



**Ethics and Anti-Corruption Commission v Kanani & 5 others (Anti-Corruption Case E022 of 2023) [2024] KEHC 16638 (KLR) (Anti-Corruption and Economic Crimes) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16638 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES**  
**ANTI-CORRUPTION CASE E022 OF 2023**  
**NW SIFUNA, J**  
**NOVEMBER 7, 2024**

**BETWEEN**

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

**AND**

**NASHON WILSON KANANI ..... 1<sup>ST</sup> RESPONDENT**  
**WILLY WALLA INTERNATIONAL LIMITED ..... 2<sup>ND</sup> RESPONDENT**  
**WILCOREG LIMITED ..... 3<sup>RD</sup> RESPONDENT**  
**BRIDGE SIDE FARM ..... 4<sup>TH</sup> RESPONDENT**  
**REGINA MUNYIVA MUTINDA ..... 5<sup>TH</sup> RESPONDENT**  
**REGINEEZ ENTERPRISES LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. This is a civil forfeiture suit, brought under Section 55 (2) of the [Anti-Corruption and Economic Crimes Act \(Act No. 3 of 2003\)](#), popularly referred to as the ACECA). The same was filed through the Originating Summons dated 12<sup>th</sup> September 2023. By it, the Ethics & Anti-corruption Commission (hereinafter referred to as the Commission) filed this suit principally against the 1<sup>st</sup> Respondent Nashon Wilson Kanani an employee of the Nairobi City County. The Summons was accompanied with the Supporting Affidavit of Anderson Weru the Commission's investigator, and to which were annexed several documentary exhibits running into hundreds of pages.
2. The Commission's case against the 1<sup>st</sup> Respondent is that his assets are way beyond his known legitimate sources of income; especially his salary, which the Commission considers to be so meagre.



It has also impugned the funds and assets belonging to his wife Regina Muniyiva Mutinda, as well as those of four companies it has associated with him.

3. The Commission joined her to this suit as the 5<sup>th</sup> Respondent. The four companies, and who were also joined as co-Respondents, are: Willy Walla International LTD (the 2<sup>nd</sup> Respondent), Wilcoreg LTD (the 3<sup>rd</sup> Respondent), Bridge Side Farm (the 4<sup>th</sup> Respondent) and Regineez Enterprises LTD (6<sup>th</sup> Respondent).
4. The Commission has also impugned funds on the bank accounts of his children, as well as those on the bank accounts of those companies. It has in this suit asserted that those assets and funds are only disguised as belonging to these others, but actually belong to the 1<sup>st</sup> Respondent; and that that is ploy meant to conceal the true ownership of those assets and funds.
5. The Commission has in this suit asserted that the explanations that the Respondents have given it, on how those assets and funds were acquired, are unsatisfactory. Hence that those are unexplained assets. The assets include: several parcels of land, motor vehicles as well as funds on Mpesa Accounts and on Bank Accounts.
6. It has in this Summons and by the said Supporting Affidavit, stated that it suspects those assets and funds to have been acquired by the 1<sup>st</sup> Respondent through corrupt activities- especially bribes and “kick-backs”. It has further stated that he has previously been convicted of soliciting bribes. The said conviction was in Nairobi Cm’s Court Anti-corruption Case No. 29 of 2007, in which he was the Accused.

### **Civil Forfeiture Suits**

7. Under Kenya’s Anti-Corruption law, civil forfeiture suits can either be brought by the Assets Recovery Agency (ARA) or by the Commission. The Commission’s forfeiture suits are filed under the ACECA, while the ARA’s forfeiture suits are filed under the *Proceeds of Crime and Anti-Money Laundering Act (Act No. 9 of 2009)*, popularly referred to as the POCAMLA).
8. Distinguishing forfeiture proceedings under the two legislations, Okwengu JA, in Pamela Aboo v. Assets Recovery Agency & Another (Supra), observed as follows:

“ACECA and POCAMLA provide for forfeiture of illegally acquired property and proceeds of crime, respectively. However, there is some distinction in the procedure provided in the two statutes. While in POCAMLA, Section 94 as read together with Section 92 empowers the court to issue an order of forfeiture of proceeds of crime if it is proved on a balance of probability that the property has been used or is intended for use in the commission of an offence or is proceeds of crime, ACECA provides under Section 55 for forfeiture of unexplained assets which is concerned with disproportion between the assets concerned and the known legitimate income of a person found with the assets.

### **Analysis and Determination**

9. This suit proceeded by way of written submissions, with the Commission and the Respondents filing their respective submissions. Upon distilling the parties’ pleadings, their respective supportive Affidavits and their written submissions, the issues for determination in this matter are follows:
  - a. Whether there is proof that the 1<sup>st</sup> Respondent Wilson Nashon Kanani, has engaged in corruption.



- b. Whether the Respondents have satisfactorily explained how the impugned assets and funds were acquired; and whether the same were acquired through corruption.
  - c. Whether the said assets and funds are disproportionate to the known legitimate sources of income of the 1<sup>st</sup> Respondent and his co-Respondents; and
  - d. Whether therefore the said assets and funds should be forfeited to the state as having been acquired through corruption.
10. It is a trite principle of law, that he who alleges must prove. This is a general rule, and which like any other general rule in law, has exceptions. To act to the contrary, one has to bring oneself under those exceptions; otherwise ordinarily, it is the allegor that has the burden of proving that which he or she has alleged.
11. Under Kenyan law, this general rule has been encapsulated in Sections 107 to 109 of the *Evidence Act* (Cap 80 of the Laws of Kenya) which provide as follows:

Section 107 (Burden of Proof)

- (1) “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”
- (2) “When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

Section 108 (The Incidence of the Burden)

“The incidence of the burden of proof in a suit or proceeding, lies on that person who would fail if no evidence at all were given on either side.”

Section 109 (Proof of Particular Fact)

The burden of proof as to any particular fact, lies on the person who wishes the court to believe in its existence, unless it is provided by any law, that the proof of the fact shall lie on any particular person.”

12. Nairobi Civil Appeal No. 452 of 2018 Pamela Aboo V. Assets Recovery Agency & Another, the Court of Appeal addressed this issue of the legal burden of proof, and contradistinguished it with the evidential/evidentiary burden of proof. In that Appeal, Warsame JA explained as follows:

”The legal burden lies only on one of the parties and does not shift to the other party throughout the length and breadth of the trial. Section 108 explains that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

“On the other hand, evidential burden refers to the obligation on a party to adduce sufficient evidence of a particular contested fact in order to justify a decision on that fact in his favour. It is also elementary that in civil cases, the standard of proof required is on a balance of probabilities or on preponderance of evidence.

“A litigant who fails to discharge the evidential burden in a case carries the risk, he may lose the whole or some part of the case. Furthermore, unlike the legal burden, the evidential burden is not static; it keeps shifting between the parties throughout the trial.”



13. There has been a mistaken position that in forfeiture proceedings under the ACECA, all that the Commission needs to do is allege, and the legal burden of proof is then on the subject to explain how the assets were acquired. I can't disagree more.
14. That legal burden of proof remains with the Commission throughout the suit and at no time does it shift to the subject. This is because this burden rests on the party that will lose the case if no evidence is adduced at all on either side. That party in these suits, is the Commission as the instituter of suit.
15. The burden borne by the subject to explain, is only an evidentiary burden, and which like a pendulum will keep swinging between the Commission and the subject on particular assertions and counter-assertions. It will at the onset of the case rest with the Commission, and then shift to the subject once the Commission has established a prima facie case. A prima facie case is one that requires an answer from the other party.
16. In *Stanley Mombo Amuti v. Kenya Anti-Corruption Commission (2019)* eKLR where the court was dealing with the concept of unexplained assets and notice to explain Under Section 2 as read together with Section 55 (2) of the ACECA, it explained this evidentiary burden as follows:

“Under Section 55 (2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset.”
17. Section 2 of the ACECA has defined an “unexplained asset” to mean:
  - a. Acquired at or around the time the person was reasonably suspected of corruption or economic, crime; and
  - b. Whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.
18. This suit being a civil suit and these proceedings being civil proceedings and not criminal proceedings, the required threshold of proof (also called the standard of proof), is that of a balance of probability. This standard and which is also described as preponderance of doubt (or preponderance of evidence as referred to in the *Black's Law Dictionary*), is of a lesser degree than the criminal law's beyond reasonable doubt; and comparatively easier to achieve than the latter.
19. The balance of probability does not mean and is not synonymous with equality of probability. To meet this threshold, the probability proffered by the protagonist, has to be higher than that proffered by the antagonist. Thus, the positive probability has to be more than fifty percent. This standard was aptly put by Lord Denning in *Miller v. Minister of Pensions (1947)* 2 All ER 372 in the following statement:

“If the evidence is such that the Tribunal can say ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal, it is not.”
20. If at the close of the evidence, an objectively-minded person seized of the facts will say this fact is more probable than not, this standard will have been attained. The electing by Anti-Corruption Authorities, to institute civil forfeiture proceedings rather than criminal proceedings, is opting for this lower threshold. In such proceedings, this same degree of proof (a balance of probability or preponderance of evidence) is expected of the Defendants and Respondents.



21. While civil forfeiture suits such as this one, are based on suspicion (and which should be reasonable suspicion), a court of law is a court of proof. It is not a court of mere perceptions, suppositions and presumptions. Therefore, to sustain a suit of any kind, including a civil forfeiture suit such as this one, some form of proof is required. Even from the Commission itself. As a court of law unlike a lynch mob, acts only on evidence and not mere unproved allegations and assertions. Such evidence being satisfactory and to the required legal threshold of proof. As such, this Court cannot act without evidence, or outside the evidence on record.
22. Let me now turn to what I have hereinabove identified as the issues for determination.

**a. Whether there is proof that the 1<sup>st</sup> Respondent has engaged in corruption.**

23. The Commission's case in this suit is not solely that the impugned assets and funds are unexplained. It has also stated the 1<sup>st</sup> Respondent is a corrupt person who has previously been convicted in Nairobi Cm's Court Anti-corruption Case No. 29 Of 2007 Republic V. Wilson Nashon Kanani, of soliciting bribes. Therefore, unlike a straight-jacket unexplained assets forfeiture case, this case has also made allegations of corrupt conduct based on a previous conviction by a court of law.
24. In answer to that averment, the 1<sup>st</sup> Respondent has in the Response filed to this suit, clarified that he appealed the said conviction, and it was overturned by the High Court in Nairobi High Court Criminal Appeal No. 381 Of 2010 Wilson Nashon Kanani V. Republic (Ajode, J as she then was). That Appeal is reported in the Kenya Law Reports as Wilson Nashon Kanani v. Republic [2012] eKLR.
25. The issue of that conviction is therefore one of the facts in issue in this suit, and for which evidence was to be called. This issue is one of the facts in issue in this suit, and a prime one. It is not such as can just be disregarded. Because the Commission is asserting it as a previous conduct to support its assertion that the impugned assets and funds are more likely to have been acquired through corruption.
26. That conviction having been quashed by the High Court on Appeal, the effect of its having been quashed on Appeal, is that the status reverts to the status ante (before the conviction). No one may thereafter rely on the said quashed conviction to urge a position against the 1<sup>st</sup> Respondent. Therefore, the Commission's reliance on that conviction fails, and in the absence of any other evidence, there is no evidence on record in this suit to prove that he or any of the Respondents has engaged in corruption or corrupt activities as alleged by the Commission in this suit.

**b. Whether the Respondents have satisfactorily explained how the impugned assets and funds were acquired, and whether the same were acquired through corruption.**

27. As already stated in this judgment, in Stanley Mombo Amuti v. Kenya Anti-Corruption Commission (supra), an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset.
28. The Respondents in the Response to this suit provided explanations on the impugned assets and funds, together with an Audit Report, Audited Accounts, and Bank statements. They further explained that the Commission wrongly classified bank and Mpesa credits as assets. That in arriving at its findings on alleged 'unexplained assets', considered credits, deposits and gross revenue as 'unexplained assets'.
29. They have maintained that this the Commission did without analyzing the withdrawals and/or transfers from those accounts. That it neglected to establish the base value of the deposits and/or income the subject of the allegations that there was a disproportion with the known sources of income.



30. They further contended that the investigations by the Commission were a sham and are not supported by an Investigation Report. Also, that the Commission has usurped the mandate of Kenya Revenue Authority (KRA) as to filing of tax returns, which they argue could only be pursued by the Authority itself and not the Commission. Further that the Commission never sought valuation of the impugned properties and hence did not produce any valuation reports, especially for parcels of land; and that the property values stated in this suit are merely the Commission's own estimates that are not accurate.
31. They further explained that, some of the impugned assets and funds blamed on the 1<sup>st</sup> Respondent are those that do not belong to him, and are not registered in his name. Hence that for such, the Commission needed to in this suit demonstrate the nexus between those and him. That the Commission failed to provide evidence of any nexus.
32. As for the properties belonging to the 1<sup>st</sup> Respondent, the Response has stated that those were declared by him in Declaration of Income, Assets & Liabilities under the Public Officers Ethics Act. This declaration is mandatorily required of public servants periodically, and the 1<sup>st</sup> Respondent has stated that the properties are contained in his Wealth Declaration Forms that he submitted to the Government.

**c. Whether the impugned assets and funds are disproportionate to the known legitimate sources of income of the 1<sup>st</sup> Respondent and his co-Respondents.**

33. One of the most contentious tests in civil forfeiture suits such as this, is the disproportionality test. In this test, it has to be proved that the impugned assets and funds are disproportionate to the subject's known legitimate source(s) of income.
34. On forfeiture for disproportionality, the court in Stanley Mombo Amuti v. Kenya Anti-Corruption Commission (supra) observed that "the cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income." (Emphasis mine)
35. I am of the considered persuasion that in forfeiture suits based on the ground of the asset being an "unexplained asset", the court should apply an objective test rather than a subjective test. Especially when determining whether the asset is beyond the subject's "known legitimate source(s) of income".
36. The question that arises in pursuit of this objectiveness is, known to who? To the subject himself, to the Anti-Corruption Authority, or to his friends, enemies and associates; or to the general public? This is the elephant in the room. While knowledge is key on this issue, it should in my view be based on the already known income, as well as that which becomes known upon being ascertained from information and documents that will have been provided. Such sources being not only known, but also legitimate.
37. I am of the further view that on this issue, the subject has the right and evidentiary burden of proving his source(s) of income, and with the Commission having the legal as well evidentiary burden of proving that it has ascertained the subject's known legitimate sources of income. That is why the Commission should before instituting such proceedings, first issue the subject with a Notice to explain his sources of income.
38. The stance seemingly taken by the Commission in this case, is that the 1<sup>st</sup> Respondent's salary is too meagre to support his existing asset base or justify the impugned assets and funds. I disagree with the position that for a person in employment, his known legitimate source of income should be only his salary. This is not only presumptive but also fallacious. An enterprising salaried person can invest and have other sources of income away from his monthly salary. This is how the 1<sup>st</sup> Respondent has in this suit described his massive investments and provided documents to support this.



39. A junior employee who wisely invests his supposedly meagre salary, can be wealthier and have more assets than an executive that spends his otherwise humongous salary on leisure and sin. Therefore, the Commission fell into error in proffering that the 1<sup>st</sup> Respondent's allegedly "meagre" salary should be his only legitimate source of income and therefore the sole yardstick for rationalizing his assets under the ACECA.
40. On the allegation of disproportionality, the Respondents have in their response and in their filed submissions further argued that the Commission has in this suit, failed to establish their (the Respondents') actual known sources of income, hence that it cannot allege disproportionality.
41. Further that it has disregarded or neglected to consider the 1<sup>st</sup> Respondent's other businesses and which is an essential ingredient of a suit for unexplained assets. That the Commission merely focused on his salary in disregard of his other sources of income; and ignored explanations he gave it on his various sources of income and of the respective transactions.
42. As for many of the landed properties, justification and evidence were provided. He owned up for what he owns and provided explanations and justification in their manner of acquisition.
43. He also explained the ones that belong to the estate of his late father and are not in his name. For these again he has provided satisfactory evidence. We need to recognize inheritance as a source of wealth. While many parents squander their lifetime and on passing on leave their children with nothing to inherit, many wise others while living remember to invest in property, and upon their passing on, leave their offspring and descendants with property to inherit.

#### **Joinder of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents.**

44. Joinder of another to a recovery suit as a Respondent must be accompanied with a demonstration of some nexus to the principal subject (the principal Respondent) who in this case is the 1<sup>st</sup> Respondent.
45. Regina Munyiva Mutinda the 5<sup>th</sup> Respondent is his wife. The reason for her joinder seems to be by reason of being the 1<sup>st</sup> Respondent's spouse, and for reason only of that spousal tie, if for nothing else. Which is inappropriate and oppressive. As from the evidence adduced by the Commission in this suit, no wrong-doing on her part has been demonstrated. Indeed, the Commission has in this suit described her as the 1<sup>st</sup> Respondent's wife.
46. Crucifying a spouse merely for being a person's spouse and without any wrong-doing on her part, is a rather ridiculous and needless. Despite the presumption of oneness, when it comes to criminal or quasi-criminal liability such as is alleged in this suit, each spouse should answer to his or her own sins. Lest marriage to some profiled persons be an overly perilous venture.
47. Notably, she had objected to the Commission's Notice of including her in the investigation on the ground of being the 1<sup>st</sup> Respondent wife. The Response filed in response to this suit has demonstrated her entrepreneurial skills and business acumen that have enabled her to run companies that win tenders and undertake big projects in parts of Kenya. These sources of income are not only in the Response, but are supported by the Audit Reports and financial statements that the defence filed in this suit.
48. As for companies, upon incorporation they become legal personalities of their own, separate and distinct from their incorporators or Directors. They cannot be punished for the infractions and personal wrong-doings of its directors or shareholders. If the properties they own have to be forfeited, there should first be the lifting of the corporate veil. Of course, where it is demonstrated that a company's shareholder or director has hidden tainted property in the company, the same shall after



due process, be for forfeiture. After all forfeiture proceedings are proceedings in rem (as against the property).

49. The 2<sup>nd</sup> to the 6<sup>th</sup> Respondents have in this suit argued that their joinder in the investigations and consequently in these proceedings was without first establishing their nexus with the 1<sup>st</sup> Respondent the person of interest in this matter. That this the Commission did in disregard of for instance the 6<sup>th</sup> Respondent's response to the Commission's precursory Notice together with forensic audit reports and bank statements demonstrating its sources of wealth while maintaining that it has no connection whatsoever with the 1<sup>st</sup> Respondent, the principal subject in this suit.
50. I need to clarify that for preservation orders at the preservation stage, all that is required of the Commission, is reasonable suspicion and only reasonable suspicion. But for forfeiture orders on the suit itself, these are drastic and eventual, hence requiring that the Commission moves from mere suspicion to proof. Ours being an adversarial and not an inquisitorial justice system, the ball was in the hands of the two contestants (the Commission and the subject) to out-smart each other.
51. With the Commission having the burden of establishing a prima facie case against the subject and the impugned assets, and the subject having the unenviable burden of satisfactorily explaining how the assets were acquired, and that they were not obtained through corrupt conduct. As this stage, the Commission can no longer rely on suspicion or on the honeymoon that obtained at the time of obtaining the preservation orders.
52. The Commission's version throughout the suit, was that it has reasonably suspected the impugned assets and funds to have been acquired through corrupt conduct, and that the subject failed to satisfactorily explain to it (the Commission) how those were acquired. The Respondents' version was that those were not acquired through corrupt conduct, and that therefore the Commission's suspicion was unreasonable or baseless.
53. In an earlier ruling I issued at the interlocutory stage of this suit, I observed that at that stage, a court adopts a precautionary approach and applies the precautionary principle which is an emerging legal principle in Anti-Corruption law, especially in civil forfeiture suits. Which principle is that any suspected property or asset needs to be quarantined and preserved until it is determined that it was not acquired through corruption. That is the subject has explained how it was acquired, and proved that it was not acquired through corrupt conduct.

### **The Final Determination**

54. In the totality of evidence so far on record in this suit, I find that the Commission has failed to prove that Wilson Nashon Kanani the 1<sup>st</sup> Respondent, has engaged in corruption. Not even on the rather generous balance of probability (preponderance of evidence) standard. There is truly no evidence at all for that on record, as the conviction by a criminal court was overturned on Appeal. Therefore, the Commission's accusation that he has engaged in bribery and kick-backs, rested on quick sand.
55. I further find that the Respondents have satisfactorily explained how the impugned assets and funds were acquired. They have also explained that there is no proof that these assets and funds were acquired through corruption.
56. I also find that there is no proof on record, that the said assets and funds are disproportionate to the known legitimate sources of income of the 1<sup>st</sup> Respondent or his co-Respondents. Having so found, there is in this suit no legal basis or lawful justification why the impugned assets and funds should be forfeited. They have been vindicated.



57. In consequence, this suit is for dismissal, and I hereby dismiss it accordingly. Each party shall bear its own costs. With this dismissal, the interlocutory injunctive preservative orders hitherto in force, are hereby discharged and the impugned assets and bank accounts are hereby unfrozen forthwith.

**DATED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**PROF (DR) NIXON SIFUNA**

**JUDGE**

