,936,042.95. Further that the 3rd Respondent had unexplained assets amounting to Kshs.245,049,723.57, the 4th Respondent of Kshs.102,185,900.72, the 5th Respondent of Kshs.25,113,819.57 and the 6th Respondent of Kshs.87,553,841.90.

20. The Applicant's position is that the impugned assets were obtained when the 1st Respondent who is a common thread in all the transactions was suspected of corruption. Counsel for the applicant submitted that during the period of interest the 7th Respondent, a private limited liability company whose director is a brother of the 1st Respondent was awarded several tenders in projects under the direct supervision of the 1st Respondent a clear conflict of interest and in violation of **Section 33 of the Public Procurement and Disposal of Assets Act**. Counsel submitted that the Applicant established that once the 7th Respondent was paid by KeRRA, the funds found their way into the accounts of the 1st to 6th Respondents. Counsel stated that the Respondents explanation that the funds were a loan repayment was not substantiated, was not supported by evidence and was not convincing and that **Section 55 (7) (b) of the Anti-Corruption and Economic Crimes Act** provides that assets acquired from persons whose assets are in question as a gift or a loan without adequate consideration is by default unexplained. Counsel submitted that other suspicious transactions involved funds received from contractors for purposes of payment to contractual staff working under the 1st Respondent which he would not pay fully which is a clear act of corruption. Counsel stated that the Respondents were accorded sufficient opportunity to explain their sources of income but they failed to do so. Counsel stated that the application by the Commission seeks to merely preserve the assets pending the hearing of the substantive motion and it stands to suffer irreparable damage if these assets are not preserved. Counsel also submitted that the balance of convenience tilts in favour of the Commission who not only acts in the public interest but has also carried out extensive investigations which are very expensive. Counsel argues that there is no demonstration that the Respondents will suffer prejudice should the application be allowed.

21. In response to the submissions of the Respondent Counsel for the applicant submitted that it is within the Applicant's mandate to define the period of interest and it is also its mandate to decide who is to be charged; That the applicant need not be confined to the complaints received and that although the period in issue is that which the 1st Respondent was the Coast Regional Manager, the complaint is that he acquired most of the disproportionate assets when he started working for KeRRA in August 2009 hence the reason the investigations go as far back as February 2009.

22. Counsel further asserted that the subject assets do not comprise all of the Respondent's assets but only the unexplained assets; that the Respondents' argument that the evidence is uncontroverted is misleading and that the law is that if the Commission is not satisfied with the explanations given it shall file a forfeiture suit as it has done in this case. Counsel submitted that as the suit is yet to be heard the issue that the evidence has not been controverted is a misnomer.

23. On the contention that the application is malicious and that the Commission has no prima facie case, Counsel submitted that the Respondents were accorded an opportunity to give an explanation and were also granted leave to file further and better particulars and that all their responses were considered before this suit was filed. Counsel submitted that as the matter is now before this court a time will come for them to adduce evidence in support of their defences. Counsel urged this court to allow the application.

Submissions of the Respondent

24. Relying on the replying affidavit sworn by the 1st Respondent on 27th August 2021 and the submissions dated 9th November 2021 Counsel for the Respondents submitted that the definition of unexplained assets in **Section 2** of the **Anti-Corruption and Economic Crimes Act** means assets of a person acquired at or around the time the person was reasonably suspected of corruption or economic crime and whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation; That investigations were commenced upon a complaint that the 1st Respondent was while working in the Coast Region asking for kickbacks and bribes from contractors and was involved in irregular award of tenders and the period in which the 1st Respondent served in the Coast Region is well known to the parties as he was posted to Kilifi on 25/6/2014 and as the acting Regional Director of Mombasa on 1st February 2016 and he served in those stations until he was suspended at the instigation of the Commission. Counsel for the 1st Respondent submitted that in view of the clear provisions of **Section 2** of the **Anti-Corruption and Economic Crimes Act**, the period of investigation ought to be confined to the period the 1st Respondent served in the Coast Region and that it is important to note that the bulk of the properties the Applicant seeks to injunct relate to a period outside that which the 1st Respondent served at the Coast Region. Counsel submitted there were properties which the 1st Respondent acquired even before he was employed by KeRRA; That the 1st Respondent was deployed to KeRRA on 10th August 2009 and that the evidence of employment of the 1st Respondent annexed to the Replying Affidavit was not controverted although the Applicant still maintains he was employed in February 2009 when he received an offer letter. Counsel contended that the date the 1st Respondent received an offer letter cannot be taken as the date he was employed.

25. Counsel submitted that the properties the 1st Respondent acquired before he was deployed to KeRRA are set out in the Respondent's affidavit and the first issue this court should determine is what is the period of interest since the Applicant intends to seize assets acquired when the 1st Respondent was an employee of the Ministry of Roads. Counsel contended that there was no complaint regarding corruption during the period the 1st Respondent worked with the Ministry of Roads. Counsel stated that the properties acquired before the 1st Respondent was deployed to KeRRA include the 1st Respondent's rural home which was acquired on 5th February 1994 and which asset was paid for by instalments up to 19th March 1995. Counsel submitted that the evidence to that effect has not been controverted by the Applicant and it is deemed not to be admitted. Counsel stated that the second property was purchased on 26th January 2002 and paid for in instalments up to 26th May 2002 while the third property Kasubi Farmland Makindu Boundary Kiboko River was purchased on 22nd June 2003, which evidence has also not been controverted. Counsel stated that the land on which the 6th Respondent is situated was purchased on 6th August 2002 and it was initially utilized for another business Royal Bar Guest House for which they have produced the relevant trading licenses.

26. In regard to the 3rd, 4th and 5th Respondents Counsel stated that the 1st Respondent has demonstrated that the land on which the schools are situated was purchased in bits and pieces with the first portion being purchased on 23rd July 2002, the second portion in instalments from 19th July 2002 to 6th September 2002 and the third portion on 3rd July 2004 up to 8th July, 2004. Counsel stated that the 1st Respondent has also produced evidence that the schools started operations in 2005 before he started working for KeRRA. That the 1st Respondent had also produced the Schools' Quality Assurance and Standards Assessment Report carried out by Quality Assessment Officers from the Ministry of Education that confirms the 3rd Respondent began operations in 2005 and that similarly the entire process of registration of the 4th Respondent as a school was also demonstrated and that they produced the approvals from the relevant authorities to show that the school begun in the year 2005 were produced.

27. On the land and other assets, Counsel stated that there was evidence that the Dandora plot was acquired in July 2001; That the said property has rental properties which were constructed from 2006 to July 2007 and that LR 209/11874 Sunrise Park was purchased on 12th February 2009 before the 1st Respondent was deployed to KeRRA. In regard to motor vehicle KWH 098, Counsel submitted that the actual purchase was in the year 1998 although the logbook was transferred in 2010. Counsel asserted that none of the evidence in paragraph 122 of the 1st Respondent's replying Affidavit had been controverted by the Applicant. He submitted that the motor vehicle has depreciated to scrap metal and therefore the investigation by the Applicant was not objective; That the Applicant alleges to have valued the motor vehicle at Kshs.850,000 yet it was purchased at Kshs.250,000 in 1998 and it is common knowledge that the value of vehicles depreciates with time.

28. Counsel further submitted that the 1st Respondent to 6th Respondent responded to each and every financial transaction and each and every asset with supporting documents and it is for this court to determine whether the responses were adequate. Counsel contended that the Applicant has chosen to ignore the Respondents' additional responses and chose to rely on those filed by the previous advocates; That the Applicant alleges to have analyzed the Respondent's responses and found them wanting but has not filed the purported analysis before this court.

29. In regard to the allegations concerning allowances Counsel submitted that the allegations that the 1st Respondent would divert allowances meant for staff to his own pocket were false and no evidence has been produced in that respect. Counsel contended that any direction given to the contractors by the 1st Respondent to pay staff would be in writing and would be accompanied by a schedule of who would be paid and that KeRRA is a public entity and any payments made are documented. Counsel contended that the Applicants seized several documents in respect of the staff allowances and it would have been easy for the Applicant to place those documents before this court to prove who the aggrieved staff were and who paid them but it instead chose to rely on mere allegations.

30. In regard to the allegation that the 1st Respondent was involved in illegal award of tenders to the 5th Respondent. Counsel submitted that the allegation is based on a deliberate misreading of the law. That under **Section 33 (1) (a) and (c)** and **subsection 2** of the **Public Procurement and Disposal of Assets Act of 2005** as read with **Regulation 26**, the extent of prohibition is to the employee, spouse and child but nothing prohibits or bars other relatives from being awarded contracts by the public entity. Counsel stated that **Section 59** of the **Public**

Procurement and Assets Disposal Act 2015 has comparable provisions and the Applicant cannot create an offence which does not exist.

31. Counsel further asserted that the Applicant did not take the time to identify the Respondent's sources of income although all relevant information was provided to the Applicant in response to the Notices to Explain. Counsel asserted that the Respondents have summarized the sources of income in their replying affidavit, and the Applicant is bound by law to consider the responses. Counsel cited the case of **NCA v Baker [2020] EWHC 822** and further submitted that the Applicant has not demonstrated that the income derived from the assets over the last 20 years would not have enabled the 1st Respondent to acquire the properties in issue and further that the applicant has also not demonstrated that the 1st Respondent's businesses are not engaged in legitimate business. Citing the case of **Ethics and Anti-Corruption CMS v Joseph Gikonyo and another 2017 eKLR**. Counsel submitted that the applicant's assertion that the property should not be released because the Respondents have not demonstrated that they are suffering has no basis in law.

32. Counsel stated that on the question whether the Applicant has demonstrated a prima facie case the court should be guided by the Court of Appeal decision in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** and the case of **Mrao v First American Bank of Kenya Limited**. Counsel argued that the Respondents have demonstrated that the Applicants have not established a prima facie case and that the balance of convenience cannot tilt in favour of the Applicant when there is evidence before the court which has not been controverted. Counsel also submitted that the applicant had obtained the ex parte orders without disclosing all the material facts and that a case is only as good as its facts. Counsel argued that the test should be one of who stands to suffer the most inconvenience should the application be allowed. Counsel pointed out that the Respondents have demonstrated how they acquired the properties and the Applicant has not controverted that evidence so the applicant cannot allege it will suffer prejudice. Counsel asserted that while proprietary rights can be limited that limitation must be proportionate. Counsel stated that the Applicant has not pointed at even one amount which it claims was a kickback. Counsel reiterated the submission that the 7th Respondent does not stand within the prohibited degree of relationship to the 1st Respondent and contended that even if he was the tenders awarded to the 7th Respondent do not amount to more than Kshs. 9.5 million as asserted by the applicant.

33. Counsel urged that should this court be inclined to grant the orders, the same should not be generalized but confined to particular properties and stated that the proceedings herein are oppressive to say the least. Counsel also urged this court to find that the Applicant has not met the conditions for grant of the orders sought and stated that **Order 40** requires an affidavit to prove that the Respondent intends to remove the properties from jurisdiction or to dispose the same. He pointed out that the investigations herein begun 3 years ago and within that time the Respondents have not attempted to dispose any of the properties and the apprehension of the Applicant is therefore not reasonable and this application should be dismissed with costs to the respondents.

Issues for determination

34. This Application seeks injunctive orders under **Order 40 Rule 1 of the Civil Procedure Rules** and **Section 56A of the Anti-Corruption and Economic Crimes Act, 2003**. The issues for determination are:

- i. Whether the applicant has met the threshold for grant of an injunction; and*
- ii. who shall bear the costs of this application.*

Analysis and determination

35. **Order 40 Rule 1** provides as follows:-

“Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

36. The principles that guide a court in considering an application for injunction were settled as follows in the case of **Giella vs Cassman Brown Co. Ltd (1973) EA**:

“It is trite and indeed an established principle of law that, for an applicant to obtain an order of injunction, he must satisfy the court that he has a prima facie case with a probability of success or, that he is likely to suffer irreparable loss or damage which cannot be compensated adequately in monetary value or, on a balance of convenience or, for any other reasonable cause, justice would tilt in his favour.”

37. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal reiterated the above principles

when it held that:-

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to; establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and all any doubts as to (b) by showing that the balance of convenience is in his favour."

38. In the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001]1E.A** the same court stated:-

"The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella –vs- Cassman Brown and Co. Ltd. 1973 E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the 1st one is satisfied and when the court is in doubt then the third condition can be addressed."

39. The Commission has spiritedly argued that the 1st Respondent acquired and accumulated assets that were disproportionate to his known legitimate sources of income throughout the period between February 2009 and December 2018 and produced documents to show that in the period of interest, the 1st Respondent's known legitimate source of income was the salary earned from KeRRA which, over the period of interest, cumulatively amounted to Kshs. 27,642,215.60. However, in the same period the 1st Respondent acquired cumulative assets worth Kshs. 675,925,666.79. Upon inquiry and set off against his known legitimate source of income he was found to be in possession of unexplained assets amounting to **Kshs. 648,283,451.19**. In the same period the 2nd Respondent, a teacher by profession and spouse to the 1st Respondent is said to have acquired assets amounting to Kshs. 85,520,642.95 out of which assets valued at **Kshs. 84,936,042.95** are unexplained assets. The 3rd Respondent, 4th Respondent and 5th Respondents Schools are owned by the 1st and 2nd Respondents and are alleged to have acquired assets valued at Kshs. 245,049,723.57, Kshs. 102,185,900.72 and Kshs. 27,885,369.57. respectively within the period of interest out of which assets valued at Kshs. 245,049,723.57, Kshs. 102,185,900.72 and Kshs. 25,113,819.57 are allegedly unexplained assets. It is alleged that the total value of the unexplained assets of the 1st to the 6th Respondents is Kshs. **1,193,122,779.90**. By this application the applicant seeks to injunct the respondents from any dealings with the properties enumerated so as to preserve them pending the hearing and determination of the recovery proceedings.

40. **Section 55 of the Anti-corruption and Economics Crimes Act** mandates the Applicant to address any dissatisfaction in explanation of acquisition of assets by institution of forfeiture proceedings as it has done in this case and the suit is the best place to address the issue of what assets were acquired during the period in issue and which were not. This is given that the Respondents will be afforded an opportunity through cross examination and by adduction of evidence to clarify their position. I say this because at this point this court is not required to go into the merits of the case but only to determine whether prima facie the applicant has demonstrated that it has a case against the Respondents which they ought to be called to answer. Having considered the material placed before this court, the rival submissions, the cases cited by Counsel and the law I am persuaded that the applicant has demonstrated a prima facie case with a likelihood of success. I am also persuaded that should the orders sought be declined and the Originating summons (forfeiture application) succeeds the applicant is likely to suffer irreparable damage as the Respondents would most likely have disposed the assets which form the substratum of the application.

41. My so saying finds support in the case of **Ethics & Anti-Corruption Commission v Moses Kasaine Lenolkulal [2019]eKLR** where the court held:-

"32. "The second issue is whether the applicant will suffer irreparable damage if the orders are not granted. According to the plaintiff, in the event the orders are not granted, the property may be disposed off to a third party and the funds withdrawn. It is true that the applicant will suffer irreparable damage or loss should the properties be disposed or funds withdrawn as there will be nothing left to forfeit and recover in the event that the suit succeeds. It is therefore equitable that the orders sought seeking to preserve the properties and funds to issue as the defendant will not suffer any prejudice by so preserving them."

42. The balance of convenience also tilts in favour of the Commission which will be inconvenienced if the orders sought are not granted as it would be left to expend public resources to trace and recover the assets if successful. I must also add that public interest dictates that all the assets be preserved pending hearing and determination of the Originating summons.

43. Accordingly, the Application is allowed as prayed but it is ordered that costs shall be in the cause. It is ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2022

E.N. MAINA

JUDGE