



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CIVIL SUIT NO. 15 OF 2019

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

VERSUS

PATRICK OCHIENO ABACHI1ST DEFENDANT

ROSALINE WANJIRA ABACHI.....2ND DEFENDANT

BENJAMIN MAKOKHA ABACHI.....3RD DEFENDANT

MOSES ODUORI.....4TH DEFENDANT

LORIAN JUMA5TH DEFENDANT

ODEAR NASEWA HOLDINGS LIMITED.....6TH DEFENDANT

RICKAIR TRAVEL AGENCIES LIMITED.....7TH DEFENDANT

JUDGMENT

Introduction

1. This matter has had a rather long sojourn in our courts. It was initiated by way of an Originating Summons dated 18th September 2008. In the application brought under the provisions of the Anti-corruption and Economic Crimes Act (ACECA), the plaintiff, then the Kenya Anti-Corruption Commission (KACC), the predecessor of the Ethics and Anti-Corruption Commission (EACC), sought various orders against the defendants. A series of suits, petitions and applications have derailed the hearing of the substantive issues raised in the application. Ultimately, however, the pending suits and applications were disposed of, and the matter is now ripe for determination.

The application

2. In the Originating Summons lodged under the provisions of section 55 of ACECA and Order XXXVI of the Civil Procedure Rules, the plaintiff seeks determination of the following issues as against the defendants:

- 1. Whether the Defendants are in possession of unexplained assets itemised hereunder at paragraph 4;**
- 2. Whether the properties listed at paragraph 4 hereunder ought to be preserved pending the determination of the suit;**
- 3. Whether the assets listed at paragraph 4 constitute 'unexplained assets' under Sections 2 and 55 of the Anti-Corruption & Economic Crimes Act;**
- 4. Whether Declarations should issue that the following properties namely:-**

a. Ngong/Ngong/14888, situated within Kajiado District registered in the name of the 1st Defendant;

- b. L.R. No. 337/1543, Mavoko Municipality Council (sic) registered in the name of 1st Defendant;
 - c. L.R. No. 337/1544, Mavoko Municipality Council registered in the name of 1st Defendant;
 - d. Kajiado/Kitengela/6491, Kajiado District, registered in the name of 1st Defendant;
 - e. Apartment No. 4 - Block A5, L.R No. 209/11646, Parkview, South C, situated within Nairobi and registered in the name of 1st Defendant;
 - f. Apartment No.7 — Block B4, L.R No. 209/11646, Parkview, South C, situated within Nairobi and in the name of 1st Defendant;
 - g. House No. HG. 60, L.R No. 146/69, Mugoya Estate, situated within Nairobi and registered in the name of 1st Defendant;
 - h. Kajiado/Kitengela/20644, situated within Kajiado District and registered in the name of 3rd Defendant;
 - i. Kajiado/Kitengela/20580, situated within Kajiado District and registered in the name of 3rd Defendant;
 - j. Kajiado/Kitengela/20641, situated within Kajiado District and registered in the name of 5th Defendant;
 - k. Kajiado/Kitengela/20609, situated within Kajiado District and in the name of 4th Defendant;
 - l. L. R. No. MN/1/5134, C. R. No. 35667 situated within the Municipality of Mombasa and registered in the name of the 6th Defendant;
 - m. Motor Vehicle Registration No. KAS 108X, Toyota Pick Up, registered in the name of 1st Defendant;
 - n. Motor Vehicle Registration No. KAV 170C, Toyota Lexus, registered in the name of 7th Defendant;
 - o. Motor Vehicle Registration No. KAU 105T, Mitsubishi Saloon, registered in the name of 1st Defendant;
 - p. Motor Vehicle Registration No. KAS 336X, Toyota Saloon, registered in the name of 2nd Defendant;
 - q. Motor Vehicle Registration No. KAU 372M, Toyota Station Wagon, registered in the name of 3rd Defendant;
 - r. Funds held in the following bank accounts:-
 - i. Barclays Bank of Kenya, Queensway Branch, Account No. [...] in the name of Rick Seaside Villas;
 - ii. Co-operative Bank Limited, Co-operative House Branch, A/C No. [...];
 - iii. Housing Finance Company of Kenya Limited, A/C No. [...];
 - iv. Cash in the sum of Kshs. 1,990,000/- recovered from the 1st Defendant's premises and held by the Plaintiff constitute unexplained assets;
5. Whether the Defendants ought not be condemned to pay to the Government the sum of Kshs. 75,690,000.00 being the value of some of the above listed properties constituting unexplained assets and in default the said properties be sold through public auction and the sale proceeds paid to the Government of Kenya or;
6. Whether the funds mentioned in (r) & iv should be forfeited to the Government;
7. Whether the sum of Kshs. 1,990,000/- held by the Plaintiff should not be forfeited to the Government of Kenya;
8. Whether the afore-listed properties being unexplained assets should be forfeited to the Government of Kenya;
9. Costs

3. The application is supported by an affidavit sworn on behalf of the plaintiff by Enoch Nguthu and is based on the grounds set out on the face of the application. Briefly summarized, these are, first, that the plaintiff is mandated under section 7 of ACECA to undertake investigations into allegations of corruption or economic crimes. It is further empowered, in appropriate cases, to institute civil proceedings against any person for the recovery or restitution of property acquired through corrupt conduct. Secondly, under section 55 of ACECA, the plaintiff is mandated to commence proceedings for forfeiture of unexplained assets against a person who has assets that are disproportionate with his known legitimate sources of income.

4. The plaintiff contends that the 1st defendant was at the time of the application employed as a Chief Accountant, Ministry of Agriculture, with a gross monthly salary of Kshs. 53,900. The plaintiff had, however, received credible information that the 1st defendant had acquired the assets the subject of the application (hereafter 'the assets') through corrupt conduct. It had commenced investigations and issued a statutory notice under section 26 of ACECA requiring the 1st defendant to explain how he acquired the assets. It had also established that between 2002 and 2007, the 1st defendant had acquired the assets which, at the time of filing the suit, were valued at over Kshs. 80,840,000.00. It had also established that the assets which are registered in the names of the 2nd to 7th defendants are held in trust for the 1st defendant.

5. The plaintiff further states that it had seized cash in the sum of Kshs. 1,990,000.00 pursuant to a search conducted at the 1st defendant's house whose source he had not been able to satisfactorily explain. It is its case that the assets were acquired at a time when the 1st defendant is suspected to have been engaged in corrupt conduct, and was also suspected to have received large sums of money. The plaintiff had given the 1st defendant an opportunity to explain the disproportion between the assets and his known legitimate sources of income at the time of acquisition of the assets. It was not, however, satisfied that he had given an adequate explanation.

6. The plaintiff had obtained orders preserving the assets for a period of six months pending investigations pursuant to section 56 of ACECA in High Court Miscellaneous Civil Application No. 100 of 2007- KACC V Patrick O. Abachi & 5 Others. It was also granted interim orders on 22nd September 2008 restraining the defendants from transferring, disposing of or otherwise dealing with the subject properties pending the hearing and determination of the suit.

7. The defendants opposed the suit by way of a Replying Affidavit and a Supplementary Affidavit, both sworn by the 1st defendant on 23rd September 2020. They deny that the 1st defendant is in possession of unexplained assets and ask the court to dismiss the suit against them.

8. In order to make a proper determination of the issues raised in this suit, it is necessary to set out the respective pleadings and submissions of the parties, as well as the evidence on cross-examination of the plaintiff's witnesses pursuant to an application in that regard by Counsel for the defendants.

The Plaintiff's Case

9. The plaintiff's case is set out in the Originating Summons dated 18th September 2008 and the affidavit in support sworn by Enoch Nguthu on the same day. A Supplementary Affidavit sworn by Pius Maithya on 5th August 2020 was also filed in support of the application, as well as two sets of submission.

10. In his affidavit in support of the Originating Summons, Enoch Nguthu, an Investigator with the plaintiff at the time this matter was filed, states that he was a member of the team that investigated the matter of the unexplained assets of the 1st defendant. He avers that the plaintiff had received credible information that the 1st defendant, a public officer, had amassed a lot of property that was disproportionate to the emoluments he was expected to have earned as a public officer. The 1st defendant was employed in the public service and was at the time of the institution of the suit the Chief Accountant in the Ministry of Agriculture. He had a gross monthly salary of Kshs. 53,900 as was evidenced by copies of his pay slips for the period October, 2006 to November, 2007 (Annexures "EN1 (1) to iv)").

11. The 2nd defendant is the 1st defendant's wife, while the 5th defendant is his brother. The 3rd and 4th defendants are close kin and associates of the 1st defendant. The 6th and 7th defendants are limited liability companies in which the 1st defendant is a majority shareholder.

12. Upon preliminary investigation, the plaintiff found out that the 1st defendant did indeed own a lot of properties in many parts of the country. It conducted a search of his residential premises, House No. HG. 60 L.R No. 146/69, Mugoya Estate, Nairobi and found cash in the sum of Kshs. 1,990,000/-. The 1st defendant could not adequately explain the source of the said cash. The plaintiff placed before the court a copy of the inventory of the items that it had collected from the 1st defendant's residential premises (Annexure "EN2"). The plaintiff's team also recovered in the 1st defendant's premises documents relating to the assets the subject of this suit.

13. According to the plaintiff, most of the properties set out above are registered in the name of the 1st defendant. The rest of the properties are either registered in the names of the 2nd defendant, who is the 1st defendant's spouse, his close relations or companies in which he is the majority shareholder as title documents and logbooks in respect thereof (annexures EN4 (i) to (xvi)) demonstrate.

14. According to the plaintiff, as demonstrated by bank statements in respect thereof (annexure "EN3 (i) to (iii)") the 1st defendant was also a signatory to accounts held in his name or in the names of the corporate defendants as follows:

i) Barclays Bank of Kenya Queensway Branch, A/C No. [...] in the name of Rick Seaside Villas;

ii) Co-operative Bank, Co-op House Branch A/C No. [...] in the 1st defendant's name

iii) Housing Finance Company Limited A/C No. [...] in the 1st defendant's name.

15. It is the plaintiff's case further that, as copies of the certificates of incorporation and Memorandum and Articles of Association of the companies (annexures "EN5 (i) to (vi)) demonstrate, the 1st defendant is a major shareholder in Odear Nasuna Holdings Limited, Rick Air Travel Agencies Limited and Rick Seaside Villas Limited. It asserts that these companies are "cloak companies" used by the 1st defendant in the acquisition of properties. Further, that the 1st defendant also conducts his transactions in the name and style of Cyber General Agencies, Urban Retail Agencies, Rick Seaside Villas and Mackan Enterprises as the copies of the certificates of registration of these entities and a

letter from the Companies Registry (annexures "EN6 (i) to (iv)") demonstrate.

16. The plaintiff states that its investigations revealed that the 1st defendant owns assets which are not proportionate to his known legitimate sources of income, which is his salary and allowances as a public officer. It contends that in purported compliance with the Public Officers Ethics Act, 2003, the 1st defendant filed wealth declarations as evidenced in the Wealth Declaration Forms for the years 2003 and 2007 (annexures "EN7 (i) and (ii)) but failed to disclose all his properties.

17. Between October 2003 and 2007 when the 1st defendant was working at the Ministry of Finance, investigations revealed that he was directly involved in the transactions and authorised payment relating to what is commonly referred to as the Anglo Leasing security type and related contracts as demonstrated by annexures "EN8 (i) to (iv)" which are copies of the documents authorising payment handled by the 1st defendant. The Anglo Leasing security type contracts comprise eighteen contracts entered into between the government of Kenya and various foreign companies, alleged to be nonexistent, through which the government was to pay out billions of monies. The said contracts were under investigation by the plaintiff and it was reasonably suspected that the contracts were tainted with corruption.

18. Following its investigations, the plaintiff had issued a notice (annexure "EN9") under section 26 of ACECA to the 1st defendant asking him to explain how he acquired the assets. In his response, the 1st defendant, through the letters dated 14th January, 2008 and 26th February, 2008 (annexures "EN10 (i) and (ii)"), attempted to explain the manner of acquisition of his properties. It is the plaintiff's case that the 1st defendant acquired the properties at issue between 2004 and 2007 during which time he was suspected of corruption and economic crime. He had also, during the same period, deposited large amounts of money in his various bank accounts. The funds, whose source he could not explain, were as follows:

Bank	Date	Amount deposited
Co-operative Bank	10/04/2007	Kshs. 600,000.00
	31/05/2007	Kshs. 400,000.00
	05/06/2007	Kshs. 100,000.00
	07/06/2007	Kshs. 160,000.00
	29/06/2007	Kshs. 374,808.00
	03/07/2007	Kshs. 140,000.00
Barclays Bank	31/08/2006	Kshs. 700,000.00
	11/10/2006	Kshs. 174,000.00
	14/11/2006	Kshs. 500,000.00
	27, 28 & 29/12/2006	Kshs. 293,000.00
	04/01/2007	Kshs. 162,000.00
	02/04/2007	Kshs. 300,000.00
	10/04/2007	Kshs. 289,651.00
	23/04/2007	Kshs. 234,000.00
	14/05/2007	Kshs. 350,000.00
	20/06/2007	Kshs. 300,000.00
04/09/2007	Kshs. 800,000.00	
HFCK	17/11/2003	Kshs. 600,000.00
	03/02/2004	Kshs. 100,000.00

12/08/2004 Kshs. 180,000.00

13/07/2005 Kshs. 1,500,000.00

19. It is the plaintiff's case that it is not satisfied with the explanation given by the defendants with regard to the manner in which the assets had been acquired. The 2nd defendant had disclosed in her statement (annexure EN 11) that motor vehicle registration number KAS 336X and property L. R. No. MN/ 5134 Rick Seaside Villas which are registered in her name or jointly in her name and the name of the 1st defendant, were solely bought by the 1st defendant without any contribution from her. In his statement (annexure "EN12"), one Gabriel Mallo, an employee of the 1st defendant and a director of the 7th defendant, had stated that the 7th defendant does not own any land or motor vehicle since it is a relatively new company. Motor vehicle registration number KAV 170C was registered in the 7th defendant's name but is owned by the 1st defendant.

20. Through its licensed valuer, Pius Maithya, the plaintiff had carried out a valuation of some of the properties reasonably suspected to be the unexplained assets of the 1st defendant and had arrived at the following valuations of the properties at the time of filing this suit:

Property	Year	Market value
Acquired	(Kshs)	
MN/1/5134	2006	54,000,000.00
House No. HG 60	2005	5,000,000.00
L.R. 337/1543 &1544	2003	5,000,000.00
Apt 4 Parkview	2005	4,500,000.00
Apt 7 Parkview	2005	4,500,000.00
Kajiado/ Kitengela/20644	2005	600,000.00
Kajiado/ Kitengela/20641	2005	600,000.00
Kajiado/ Kitengela/20580	2005	600,000.00
Kajiado/ Kitengela/20609	2005	600,000.00
KAU 372M	2005	350,000.00
KAV 170C	2004	1,500,000.00
KAS 108X	2004	600,000.00

21. The plaintiff had not been able to value the other assets registered in the name of the defendants. However, a transfer of L. R. No. Kajiado/ Kitengela/6491 (annexure "EN 13") indicated that the 1st defendant had purchased it at a consideration of Kshs. 1 million on or about 13th July 2005. The plaintiff placed in evidence the valuations of some of the properties (annexure "EN14 (i) to (vi) and estimated the total value of the properties at over Kshs. 80,840,000.00. Its case is that the properties in the names of the 2nd to 7th defendants are held in trust for the 1st defendant as the explanation given by the 1st defendant for being in possession of the title documents is not satisfactory.

22. The plaintiff contends that it is reasonably suspected that the unexplained assets owned by the defendants have been obtained through corrupt conduct and that the defendants ought to be ordered to pay to the government a sum equivalent to the value of the properties in question having failed to give a satisfactory explanation on their acquisition. The 1st defendant has been afforded a reasonable opportunity to explain the disproportion between the assets and his known legitimate sources of income but the explanation he has given is not satisfactory as he has failed to demonstrate that the properties were obtained otherwise than as a result of corrupt conduct.

23. The plaintiff notes that although the 1st defendant, in his reply to the notice under section 26 of ACECA, stated that the house he resides in at Mugoya Estate is under tenant purchase scheme, there is evidence in the form of copies of a letter from the Ministry of Lands and Housing, letter of acceptance by the 1st defendant, bankers cheques and payment receipt (annexures EN15(i) to (iv)) that he paid the purchase price of Kshs. 2,560, 000.00 in two installments at the time of purchasing the house.

24. Enoch Nguthu confirmed in cross-examination by Counsel for the defendants that he had sworn the affidavit on behalf of the plaintiff filed in support of the Originating Summons. He further confirmed that both the names Enoch Kimanzi Nguthu and Enoch Nguthu referred

to the same person. He was an investigator with the KACC at the time this suit was filed. He had annexed copies of titles to the properties registered in the names of the defendants which came from government sources. He had not attached searches of the properties. He had not been able to get trading reports or financial statements from the defendants.

25. Nguthu further confirmed that he had written to the 1st defendant under section 26 of ACECA requesting him to give the plaintiff the sources of his funds, though he did not write specifically asking for financial statements. He had sat with the 1st defendant but the 2nd defendant could not produce any financial statements. While the investigations had focused on all the defendants, he did not write to all of them under section 26 of ACECA as they were not public servants. While the 1st defendant had written to the plaintiff indicating that he conducted other businesses, he did not disclose any businesses but only said in general terms that he ran businesses. Nguthu denied that he had asserted that the 1st defendant benefitted from Anglo Leasing contracts, noting that what he said was that the 1st defendant had signed some vouchers related to Anglo Leasing. He also denied saying that the 1st defendant had been given money by the contractors in Anglo Leasing.

26. In re-examination, Nguthu stated that notices under section 26 of ACECA are issued when allegations are made in a certain matter, the intention of the notices being to confirm whether the allegations are true. A notice under the section had been issued to the 1st defendant as the section is specific to public servants. Nguthu had conducted a search at the 1st defendant's house, for which he had a search warrant. He and his colleagues who conducted the search had shown the 1st defendant and his wife their cards, as well as the search warrant, a copy of which they gave to the 1st defendant.

27. At the end of the search, the 1st defendant had signed an inventory of the items collected and had confirmed that the search was legal as there was a warrant. The search had also been witnessed by his wife, Roselyne Wanjira Abachi the 2nd defendant. The EACC team that carried out the search comprised Nguthu, who was the team leader, Pius Maithya, Francis Mwaniki and Patrick Mbijiwe. The team was not able to investigate the 1st defendant's claim that he carried on businesses and consultancies as he only gave general information that he run such businesses and consultancies.

28. The KACC team had also met some of the other defendants and had recorded their statements. The 2nd defendant had stated that the properties in her name had been bought for her by the 1st defendant.

29. Pius Nyange Maithya, an investigator and valuer with the plaintiff, had been part of the team that investigated the matter concerning the defendants. He swore a Supplementary Affidavit in support of the suit and was cross-examined thereon by Counsel for the defendants.

30. In the Supplementary Affidavit, Maithya, like Nguthu, states that he is an investigator with the EACC appointed under section 23 of ACECA. He was also part of the team that investigated the matters leading to the filing of this suit. Maithya reiterates and supplements materially the depositions set out in the affidavit of Nguthu regarding the allegations that the 1st defendant has assets that are unexplained and are not commensurate with his known sources of income.

31. According to Maithya, their preliminary investigations revealed that the 1st defendant owns a lot of properties in many parts of the country which are disproportionate to his known sources of income. The team had established this when it conducted a search of the 1st defendant's residential premises. The information is captured in an inventory of the items collected from the 1st defendant's residential premises, House No. HG. 60 on L.R No. 146/69, Mugoya Estate, Nairobi as evidenced by annexure EN2 in the affidavit of Enoch Nguthu.

32. The investigators had also obtained documents relating to the properties the subject of this suit. Most of the properties are registered in the name of the 1st defendant while the rest are either registered in the names of the 1st defendant's spouse, close relations or companies in which he is the majority shareholder as evidenced by annexures EN4, EN5 and EN6 annexed to the affidavit of Enoch Nguthu sworn in support of the Originating Summons. The 1st defendant's assets are not proportionate to his known legitimate sources of income which comprise his salary and allowances as a public officer. The plaintiff had issued a statutory notice to the 1st defendant dated 14th January, 2008 (annexure EN9) under section 26 of ACECA asking him to explain how he acquired the properties. He had responded by his letter dated 26th February, 2008 (annexure EN 10).

33. The plaintiff's investigations revealed that the 1st defendant had acquired most of his properties between 2004 and 2007 during which time he is suspected of engaging in corruption and economic crime. During this same period, the 1st defendant deposited large amounts of money in his various bank accounts. He could not explain the sources of these funds.

34. Maithya sets out the amount of funds and the dates on which the funds were deposited in the 1st defendant's account or in accounts held by entities in which he was a shareholder and director. Account number 94-8780127 Barclays Bank of Kenya, Queensway Branch-Nairobi, held in the name of Rick Seaside Villas Limited received a total of Kshs 720, 000 in two days, with Kshs 20,000 deposited on 9th August 2006 and 700,000 on 31st August 2006. A total of Kshs 202,500 was deposited in the same account in September 2006, with near daily, twice in one day, deposits of Kshs 39,000, 6,000, 15,000, 45,000, 58,500, 12,000, and 27,000 on 6th, 11th, 20th, 21st, 27th and 28th August 2006 respectively.

35. In October, the account received deposits amounting to Kshs 447,500. The amounts were deposited in tranches of Kshs 8000 on 2nd October 2006 and three deposits of Kshs 110,000, 80,000 and 64,000 on 11th October 2006. On 12th, 13th and 17th October 2006, deposits of Kshs 4000, Kshs 60,000 and Kshs 24,000 respectively were made. Two deposits of Kshs 12,000 and Kshs 7,200 were made on 23rd October 2006 while on 25th October 2006, two deposits of Kshs 26,000 and 52,300 were made into the account.

36. It is the plaintiff's case further that a total of Kshs 385,500 was deposited into the account in November 2006 on diverse dates tabulated

in Maithya's affidavit: Kshs 595,000 in December 2006; Kshs 669,300 in January 2007; Kshs 283,780 in February 2007; Kshs 417,700 in March 2007 and Kshs 980, 801 in April 2007. Daily, sometimes twice daily deposits were made into the same account in May to September 2007. The total amounts deposited in these months were Kshs 311, 300, Kshs 814,913, Kshs 442,000, Kshs 705,160 and Kshs 1,557,410 respectively.

37. Deposits were also made into the same account, again on an almost daily, sometimes twice daily basis as tabulated in Maithya's affidavit, in October, November and December 2007. The total amounts deposited in these three months was Kshs 627,828, Kshs 681,035 and Kshs 10,000 respectively. In the period of one year and 6th months between 9th August 2006 to 10th December 2007, account number 94-8780127 held in the name of Rick Seaside Villas Limited held at Barclays Bank of Kenya, Queensway Branch-Nairobi received a total of Kshs 9,851,727.

38. In the same period, deposits were being made into the 1st defendant's personal account. This account, number 0110200614200 held in the name of Patrick Ochieno Abachi in Co-operative Bank Limited, Co-operative House Branch Nairobi, received, on diverse dates and at times on the same date in the month of October 2005 Kshs 10,000; in November 2005, Kshs 328,000 and in December 2005, Kshs 26,006. Deposits were also made in the 1st defendant's personal account in the following year. In January 2006, Kshs 1,660,000; February 2006, Kshs 158,000; March 2006, Kshs 19,000; April 2006, Kshs 50,000; May 2006-Kshs 60,240; June 2006- Kshs 87,009; July 2006-Kshs 265,000; August 2006-Kshs 75,000; September 2006- Kshs 129, 299, October 2006- Kshs 696,519; November 2006-Kshs 606,833 and in December 2006- Kshs 177,707.

39. The 1st defendant's account received further deposits the following year. In January 2007, it received Kshs 44,841; February 2007- Kshs 69,923. March 2007-Kshs- 52,076; April- Kshs 661,100; May, 2007-Kshs-448,469; June 2007-Kshs 404,122; July 2007-Kshs 536,082; August-Kshs 48,927; September- Kshs- 484,837; October-Kshs 173,433; November 2007-Kshs 71,455; December 2007-Kshs 27,500. The 1st defendant's account therefore received, in the two years and two months' period from 19th October 2005 to 14th December 2007, a total of Kshs 7,371,378.

40. Copies of the bank statements in respect of the two accounts, showing the deposits summarised above, are annexed to Enoch Nguthu's supporting affidavit sworn on 18th September, 2008 (annexure EN3 (i) and EN3 (ii) respectively). Maithya deposes that the plaintiff is not satisfied with the explanation given by the 1st defendant with respect to the acquisition of the subject properties. As a licensed valuer, Maithya had undertaken valuation of some of the properties reasonably suspected to be the unexplained assets of the 1st defendant. The properties were valued as set out earlier in this judgment in the summary of Nguthu's affidavit.

41. Maithya had not been able to value some of the properties. However, a copy of the transfer of L. R. No. Kajiado/ Kitengela/6491 (annexure EN 13) shows that the 1st defendant purchased it for a consideration of Kshs. 1 million on or about 13th July 2005. He estimates the value of the properties that he was able to value as evidenced in the valuation reports (EN14), together with the cash recovered from the 1st defendant's premises during the search and the value of L. R. No. Kajiado/ Kitengela/6491 at Kshs 80,840,000.00. It is the plaintiff's case that while the 1st defendant has been given a reasonable opportunity to explain the disproportion between the assets and his known legitimate sources of income, the plaintiff is not satisfied with the explanations given. In its view, the 1st defendant has failed to demonstrate that the properties were obtained otherwise than as a result of corrupt conduct.

42. Maithya was cross-examined on his affidavit sworn on 5th August 2020. He confirmed that he was a registered valuer and had prepared the valuation reports annexed to the Originating Summons. He had not attached a certificate to prove his registration as a valuer but there was no such requirement in law. Further, that registered valuers are gazetted each year and Kenya Gazette notices are public documents that can be accessed from the Government Printers or from the Valuers Registration Board. He was also an investigator with the EACC. He had conducted searches of the defendants' properties but had not attached the searches to his affidavit. He could also not say that there was a particular transaction that was connected to corruption. He did not find that the defendant had received any money from anyone as part of a corrupt scheme. However, the investigation of the defendants was not of a crime *per se* but about suspicion of a disproportion of ownership of assets in comparison with the 1st defendant's known source of income.

43. According to Maithya, the plaintiff had presented to the 1st defendant what it had established to be his known source of income. It had noted that some of the properties are registered in the names of companies, and had established the ownership and directorship of the companies. He confirmed that there was no mention of the 1st defendant in the directorship of Rockair Travel Agencies. The documents in the plaintiff's possession dated 2007 indicated that the first subscriber of Rockair Travel Agencies was the 1st defendant with 900 shares. The others were Loran Juma and Gabriel Malo.

44. In re-examination, Mr. Maithya confirmed that he had met the 1st defendant in Mombasa during the valuation of his properties. The 1st defendant had not asked for proof that Maithya was a valuer, nor did he deny him access to his properties. The defendants had also not challenged the assertion that Maithya was a valuer. Had they done so, he would have furnished such proof. He was part of the team that carried out investigations against the defendants, and was part of the team that conducted the search and had identified himself as an investigator. The investigations against the defendants were about the disproportionate assets relative to the 1st defendant's known legitimate source of income and the 1st defendant had not provided proof of any source of income other than his salary.

The Defendants' Case

45. In opposition to the suit, the defendants filed two affidavits, both sworn by the 1st defendant, on 23rd September 2020. In his Replying Affidavit which he states is sworn on behalf of all the defendants, the 1st defendant avers that the Originating Summons is devoid of merit, baseless, unsupported, anchored on wish-wash and is a blatant abuse of court process. He asserts that the institution of the suit is just a 'discomfited' (sic) attempt by the plaintiff to justify its existence as a commission by alleging all manner of abstractions against him as a civil servant and people related to him. It is his contention that it is not a crime for a citizen of Kenya, whether employed as a civil servant or

not, to acquire property. Further, that every person has a constitutional right to own property of whatever description or value either individually, jointly with others or in any other manner.

46. According to the 1st defendant, the search of his residential premises was illegal and an outright violation of his rights and those of his family. It is his deposition that he does not owe the plaintiff or any other person an obligation to explain why he had the sum of Kshs. 1,990,000/= in his residence.

47. The 1st defendant denies generally the contents of the Originating Summons. He deposes that any sane person can be a signatory to a bank account and every bank maintains statements for each account holder. Further, that any person can form and be part of a company notwithstanding their place of employment and the position they hold, and his companies are not “cloak companies”. He further denies that he failed to disclose all his properties and asserts that he filled the Wealth Declaration forms accurately.

48. The 1st defendant asserts that he cannot be condemned for performing his obligations as an employee, averring that he had authorised payment of money after the contracts had gone through the approval process. He denies that he has ever been involved in any corrupt dealings or economic crimes, asserting that all the money that he has is as a result of lawful gain.

49. The 1st defendant further denies that the properties held by the 2nd to 7th defendant are held in trust for him, his averment being that every person has a right to own property and a company can own property in its own name. He further contends that the plaintiff has wrongly contended that the defendants have been corrupt simply because they own various properties, and that the plaintiff’s suit has proceeded on the presumption that the defendants are guilty of corrupt conduct and should therefore absolve themselves. It is his averment that the plaintiff is abdicating its role to investigate and has instead placed the burden of proving corrupt conduct on the defendants yet none of them is guilty of corrupt conduct.

50. The 1st defendant asserts that there is nothing wrong in the fact that he paid the entire purchase price for House No. HG 60 in Mugoya Estate in two instalments. That he had the option of paying for the house through monthly deductions or payment of the purchase price in full within 90 days, and he had elected to pay the entire purchase price in full before the expiry of 90 days.

51. In his supplementary affidavit sworn in response to the affidavit of Pius Maithya, the 1st defendant avers that there is no evidence to demonstrate that the deponent is or was an investigator for the plaintiff at the time of filing the Originating Summons or that he was part of the investigation team. It is his deposition that he does not own assets that are disproportionate to his sources of wealth, and he has not been furnished with an investigation report that contains such a conclusion, nor was he involved in the investigations.

52. The 1st defendant avers that he acquired the properties at issue using income from his salary and allowances as well as proceeds from other businesses that he operates. Regarding the funds deposited in his account, he avers that the funds are from his businesses and he did not get funds from any corrupt practices or economic crime. It is his contention that the plaintiff does not state why it is not satisfied with the explanation that he gave relating to the manner of acquisition of wealth. Further, that Maithya, who alleges that he is an investigator, did not investigate the viability and profitability of the 1st defendant’s businesses. He contends that there is no evidence that Maithya is a licensed valuer and that the properties have deliberately been overvalued for purposes of the plaintiff’s case.

The Submissions

53. The parties filed written submissions in support of their respective cases.

The Plaintiff’s submissions

54. The plaintiff filed submissions dated 25th June 3030 and Supplementary Submissions in response to the defendants’ submissions. The gist of the plaintiff’s case is that the defendants are in possession of unexplained assets valued at Kshs. 80,840,000.00 which ought to be forfeited to the government of Kenya. The plaintiff contends that the sum of Kshs. 80,840,000.00 comprises the difference between the value of the 1st defendant’s assets and the value of his known lawful and legitimate source of income acquired within a period of 5 years from 2002 to 2007.

55. The plaintiff submits that in April, 2006, a special audit report of the Controller and Auditor General was issued on financing procurement and implementation of security related projects that came to be known as the Anglo Leasing contracts. The report indicated that by these contracts, the government suffered loss due to single sourcing mode of procurement. Further, that there was absence of complete information on the work, goods or services delivered in respect of each contract. The procurement of supplies contracts, which were for the installation of a nationwide dedicated digital multi-channel security systems telecommunication network for the Kenya Administration Police and the Provincial Administration, had been entered into on 29th May, 2003 between the government of Kenya and various companies. The supply contract price was forty-nine million six hundred fifty thousand euros (€49,650,000).

56. According to the plaintiff, it had received reports of the existence of possible procurement irregularities in the procurement of eighteen (18) of the Anglo Leasing contracts. Among the allegations made in relation to the said procurement was that there were payments being made for goods and services not rendered to the government of Kenya. The plaintiff had therefore initiated investigations pursuant to its mandate to investigate corruption and economic crimes to verify whether there may have been pricing, financing, and other irregularities in the procurement of the said government security sector contracts. Its preliminary investigations confirmed that the Ministry of Finance was responsible for making payments which were found to be flawed and grossly inflated, warranting further investigations.

57. In the course of its investigations in or about 2007, it had received information that the 1st defendant had assets well beyond his known legitimate sources of income. That such unexplained assets were acquired as a result of corrupt conduct related to the Anglo Leasing

contracts; and that the assets had been acquired through abuse of office in which the 1st defendant had used his position to improperly confer benefits to himself or others contrary to section 46 of ACECA.

58. The plaintiff submits that the 1st defendant served in the accounting unit of the Ministry of Finance between 2003 and 2007. He was also the Chief Accountant in the Ministry of Agriculture from 2006. It submits therefore that at all times material to this suit, the 1st defendant was a public officer within the meaning of section 2 of The Public Officers Ethics Act, No. 4 of 2003, and that he was charged with the responsibility of managing public resources in a position of public trust.

59. Following receipt of the information with regard to the 1st defendant's unexplained assets, the plaintiff had commenced investigations and had conducted an authorized search of the 1st defendant's premises on the 28th of November, 2007. It had recovered the items set out in the inventory (annexure "EN2") which included the sum of Kshs. 1,990,000/- and documents relating to the properties the subject of the suit. The said assets had been acquired in the period between 2002 and 2007 and were valued at approximately Kshs. 80,840,000. During the period that the 1st defendant acquired these assets, he had a gross monthly salary of Kshs. 56,189.00. Its investigations had established that the 1st defendant was actively involved in the Anglo Leasing procurement in the government security sector entered into between 2002 and 2004.

60. It is the plaintiff's case that it had complied with the statutory requirements relating to applications for forfeiture of unexplained assets. It had obtained preservation orders against the assets at issue in order to prevent their sale, transfer, wastage or other disposal. The orders had been obtained on 20th December 2007 pursuant to section 56 of ACECA in Miscellaneous Application No. ELC 100 of 2007 filed on 18th December 2007. The defendants had never sought to have the preservation orders discharged.

61. The plaintiff further submits that it had issued the 1st defendant with a notice to explain the disproportion between his known legitimate sources of income and his vast wealth by way of a letter dated 7th January, 2008 (annexure "EN 9"). The 1st defendant had responded by his letters dated 14th January 2008 and 26th February 2008 (annexure "EN10"). The explanations given by the 1st defendant were generally not credible, and it had therefore sought clarification and recorded statements of the 2nd defendant and a director of the 7th defendant. Its conclusion was that the defendants, specifically the 1st defendant, had no intention of explaining the sources of their wealth. It had accordingly filed the present matter, initially filed as ELC Suit No. 423 of 2008, to recover the unexplained assets from the defendants.

62. The plaintiff submits that it seeks determination of the six questions set out in its Originating Summons. It reiterates the averment that upon receipt of credible information that the 1st defendant, a public officer, had amassed a lot of property which is disproportionate to the emoluments he is expected to have earned as a public officer during the period in question, it had executed a search at his premises, House No. HG. 60 L.R No. 146/69, Mugoya Estate, Nairobi on 28th November 2007 where several documents relating to the subject properties were seized, as well as Kshs. 1,990,000/- whose source the 1st defendant could not adequately explain. An inventory was made immediately after the search and was signed by the 1st defendant and witnessed by the 2nd defendant. It was also signed by the plaintiff's investigating officers. The plaintiff submits therefore that the contention by the 1st defendant that the search was illegal and a violation of his constitutional rights are false and misleading.

63. It is its submission further that it was upon identification of the plaintiff's investigators and receipt of a search warrant that the 1st and 2nd defendants allowed the search to be conducted. The plaintiff submits therefore that it is absurd for the defendants to claim that Enoch Nguthu and Pius Maithya are not investigators in the employ of the plaintiff. It notes that the defendants have not challenged the search of their premises nor placed any evidence before the court to support their claim that Enoch Nguthu and Pius Maithya were not investigators with the plaintiff at all times material to this suit.

64. The plaintiff submits that it had moved the court pursuant to the provisions of section 180(1) of the Evidence Act and section 23 of ACECA in seeking warrants to search the 1st defendant's premises. It had satisfied the court that the orders sought were necessary and the warrants were issued. The defendants had never challenged the search warrants or the search, and they cannot do so in the replying affidavit by making allegations of violation of constitutional rights.

65. It is the plaintiff's submission further that the subject money was seized on the strength of the search warrant which authorized its officers to seize and take possession of all documents relating to the investigation and any other documents or information that can facilitate conclusion of the ongoing investigation. The plaintiff cites in support the case of **Abubakar Shariff Abubakar v Attorney General & Another Constitutional [2014] eKLR** in which it was found that a search warrant authorizes an investigating officer to seize not only the goods which he reasonably believes to be covered by the warrant, but also any other goods which he believes, on reasonable grounds, to contain material evidence on any other charge against the person in possession of the items.

66. According to the plaintiff, an analysis of the documents relating to the properties showed that they are registered in the name of the 1st defendant, in the name of the 2nd defendant who is the 1st defendant's spouse, or in the names of close relations of the 1st defendant or companies in which the 1st defendant is the majority shareholder. It notes that the shareholders in the 6th defendant, Odear Nasuna Holdings Limited, are Rickair Travel Agencies Limited, the 7th defendant, and Rick Seaside Villas Limited. The shareholders in Rickair Travel Agencies Limited are the 1st defendant, Lorian Juma, the 5th defendant, and Gabriel Mallo. The shareholders in Rick Seaside Villas Limited are the 1st and 2nd defendants. From the statements of the 2nd defendant and Gabriel Mallo, a Director of the 7th defendant, the plaintiff had established that the above companies were used by the 1st defendant for the acquisition of the subject properties.

67. The plaintiff submits that in its notice under section 26 of ACECA dated 7th January 2008, the plaintiff had requested the 1st defendant to explain the source of his assets, including the source of the money seized from his premises during the search. The information that the plaintiff requested for included the cost and date of acquisition of each of the properties, as well as the development costs of the buildings or structures erected on the properties. The explanation offered by the 1st defendant by the letters dated 14th January, 2008 and 26th February

2008, however, was not satisfactory. He had stated that he purchased Ngong/Ngong/14888 Kajiado in 1989 yet the title document indicates that it was acquired in 1992. He had further stated that he sold Ngong/Ngong/14888 Kajiado District in 2001 but at the time of the investigations, the title document was still in his name. He had not provided proof of sale or transfer of the property to the alleged buyer, nor did he name the alleged buyer. The plaintiff observes that the 1st defendant had also not provided this information to the court despite filing his response 12 years after the institution of the suit.

68. With regard to plot numbers 337/1543 and 1544 Mavoko Municipality, the plaintiff notes that the 1st defendant stated that he purchased them between 1999 to 2001, and that he developed them between 2000 to 2005 during part of the period in question, from his salary and allowance. The plaintiff submits that it is evident that there was substantial construction on the plots which the 1st defendant could not explain how he managed to do with his salary and allowances while still meeting his personal expenses and liabilities and still acquiring other subject properties. The 1st defendant had not provided evidence of the loans he stated he had obtained, nor had he provided evidence of the businesses he alleged he was running.

69. The plaintiff further submits that the 1st defendant had stated that he is holding apartments number 4 block A5 and number 7 block B4 on L.R number 209/11646 Parkview South C on behalf of a Maxwell Mbechah resident in the USA. He further claimed that he was holding a power of attorney to the said property. The plaintiff submits that this is a blatant lie as the 1st defendant acquired the said properties on 2nd September 2005 and 16th August, 2005 during the period in question. It notes that the agreement for lease of the said properties refer to the 1st defendant as the owner of the said properties. It further notes that the 1st defendant has not provided anything to prove that the alleged Maxwell Mbechah exists, nor has the 1st defendant provided the alleged registered power of attorney regarding the said properties. It is its case that the 1st defendant is the absolute proprietor of the said properties, no power of attorney exists, and the 1st defendant is not able to explain how he acquired the said properties.

70. The plaintiff submits that the explanation given by the 1st defendant with respect to House No. HG 60 LR No.146/69 Mugoya Estate was that it was previously a government house which he has lived in since 1993, and that it is under the government house purchasing scheme. He was not, however, able to explain how he was able to pay the full purchase price of Kshs. 2,560,000/= for the house in two cash instalments between 29th December 2004 and 28th January, 2005 during the period in question.

71. The plaintiff submits that the 1st defendant's explanation with respect to Kajiado/Kitengela/6491 Kajiado District was that he purchased the property from proceeds gained while undertaking one of his business ventures in Mavoko in May, 2005. The plaintiff submits that the property was purchased at Kshs. 1,000,000/= on 13th July, 2005, during the period in question. The 1st defendant was not able to explain how he acquired the said property.

72. Regarding Kajiado/Kitengela/20644, 20580, 20641 and 20609, the 1st defendant's explanation was that the two properties do not belong to him. The plaintiff, however, submits that during the search of his premises, the 1st defendant was in actual possession of the title deeds for the said parcels of land. Its case is that Kajiado/Kitengela/20644 and Kajiado/Kitengela/20580 are registered in the name of the 3rd Defendant who is a close kin of the 1st defendant while Kajiado/Kitengela/20641 is registered in the name of the 5th defendant who is a brother of the 1st defendant. Kajiado/Kitengela/20609 is registered in the name of the 4th defendant who is a close kin of the 1st defendant. The plaintiff submits that it is its belief that the 1st defendant is the beneficial owner of the said properties since the other defendants did not care to explain the acquisition of their said properties, either during its investigations or in the present proceedings. The plaintiff asks the court to make this inference in determining whether the said properties are unexplained wealth.

73. The plaintiff notes that the 1st defendant states that plot number MN/1/5134 Nyali, Mombasa is property that he is holding on behalf of a Maxwell Mbechah, a resident of the USA, and that he holds a power of attorney with respect to the said property. The plaintiff submits that this is a blatant lie intended to conceal the source of his wealth and the inability to explain the acquisition of his assets. It submits that an analysis of its evidence shows that the 1st defendant is the beneficial owner of the said property. He purchased it on 7th June, 2005 during the period in question, but subsequent to such purchase, he transferred it to Odcar Nasuna Holdings Limited on 27th September, 2007.

74. It is the plaintiff's submission therefore that the property is owned by the 1st defendant, a fact that is confirmed by the statement of the 2nd defendant. It submits that at paragraph c, e and d of the said statement, the 2nd defendant confirms that the 1st defendant is the beneficial owner of the said property. Further, that she elaborates the shareholding in the cloak companies used by her husband to conceal the assets. The plaintiff refers in this regard to annexure EN 5 in the Supporting Affidavit of Enoch Nguthu which shows the shareholding in the said company. The plaintiff urges the court to see the elaborate scheme of concealment that the 1st defendant engaged in in responding to its notice as proof of its averments that the 1st defendant is in possession of unexplained assets which are disproportionate to his legitimate sources of income.

75. The plaintiff further refers the court to annexure EN 14 in the Supporting Affidavit of Enoch Nguthu, the valuation report of the said property. It is its submission that a study of the said valuation report reveals the substantial and cost intensive developments undertaken on the property. It submits that the 1st defendant is not able to explain how, against his known sources of income, personal expense and liabilities, he has financed the said developments within a period of two years and six months from the date of acquisition of the property, 7th June 2005 to 20th December, 2007.

76. Regarding motor vehicles registration numbers KAS 108X Toyota Pick-up purchased in 2004 valued at Kshs. 600,000/= and KAU 105T Mitsubishi Salon purchased in 2005, the plaintiff notes that the 1st defendant stated that he had purchased them using salary and allowances from his employment and business income. He had not, however, proved this before the court, nor had he done so in response to the notice issued by the plaintiff. The plaintiff urges the court to infer that these vehicles are also unexplained assets as the 1st defendant has failed to provide any proof of business income or sources of income that would enable him to acquire the said motor vehicles.

77. The plaintiff notes that the 1st defendant had stated that motor vehicles KAS 336X Toyota Saloon, KAU 372M Toyota station wagon and KAV 170C Toyota Lexus purchased in 2004, 2005 and 2006 respectively do not belong to him. Its submission, however, is that all the vehicles belong to the 1st defendant. In relation to motor vehicle KAS 336X Toyota Saloon registered in the name of the 2nd defendant, the plaintiff submits that she had stated in her statement to the plaintiff (annexure EN 11) that it was the 1st defendant who had purchased the vehicle.

78. It is also the plaintiff's case that motor vehicle KAU 372M Toyota station wagon registered in the name of the 3rd defendant was also purchased by the 1st defendant. This is why he was in possession of the original ownership document, the logbook, and he is the beneficial owner of the said motor vehicle. As for motor vehicle registration number KAV 170C Toyota Lexus registered in the name of the 7th defendant and valued at Kshs. 1,500,000/= purchased in 2004, the plaintiff submits that it was purchased by the 1st defendant for his use. This submission is based on the statement of one Gabriel Mallo, a director in the 7th defendant (annexure EN 12 in the Supporting Affidavit of Enoch Nguthu) and the valuation report (annexure EN 14 in the said Supporting Affidavit).

79. The plaintiff submits that the 1st defendant has not provided any explanation for the cash deposits in the various bank accounts, nor has he provided an explanation for the Kshs. 1,990,000 in cash found on his premises. In particular, no evidence of employment allowance or business income has been provided.

80. The plaintiff contrasts the assets acquired by the 1st defendant in the period in question against the declarations made by the 1st defendant in compliance with the requirements of the Public Officers Ethics Act. It submits that by virtue of his position, he was under an obligation to make biennial declarations of his income, assets and liabilities in the prescribed Public Service Commission form (Form PSC.2B). He had lodged form PSC 2B between the years 2002-2007 (annexure "EN 7"). In these forms, the 1st defendant had declared income in the form of gross monthly salary of Kshs 36,590.00 and assets as follows:

- i. Toyota Corolla KAJ 154Y 12 years old Kshs. 180,000.00;
- ii. LR No. 6616/6555 Busia Kshs. 60,000.00;
- iii. Hazina Co-operative Shares Kshs. 94,400.00;
- iv. LR. No. 14888 Kajiado Kshs. 200,000.00;
- v. Bank A/c HFCK [...] Kshs. 6,700; and
- vi. Personal effects (household) Kshs. 50,000.00.

81. The plaintiff submits therefore that the total legitimate known sources of income as at the statement date of 23rd September 2003 was a gross amount of Kshs. 1,030,180.00.

82. For the period 29th November 2006 to 29th November 2007, the 1st defendant declared gross monthly salary in the sum of Kshs. 56,189.58, while the assets declared were as follows:

- i. Toyota Corolla KAQ 623X 10 years old Kshs. 385,000.00;
- ii. L.R No. 6616/6555 Busia Kshs. 70,000.00;
- iii. Hazina Co-operative Shares Kshs. 190,245.00;
- iv. Co-op Bank Account Kshs. 50,000; and
- v. Personal effects (household) Kshs. 350,000.00.

83. The plaintiff submits therefore that the 1st defendant's known legitimate sources of income as at the statement date of 29th November 2007 was a gross amount of Kshs. 1,719,520.20. It had obtained the declaration forms from the Public Service Commission of Kenya on 12th February, 2008.

84. According to the plaintiff, the 1st defendant blatantly lied and filled the wealth declaration forms knowing very well that he had failed to disclose his true income, assets and liabilities status at the time of filing the forms. Its submission was that the reason why a public official holding an office in public trust would fail to disclose his income, assets and liabilities was the intention to conceal such income, assets and liabilities from the Public Service Commission. It is its case that several properties acquired by the 1st defendant between 2002 - 2005 were never declared as assets in his wealth declaration forms. In its view, the only inference that could be drawn for such failure was because he knew he would be tasked with explaining the sources of the said wealth. Such failure to disclose the said assets in the wealth declaration forms was part of his efforts to conceal the unlawfully acquired assets.

85. The plaintiff submits that it had carried out valuations of some of the properties that were purposely omitted from the wealth declaration forms lodged by the 1st defendant. It sets out in its submissions the title of the property, the year of its acquisition and the capital value that it

placed on the properties. By way of illustration, L. R. No. MN/1/5134, C. R. No. 35667 situated within the Municipality of Mombasa and registered in the name of the 6th defendant was acquired in 2005. It was developed between 2005 and 2007, and was valued by the plaintiff at Kshs. 49,000,000.00. House No. HG. 60, L.R No. 146/69, Mugoya Estate, situated within Nairobi and registered in the name of 1st defendant was purchased in 2005. It was valued at Kshs. 2,560,000.00.

86. L.R. No. 337/1543 and L.R. No. 337/1544, in Mavoko Municipal Council registered in the name of the 1st defendant were developed in 2002-2005 and were valued at Kshs. 2,000,000.00. Apartment number 4 on Block A5, and number 7 Block B4, both on L.R No. 209/11646, Parkview, South C registered in the name of the 1st defendant had a capital value of Kshs 3,650,000 and Kshs. 3,750,000.00 respectively.

87. It is the plaintiff's case that from its valuation, the 1st defendant, in his efforts to conceal the assets, had deliberately failed to disclose assets valued at Kshs. 65, 500, 000. 00. In its view, this represents an exceedingly steep increment in the 1st defendant's revenue over a relatively short period considering his only known source of income as indicated in his wealth declaration forms in 2002-2006 and the plaintiff's investigations in 2007-2008 was his salary and emoluments.

88. The plaintiff submits that the 1st defendant claimed to have a liability which he describes as "Govt house on tenant purchase loan", a declaration made on 29th November 2006. It submits that the 1st defendant purports to declare an existing loan on the government house number HG 60 LR. No 146/60 Mugoya, yet he had fully paid for the house, in cash, in 2005 as evidenced by annexure "EN15" which comprises copies of the ownership and transaction documents relating to the said house. In its view, this demonstrates the deception employed by the 1st defendant to conceal ill-gotten gains. The 1st defendant had acquired or developed the high-value assets worth over Kshs. 65 million within a very short period of time between 2002-2007. The plaintiff asks the court to be guided by the decision in **Kenya Anti-Corruption Commission v James Mwathethe Mulewa & Another [2017] eKLR** with respect to what to consider when determining whether the assets at issue are unexplained assets.

89. The plaintiff sets out in detail the numerous cash deposits made into the 1st defendant's accounts which are set out earlier in this judgment. It is its submission that most of the assets the subject of the suit were acquired by the 1st defendant between 2002 to 2007, the same period that he made deposits of large amounts of money in his various bank accounts. This is the same period, according to the plaintiff, during which the 1st defendant was engaged in corrupt conduct.

90. The plaintiff observes that within a period of 2 years and two months, from 19th October 2005 to 14th December 2007, deposits totaling Kshs. 17,223,105 were made into the accounts held in the name of Rick Seaside Villas, an entity whose directors are the 1st and 2nd defendant, and in which the 1st defendant holds 900 shares and the 2nd defendant 100 shares. And the other account in the name of the 1st defendant. It is its submission that the said deposits were not salaries or emoluments due to any of the defendants.

91. According to the plaintiff, the deposits of Kshs. 17,223,105 made within a period of 2 years and two months translates to an income of Kshs. 662,427.115 per month during the 26 months. This, it submits, represents an exceedingly steep increment in the 1st defendant's revenue over a relatively short period. The 1st defendant had not mentioned the deposits when lodging his wealth declaration forms.

92. The plaintiff submits that the defendants have failed to explain the disproportion between their legitimate source of income and the properties, including the cash deposits, acquired. It cites the decision of the Court of Appeal in **Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR** and the case from the United Kingdom of **National Crime Agency -v- Mrs A [2018] EWHC 2534** with respect to what the court should take into consideration in determining whether to issue an unexplained assets order.

93. The plaintiff submits that for the court to issue an unexplained wealth order, there must be reasonable grounds for suspecting that the known sources of an individual's lawfully obtained income would have been insufficient to enable him to obtain the property at issue. That one of the critical factors to be considered is the "income requirement". This obligates an individual required to explain the source of wealth to lead sufficient evidence to defeat any "reasonable grounds for suspicion" presented by the opposing side under the income requirement.

94. According to the plaintiff, section 362A of the United Kingdom's Proceeds of Crime Act (POCA) is in *pari materia* with section 55 (2) of ACECA. This section lays emphasis on assets being disproportionate to an individual's known legitimate sources of income, while section 55 (2) embodies the concept of "income requirement" under which an individual's assets should be proportionate to his or her legitimate known source of income.

95. The plaintiff submits that under section 55 (4) (a) of ACECA, it is under an obligation to adduce evidence to show that a person has unexplained assets. It is its submission that it has tendered documentary evidence to discharge this obligation, and the defendants have not offered any satisfactory explanation on the source of the subject properties or cash deposits to controvert what the plaintiff has placed before the court.

96. In addressing itself to the defendants' case, the plaintiff notes that though all the defendants were duly served, the 1st defendant filed a Replying Affidavit and Further Affidavit both dated 23rd September 2020 on behalf of all the defendants. All the defendants thus had an opportunity to respond to the plaintiff's claim. It is its submission that a consideration of the averments at paragraph 1 and 2 of the affidavits sworn by the 1st defendant confirms that the other defendants were cronies or agents of the 1st defendant and it invites the court to make this inference.

97. The plaintiff submits that a person who holds lawfully acquired property would consider it just to lay a claim to such property. In its view, it is no coincidence that none of the other defendants cared enough for the properties registered in their names to give an explanation regarding its acquisition. In its view, this is due to the fact that the ultimate beneficiary of the property is the 1st defendant.

98. The plaintiff observes that the 1st defendant had a minimum monthly bank deposit of Kshs. 300,000.00 against an estimated net employment income of Kshs. 35,000.00 per month, which raised the question why he would, with such an income, choose to remain in a public service job where his net highest salary as of November, 2007 was a modest Kshs. 43,995.40 per month (annexure EN 1 iv). It is its submission that the 1st defendant's averments in his two affidavits are untrue, are mere denials and are not the explanations envisaged under section 55 (5) of the ACECA.

99. The plaintiff submits that section 55(5) of ACECA shifts the evidentiary burden to the person said to have unexplained assets to provide an explanation to satisfy the court that the assets were acquired otherwise than as a result of corrupt conduct. It relies in support of this submission on the decision of the Court of Appeal in the case of **Stanley Mombo Amuti v Kenya Anti-Corruption Commission** (supra). It is the plaintiff's submission that the defendants have not placed any material before the court to substantiate their claims in relation to the properties at issue as any explanation offered would be mere fabrications and would expose facts unfavorable to them. It notes that an explanation that is now being advanced, coming more than 12 years after it sought such explanation for the 1st defendant's vast wealth, is non-existent. In its view, there is really no explanation for the disproportionate wealth the 1st defendant has acquired as against his known legitimate source of income.

100. The plaintiff notes that the defendants have not placed before the court any proof of the allowances or honoraria issued to the 1st defendant or any proof or corroboration of the loans the 1st defendant avers he was advanced. There is also no evidence of any business or trade that the 1st defendant was engaged in to prove business income. The 1st defendant has also not placed before the court the power of attorney between him and one Maxwell Mbecah to corroborate the claims related to L. R. No. MN/1/5134, C. R. No. 35667, Apartment No. 4 — Block A5, L.R No. 209/11646 and Apartment No.7 — Block B4, L.R No. 209/11646. In the plaintiff's view, this is because the 1st defendant is the sole beneficiary of the said properties.

101. Finally, the plaintiff submits that there is no evidence of any trust deed or agreement between the 1st defendant and the 3rd, 4th and 5th defendants to corroborate his claims regarding ownership of Kajiado /Kitengela 20644, Kajiado /Kitengela 20580 and Kajiado /Kitengela 20641. This, in its view, is because these defendants are close kin and associates of the 1st defendant.

102. The plaintiff submits that the 1st defendant's explanation that L. R. No. MN/1/5134, C. R. No. 35667 does not belong to him is untrue. It submits that evidence on record (annexure EN 4 xi) confirms that the property was registered in the name of the 1st defendant on 7th June 2005 and transferred to the 6th defendant on 27th September, 2007, and the 1st defendant is the ultimate beneficiary in the 6th defendant company.

103. The plaintiff dismisses the explanation given by the defendants in relation to ownership of the motor vehicles. It submits that while the 1st defendant has stated that they do not belong to him, the 2nd defendant had confirmed that he had purchased motor vehicle KAS 336X and that KAU 372M belongs to Benjamin Abachi, a close kin of the 1st defendant. It is its submission further that while the 1st defendant denies ownership of KAV 170, Gabriel Mallo, a Director of the 7th defendant, confirms that the vehicle is owned by the 1st defendant despite being registered in the name of the 7th defendant.

104. Regarding the sum of Kshs. 1,990,000.00 recovered from the 1st defendant's house, the plaintiff notes that the 1st defendant has offered no explanation other than a mere and vague statements that it was from a client. In its view, the 1st defendant should have been able, if he was engaging in lawful business, to explain the source of his income, including the not insubstantial amount of Kshs. 1,990,000.00 which no-one, let alone a public officer holding an office in public trust, would be carrying around with no plausible explanation.

Submissions by the defendants

105. In their submissions dated 23rd October 2020, the defendants set out and address each of the questions for determination raised in the plaintiff's Originating Summons. To the question whether they are in possession of unexplained assets, their submission is that the present suit is just a 'discomfited' (sic) attempt by the plaintiff to justify its existence as a commission by alleging all manner of abstractions against them. They cite Article 40 (1) and (2) of the Constitution which they submit guarantees them the right to own property. It is their submission that the fact that they own property does not constitute a crime or a violation of any civil law. Further, that the right to own property is guaranteed to all irrespective of their employment. Support for this submission is sought in Article 27 () of the Constitution.

106. According to the defendants, the plaintiff bases its case on the fact that it found documents relating to different properties in the 1st defendant's residence, and due to his employment as a civil servant, the plaintiff unfairly and illegally treated him as a corrupt person. The defendants submit that the plaintiff alleges that the defendants have in their possession unexplained assets but has admitted that the 1st defendant wrote to it letters dated 14th January 2008 and 26th February 2008 explaining the source of his properties. They submit that the plaintiff has not adduced evidence before the court to contradict what the 1st defendant wrote in his two letters.

107. The defendants submit that both of the plaintiff's witnesses whom their Counsel cross-examined were not the actual deponents of the affidavit in support of the Originating Summons and the Supplementary Affidavit respectively. They argue that the first witness identified himself as Enoch Kimanzi Nguthu while the affidavit in support of the Originating Summons was sworn by Enoch Nguthu. The second witness identified himself as Pius Nyange Maithya while the supplementary affidavit was sworn by Pius Maithya. In light of this, it is their submission that there is no way of ascertaining whether the person who appeared before the court was the same person who swore the affidavit. The two witnesses did not also adduce documents to prove that they were or are in the plaintiff's employment. According to the defendants, both witnesses were impersonating other people, their evidence has no probative value and the plaintiff's case is therefore unsupported by evidence.

108. The defendants cite the provisions of section 26 of ACECA to submit that the power to issue a statutory notice under the section to a

public officer is only vested in the Secretary to the Commission. It is their submission therefore that in this case, the letter dated 7th January 2008 addressed to the 1st defendant was written and issued by the Director of the plaintiff, and the notice was therefore illegal.

109. They submit, however, that the 1st defendant had responded to the statutory notice by his letters dated 14th January 2008 and 26th February 2008 and had addressed each of the queries raised by the plaintiff in respect of each of the properties. The explanation he had given was that he had bought title number Ngong/Ngong/14888 using savings from his salary and allowances earned as a civil servant at a cost of Kshs. 150,000/=. He had later sold it for Kshs. 1,500,000/=. The 1st defendant is not obligated to keep copies of purchase or sale agreements that he enters into, and the fact that he did not produce these agreements does not mean that the property is an ‘unexplained asset’.

110. The defendants submit, with respect to title number Bukhayo/Mundika 6555 and 6616 that the 1st defendant bought these properties between 1996 and 1997 through instalment payments from his salary and allowances at a cost of Kshs. 60,000/=. He was not under an obligation to keep documents relating to the purchase of the said properties, and a failure to produce such documents does not render them ‘unexplained assets’.

111. Similar submissions are made in relation to plot numbers 337/1543 and 1544 – Mavoko Municipal Council. The 1st defendant had bought the properties between 1999 and 2000 from his salary and allowance at a cost of Kshs. 300,000/=. He had thereafter build a four 4 bedroomed house on the properties.

112. Regarding apartment numbers 4 and 7 in Parkview, South C, the defendants reiterate the 1st defendant’s averment that he is only holding possession of the properties on behalf of one Maxwell N. Mbechah, a resident of a foreign country, who has given him a power of attorney to transact with the property.

113. With regard to House No. HG 60 – L.R No. 146/69, Mugoya Estate, the defendants submit that the 1st defendant acquired it under the Civil Servants Housing Scheme Fund using his salary and allowances. He had bought Plot No. Kajiado/Kitengela/6491 from proceeds he earned from a business venture in Mavoko in May 2005. As for plot numbers Kajiado/Kitengela/20644, 20580, 20641 and 20609, they belong to the 3rd, 5th and 4th defendants respectively. The defendants submit that there is no evidence to show that these defendants were civil servants or that they were involved in any corrupt scheme.

114. The defendants reiterate the 1st defendant’s averment that he is holding possession of plot number MN/1/5134, Nyali, Mombasa on behalf of Maxwell N. Mbechah, who is resident outside the country, and who has given him a power of attorney with respect to the property.

115. As for motor vehicles registration numbers KAS 108 X and KAU 105T, the defendants submit that the 1st defendant purchased them from savings from his salary, allowances and proceeds from businesses that he was running. They reiterate the 1st defendant’s averment that motor vehicle registration numbers KAS 336X, KAU 372M and KAV 170 C are owned by the 2nd, 3rd and 7th defendants. They submit that there is not an iota of evidence before the court to demonstrate that the three defendants were involved in any corrupt scheme when they acquired these motor vehicles.

116. With respect to the funds deposited in the various bank accounts in the name of the 1st defendant and the limited liability company defendants, it is the position of the defendants that the accounts relate to businesses the 1st defendant has been running and are not therefore unexplained assets.

117. The defendants set out in their submissions what they term as a breakdown of the amount of Kshs 1,990,000 found in the 1st defendant’s house. They submit that they have given ample explanation regarding the source of the wealth alleged to be ‘unexplained assets’ by the plaintiff. That the burden of proving that a public officer has unexplained assets lies squarely with the plaintiff who is obligated to satisfy the court that such assets exist. Since the allegations levelled against them are serious, the standard of proof required on the part of the plaintiff must be high and in this case it must be beyond reasonable doubt.

118. They submit that the plaintiff has not discharged the burden of proof placed upon it, and rely on the decision in **Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another** (supra) in which the court cited the case of **Col Dr. Kizza Besigye v Museveni Yoweri Kaguta & Electoral Commission Election Petition No. 1 of 2001** in which it was stated that *“proved to the satisfaction of the court” connotes absence of reasonable doubt.*”

119. The defendants submit that the plaintiff’s witnesses had admitted during cross examination that they did not conduct searches in the respective registries to ascertain the ownership of the properties which they allege are owned by the 1st defendant as ‘unexplained assets’. They had also not conducted searches at the Companies Registry to ascertain the directorship, shareholding and ownership of the companies which the plaintiff alleges are ‘shell enterprises’ owned by the 1st defendant. Further, that Pius Maithya who had carried out the valuation of the properties had not produced his practicing certificate as a licensed valuer either at the time he allegedly valued the properties or at the time he testified in court. The defendants cite the case of **Maina Thiongo v Republic [2017] eKLR** in which the High Court relied on the decision in **Mutonyi v Republic (1982) KLR 203** with regard to the admission of expert evidence. They submit, on the strength of these decisions, that the valuation reports prepared by Pius Maithya and annexed to the affidavit in support of the Originating Summons have no probative value.

120. It is their case further that the plaintiff did not conduct proper investigations and has no evidence to prove the allegations against them. They submit that there is no law that bars a person holding a position in the civil service from incorporating companies, registering businesses or forming business entities with other individuals with the aim of making profit. They assert that the insinuation by the plaintiff that the 2nd – 7th defendants acquired their properties through corrupt means simply because they are related to the 1st defendant is malicious, baseless and illegal.

121. The defendants submit that none of the properties at issue in this matter constitute ‘unexplained assets’ within the meaning of sections 2 and 55 of ACECA. They submit that the plaintiff’s suspicions regarding the 1st defendant’s source of wealth are unfounded. That the plaintiff suspected that the 1st defendant was corrupt because the “highest salary” he ever earned was the sum of Kshs. 53,900/=. The defendants submit that this is not the true position as, according to the 1st defendant’s November 2007 pay slip, he would earn a salary as high as Kshs. 86,355/= per month. The plaintiff had also not computed the income received by the 1st defendant from the time he joined the civil service in 1987.

122. It is their contention further that the plaintiff’s second witness, Maithya, had admitted that the 1st defendant did not engage in any corrupt practice and that the plaintiff does not have evidence to demonstrate that he was engaged in corruption at all. Further, that there was no evidence that the 1st defendant received any form of benefit arising from the Anglo Leasing contracts. They further submit that the plaintiff’s agents had desperately sought for information from the 1st defendant regarding the Anglo Leasing contracts with a promise that they would drop the investigations against him but did not get any information from him, and the defendants attribute the present proceedings to such failure to get information. The defendants further submit that the statements made by Rosaline Wanjira and Gabriel Mallo were made as a result of intimidation and threats made by the investigators.

123. The defendants submit that the court should not issue the orders sought by the plaintiff in the originating Summons. They submit that the plaintiff has not proved that they have or own ‘unexplained assets’. Further, that the valuation reports in respect of the properties have no probative value as the witness did not produce evidence to show his skill or expertise as a valuer.

124. Regarding the funds held in the accounts the subject of the suit, the defendants submit that the plaintiff has not adduced any shred of evidence to show that either of the defendants had money that constitutes ‘unexplained assets’. It is also their submission that while the plaintiff captured the transactions involving deposit of funds in the accounts, it had conveniently omitted to capture the payments made out of those accounts in order to generate revenue from the businesses. The defendants set out in their submissions explanations with respect to each of the accounts: that the account held at Barclays Bank was a business account that was used to bank all the collections as well as pay out all expenses related to business transactions; that the Co-operative Bank account was the 1st defendant’s personal bank account through which he received his salary and also banked all proceeds collected from the Bar and Restaurant business; that he also had a loan from Co-operative Bank and the proceeds of the loan were deposited in this account.

125. The defendants submit that the sum of Kshs 1,990,000/= found in the 1st defendant’s house should not be forfeited to the government of Kenya. It is their submission that the plaintiff has not adduced any evidence to demonstrate that the money constitutes ‘unexplained assets’. The plaintiff has also not controverted the 1st defendant’s explanation that he had been given the money by clients to purchase motor vehicles from Japan for them.

126. The defendants therefore urge the court to dismiss the plaintiff’s suit and order the plaintiff to release to them all the documents and money that the plaintiff holds illegally. They also ask the court to award them the costs of the suit.

The Plaintiff’s Submissions in Reply

127. The plaintiff filed supplementary submissions in response to the defendants’ submissions. It notes that in their submissions, the defendants have introduced factual and evidential matters which had not been included in their Replying Affidavits. The defendants have, in an attempt to explain the huge regular cash deposits made into the 1st defendant’s bank accounts, cited business income arising out of purported bar and restaurant business as the source of the said cash deposits. That they have also alleged that the source of the impugned cash deposits was a co-operative bank loan taken out by the 1st defendant. The plaintiff submits that these are facts which had not been part of the defendants’ depositions and they cannot be ascertained.

128. Regarding the claim that its witnesses are imposters, the plaintiff asks the court to critically peruse its search inventory filed with the Originating Summons. It submits that the two witnesses had presented themselves at the 1st defendant’s residence on 28th November, 2007 and duly identified themselves. It was upon serving the 1st defendant with a search warrant that the said witnesses had obtained on behalf of the plaintiff that the 1st defendant had submitted to the search of his residence. In light of the declarations made by the 1st defendant in the search inventory, the plaintiff asks the court to infer dishonesty on the part of the defendants in alleging that the plaintiff’s witnesses are imposters.

129. The plaintiff submits that while the defendants have claimed that it did not carry out investigations on the directorship and ownership of the corporate defendants in this matter, they had not disputed the evidence presented by the plaintiff regarding the directorship of the companies or ownership of the assets.

130. It is the plaintiff’s submission that the factual and evidential issues raised in the defendants’ submissions have no probative value. Submissions by Counsel from the Bar, it contends, are not evidence, and have never been a means for parties to tender their evidence in court. Submissions are only meant to clarify issues and not for giving evidence, and Counsel’s role in proceedings has never been that of a witness giving evidence on behalf of their clients. The plaintiff relies in support of this submission on the decisions in **Republic v Chairman Public Procurement Administrative Review Board & another ex parte Zapkass Consulting And Training Limited & another [2014] eKLR**; **Clips Limited v Brands Imports (Africa) Limited formerly named Brand Imports Limited [2015] eKLR**; and **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR**. The plaintiff asks the court to disregard the evidence introduced by the defendants in their submissions.

131. While conceding that every person is entitled to protection of the right to property under Article 40, the plaintiff submits that while the defendants have alleged violation of their rights in their submissions, they have not demonstrated how the right has been violated. The plaintiff relies on the decision in **Oscar Kipchumba Sudi v Ethics & Anti-Corruption Commission & 3 others [2017] eKLR** in which it was held that it is not enough to allege that one’s fundamental rights or freedoms have been violated. One was required to go further and

demonstrate the violation, a requirement that accords with section 107 (1) of the Evidence Act.

132. It is the plaintiff's position, however that in any event, while Article 40 protects the right to own property, under Article 40(6), the protection is not absolute and does not extend to property found to have been unlawfully acquired.

133. The plaintiff submits that it is in the public interest to require public officials to explain how they acquired their wealth. That section 55 of ACECA is essentially rooted in the contractual and fiduciary responsibilities that a public official assumes on taking up his post, and that this explains why the public official is the primary subject under this provision. Upon acceptance of office or employment as a public official, one implicitly accepts the regime unilaterally established by the legislature, and he also accepts the duty related to his public functions to file his wealth declaration forms.

134. The plaintiff submits further that the 1st defendant has had an opportunity to be heard with respect to the assets that are alleged to be unexplained. First, upon receipt of the notice under section 26 of ACECA, and secondly, during the hearing of a matter such as this filed pursuant to section 55(2) of ACECA.

135. It is the plaintiff's case that the defendants have had an opportunity to explain the assets at issue but have failed to do so. Its role is to prove to the court, on a balance of probabilities, that the assets acquired constitute unexplained property and the burden then shifts to the defendants to justify possession. No proof of any element of criminal conduct is required in matters such as this, and the absence of criminal proceedings or allegation is immaterial. The plaintiff cites in support the case of **Stanley Mombo Amuti v KACC (supra)** and **Director of Assets Recovery Agency and others v Green and others [2005] EWHC 3168**.

136. The plaintiff submits that it has demonstrated the disproportion in the assets of the 1st defendant when compared with his known sources of legitimate income during the period in question. The 1st defendant cannot account for the disproportion in wealth nor is he able to present documentation of legitimate sources of income before this court. In the absence of any evidence to support the defendants claim, the plaintiff submits that it is only logical to conclude that they are unable to convince the court that the assets and wealth were acquired from a legitimate source of income. Reliance for this submission is again sought from the decision of the Court of Appeal in **Stanley Mombo Amuti v KACC (supra)**.

137. In addressing the defendants' challenge of its valuation reports, the plaintiff submits that the defendants' averments are factually and legally unfounded. It refers the court to section 59 of ACECA and asks the court to presume, in the absence of evidence to the contrary, that the certificate of a valuation officer is such a certificate. The plaintiff further asks the court to consider the definition of a valuation officer in line with section 59 (3) of ACECA. It is its submission that the defendants have not tendered any evidence that is contrary to what it has presented to the court with respect to the valuation of the properties.

138. The plaintiff further asks the court, in finding that it has proved its case and the defendants have failed to explain the source of the assets at issue, to be guided by the decision in **Stanley Mombo Amuti v KACC (supra)** in which the court held that under section 55 (5) and (6) of ACECA, the court has discretion to decide if the Commission has tendered evidence on a balance of probability establishing that a party had unexplained assets. Further, that it had the discretion to let the defendant satisfactorily explain the source of his assets.

Analysis and Determination

139. I have considered the pleadings of the parties in this matter, as well as their respective submissions. The overarching issue for determination is whether the 1st defendant has unexplained assets. The corollary to that issue is whether the said assets, should they be found to be unexplained, are liable to forfeiture to the State as prayed by the plaintiff.

140. Before embarking on a consideration of this issue, it is useful to begin by considering the law relating to forfeiture of unexplained assets. The legislative framework for recovery of unexplained assets is to be found in ACECA, section 55 of which provides as follows:

55. Forfeiture of unexplained assets

(1) In this section, "corrupt conduct" means—

(a) conduct that constitutes corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which—

(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

(2) The Commission may commence proceedings under this section against a person if—

(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and

(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

141. Section 55(4) of ACECA ensures that there is due process in the hearing of a matter relating to a claim that a party has in his possession unexplained assets by providing that:

(4) In proceedings under this section—

(a) the Commission shall adduce evidence that the person has unexplained assets; and

(b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.

142. Section 55(5) contains the reverse burden provision imposed on a defendant in a matter alleging possession of unexplained assets. It states as follows:

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

143. While section 55(6) sets out the powers of the court if satisfied that the defendant in a matter has unexplained assets, section 55(7) elucidates the extent of the properties that may be subject to an order relating to unexplained assets. These sections provide as follows:

(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

(7) For the purposes of proceedings under this section, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds—

(a) are held in trust for the person whose assets are in question or otherwise on his behalf; or

(b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration.

144. There is no dispute that the ‘Commission’ vested with the mandate to pursue recovery of unexplained assets under section 55(2) of ACECA is the plaintiff. Section 11(1)(j) of the EACC Act provides that:

“In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall... institute and conduct proceedings in court for purposes of the recovery or protection of public 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.”

145. The plaintiff is also empowered under Article 252 of the Constitution to **“conduct investigations on its own initiative or on a complaint made by a member of the public.”** It is also mandated, in accordance with the provisions of the Convention against Corruption (UNCAC) which is applicable to Kenya in accordance with Article 2(6) of the Constitution, to institute these proceedings as consistent with the United Nations Convention against Corruption which Kenya signed and ratified on 9th December 2003.

146. The Convention allows for the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with the Convention. “Confiscation”, which includes forfeiture where applicable, is taken to mean permanent deprivation of property by order of a court or other competent authority under Article 2(g).

147. The provisions of ACECA relating to unexplained assets have been considered by both the High Court and the Court of Appeal. In its decision in **Stanley Mombo Amuti v KACC (supra)** the Court of Appeal stated as follows:

“A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired.”

148. The Court of Appeal also observed in that case that:

“The concept of “unexplained assets” and its forfeiture under Section 26 and 55(2) of ACECA is neither founded on criminal proceedings nor convictions or criminal offence or economic crime.”

See also **KACC v James Mwachethe Mulewa (supra)**.

149. Thus, the jurisprudence from our courts is that the plaintiff, in seeking to recover unexplained assets, is not required to prove corrupt acts on the part of the public servant concerned. All that is required is for the plaintiff to show, on a balance of probabilities, that the

defendant in a matter has acquired assets which are not commensurate with his known legitimate source of income. Once that is done to the satisfaction of the court, the burden shifts to the defendant to explain the source of the assets at issue.

150. It is thus permissible, under our legislative framework and as determined by our courts, for the plaintiff to institute proceedings alleging that a public servant has acquired assets that are not commensurate with his known legitimate sources of income. The plaintiff must place before the court evidence that indeed shows that the defendant is a public servant, that he has assets that are not commensurate with his known legitimate source of income, and that he has not been able to explain the source of the said assets. The question is whether the plaintiff has been able to do this in the case before me.

151. The facts that emerge from the pleadings of the parties, which are largely undisputed, are these. The 1st defendant was, at the time material to this suit, between 2002- 2007, a public officer. He was a Chief Accountant, first at the Ministry of Finance, and then at the Ministry of Agriculture. At the material time, he had a gross salary of Kshs 53,900. The 2nd defendant is the 1st defendant's wife, while the 3rd, 4th and 5th defendants are his close relatives. The 6th and 7th defendants are limited liability companies in which the 1st defendant is the majority shareholder.

152. It is also not disputed that in the period between 2002-2007 during which the 1st defendant is alleged to have been involved in the corrupt dealings that later came to be known as the Anglo Leasing security contracts, he and his co-defendants, including the limited liability companies in which he and his relatives are shareholders, acquired substantial properties. These are the properties that the plaintiff alleges are unexplained assets as defined in ACECA.

153. It is not disputed that in 2005, the 1st defendant acquired L. R. No. MN/1/5134 which is registered in the name of the 6th defendant. It is alleged by the plaintiff and not disputed by the defendants that the property was developed at substantial cost between 2005 and 2007. The 1st defendant purchased House No. HG. 60, L.R No. 146/69, Mugoya Estate in 2005 at a cost of Kshs. 2,560,000.00. The evidence before the court shows that the 1st defendant paid for the house, in cash, in January of 2005. It is also not disputed that L.R. No. 337/1543 and L.R. No. 337/1544, in Mavoko Municipality which are registered in the name of the 1st defendant were developed between 2002-2005. Apartment No. 4 — Block A5, L.R No. 209/11646, Parkview, South C and Apartment No.7 — Block B4, on L.R No. 209/11646, Parkview, South C were acquired in 2005.

154. The evidence further shows that the motor vehicles the subject of the suit, which are registered in the name of the 1st or 2nd defendant and the 7th defendant, were also purchased during the period in question, between 2002 and 2007.

155. As a public officer, the 1st defendant was required to make declarations of wealth every two years, and it appears that he complied with this requirement. In his wealth declaration forms for the years 2002-2007 (annexure "EN 7"), the 1st defendant had declared income in the form of a gross monthly salary of Kshs 36,590.00. His assets were declared as being a Toyota Corolla KAJ 154Y 12 years old valued at Kshs. 180,000.00; property LR No. 6616/6555 Busia valued at Kshs. 60,000.00; Hazina Co-operative shares valued at Kshs. 94,400.00; property number LR. No. 14888 Kajiado valued at Kshs. 200,000.00; cash of Kshs. 6,700 in HFCK bank account number 105001110921; and personal and household effects worth Kshs. 50,000.00. The plaintiff submits, on the basis of the wealth declaration by the 1st defendant, that as at the statement date of 23rd September 2003, the 1st defendant's wealth was a gross amount of Kshs. 1,030,180.00.

156. The 1st defendant had also filed a wealth declaration for the period 29th November 2006 to 29th November 2007. He had declared for this period a gross monthly salary of Kshs. 56,189.58. His assets were indicated as being Toyota Corolla KAQ 623X, 10 years old, valued at Kshs. 385,000.00; L.R No. 6616/6555 Busia valued at Kshs. 70,000.00; and Hazina Co-operative shares valued at Kshs. 190,245.00. He had also declared cash in Co-op Bank account of Kshs. 50,000 and personal and household effects of Kshs. 350,000.00. His known legitimate sources of income as at the statement date of 29th November 2007 was a gross amount of Kshs. 1,719,520.20.

157. When compared to his known legitimate sources of income and the self-declarations of wealth, the properties the subject of this suit, as well as the deposits in the 1st defendant's accounts and the accounts of the limited liability companies in which he is a majority shareholder, raise questions with respect to their sources. I am satisfied, on the evidence placed before me by the plaintiff, that the 1st defendant has unexplained assets within the meaning of section 2 of ACECA which states that:

“unexplained assets” means assets of a person—

(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.

158. I have already alluded to the provisions of section 55(5) of ACECA. Under this section, should the court be satisfied, on ***a balance of probabilities*** on the basis of the evidence placed before it by the Commission that the person has unexplained assets, it may direct that the person explains the source of the assets. The burden of proof in matters relating to unexplained assets under ACECA, contrary to the submission by the defendants, is not beyond reasonable doubt. The procedure for recovery of unexplained assets is civil in nature and the burden of proof set by statute is on a balance of probabilities.

159. I should observe at this juncture that aside from the 1st defendant, none of the other defendants deigned to place any information before the court regarding the properties the subject of this suit. The only explanation that is before the court is in the form of the two affidavits filed on the same day by the 1st defendant. His explanation is that some of the properties do not belong to him but to the other defendants. Further, that in the case of three properties, namely apartments number 4 Block A5 and number 7 Block B4 on L.R number 209/11646 Parkview

South C and plot number MN/1/5134 Nyali, Mombasa, he is holding the properties on behalf of a Maxwell Mbecah, a resident of the United States.

160. All the evidence before the court, however, shows that the properties in question are registered in the name of the 1st defendant or, as the statements of the 2nd defendant and one Gabriel Malo confirm, that he is the beneficial owner thereof. Nothing would have been easier than for the other defendants to place before the court, by way of affidavit evidence, their purported ownership of the subject properties. It must be observed that this matter has been in court since 2008. The defendants have had ample time to place such evidence relating to their ownership of the assets, and the legitimate sources of funds to acquire the said assets, before the court. Further, nothing would have prevented the 1st defendant from placing before the court the alleged power of attorney in respect of the properties that allegedly belong to Maxwell Mbecah. In any event, it seems to the court that if indeed the properties were owned by the said Mbecah, they would have been registered in his name, and he would then execute a power of attorney authorising the 1st defendant to deal with his properties.

161. The 1st defendant has sought to explain the sources of funds deposited in his personal account and in the accounts held in the names of the corporate defendants in this matter. I note, however, that the explanations have been set out in the written submissions, where reference to a bar and restaurant business, among other things, are made. As submitted by the plaintiff however, such factual matters in submissions are of no value. I am guided in reaching this conclusion by the decision of the court in **Republic v Chairman Public Procurement Administrative Review Board & another ex parte Zapkass Consulting and Training Limited & another** [2014] eKLR in which the court held that:

“The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.” (Emphasis added)

162. In **Clips Limited v Brands Imports (Africa) Limited formerly named Brand Imports Limited** [2015] eKLR the court observed that:

“In paragraph (iii) of its supplementary submissions, the Defendant submits that it highly regrets it did not produce any evidence of usage of the disputed marks and submits the court cannot ignore this fact. However, it is trite law that new issues cannot be raised in submissions.” (Emphasis added)

163. In **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another** [2014] eKLR the court held that:

“Submissions cannot take the place of evidence...What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

164. In the present case, the only credible evidence before me with regard to the assets the subject of the suit is that presented by the plaintiff. The submissions by the defendants in which they seek to introduce information about businesses operated by the 1st defendant are of no assistance to them. Nor are the submissions that the 2nd defendant and Mr. Malo did not make statements regarding ownership of the properties registered in the names of the 2nd and 7th defendant of their own accord. The 1st defendant was, at the material time, a public officer working in the Ministry of Finance in which the infamous Anglo Leasing corruption scheme was perpetrated. The evidence shows that he acquired numerous assets, registered in his name and in the names of his relations or companies in which he is the major shareholder. He also made large deposits in his personal account and in the accounts of the corporate entities in the same period. Despite being given the opportunity to do so, he has not been able to explain the source of funds for the acquisition of the assets. The assets are not commensurate with his known legitimate source of income, which was his salary. In the circumstances, I am constrained to find that the assets the subject of this suit are unexplained assets.

165. The defendants submitted that the plaintiff’s witnesses are imposters, and that the valuations by the 2nd plaintiff’s witness, Mr. Maithya, could not be relied on as he had not established that he was an ‘expert’ as required under the Evidence Act.

166. I have considered these arguments and the responses thereto by the plaintiff. I note that this assertion by the defendants arose during cross-examination and appears to be grounded on the fact that the witnesses included their middle names in introducing themselves to the court. I note, however, that in the Schedule of Items Collected from the 1st defendant’s house during the search on 28th November 2008 in the presence of, among others, the two witnesses who testified before the court, P. Maithya and E. Nguthu, the schedule is signed by ‘Patrick O. Abachi’ and ‘Enoch K. Nguthu.’ The omission of the middle name in the affidavits in support of the Originating Summons does not, in my view, amount to a material omission that would render the suit unsupported by evidence.

167. The defendants have also questioned the valuation reports prepared by P. Maithya and annexed to the Originating Summons on the basis that the valuer has not included a certificate to confirm that he is indeed a valuer. The response from the plaintiff is that there is no such requirement as valuers are registered and gazetted and such gazette notice is a public document. The plaintiff also refers the court to the provisions of section 59 of ACECA which provides that:

Certificates to show value of property, etc.

(1) In a prosecution for corruption or economic crime or a proceeding under this Act, a certificate of a valuation officer as to the value of a benefit or property is admissible and is proof of that value, unless the contrary is proved.

(2) A court shall presume, in the absence of evidence to the contrary, that a certificate purporting to be the certificate of a valuation officer is such a certificate.

(3) In this section, “valuation officer” means a person appointed, employed or authorised by the Commission or the Government to value property and whose appointment, employment or authorisation is published by notice in the Gazette.

168. I note that the valuation reports in respect of each of the properties in issue in this matter is accompanied by a certificate titled ‘**Valuation Certificate**’ and signed by Pius N. Maithya, Registered Valuer. In accordance with section 59(2) set out above, and there being no evidence to the contrary, I believe I am entitled to presume that the certificate and the valuation by Maithya, an employee of the plaintiff, is properly before the court with regard to each of the respective properties in this matter.

169. The defendants have submitted that everyone has a right to property guaranteed under Article 40 of the Constitution. They have further argued that they have a right to non-discrimination guaranteed under Article 27. The plaintiff does not dispute this. While it concedes that these rights are indeed guaranteed to all, it submit, first, that the defendants have not demonstrated a violation of these rights. Secondly, that under Article 40(6), assets found to have been unlawfully acquired do not enjoy constitutional protection.

170. I agree with the petitioners on these two points. The 1st defendant whom, from the evidence before the court is the owner or beneficial owner of all the assets the subject of the suit, was suspected to have been involved in corruption that revolved around the Anglo Leasing contracts. Investigations showed that he had, in the five-year period that he was reasonably suspected of involvement in corruption, acquired assets whose value, as at 2008, was estimated to be in excess of Kshs 65,000,000. He has not been able to show a legitimate source for the funds to acquire the said assets.

171. In the circumstances, it is my finding and I so hold that the Originating Summons dated 18th September 2008 has merit, and is hereby allowed.

172. The orders which commend themselves to me, and which I hereby grant, are as follows:

1. I declare that the defendants are in possession of the following unexplained assets:

- a. Ngong/Ngong/14888, situated within Kajiado District registered in the name of the 1st defendant;
- b. L.R. No. 337/1543, Mavoko Municipality Council registered in the name of the 1st defendant;
- c. L.R. No. 337/1544, Mavoko Municipality Council registered in the name of 1st defendant;
- d. Kajiado/Kitengela/6491, Kajiado District, registered in the name of the 1st defendant;
- e. Apartment No. 4 - Block A5, L.R No. 209/11646, Parkview, South C, situated within Nairobi and registered in the name of the 1st defendant;
- f. Apartment No.7 - Block B4, L.R No. 209/11646, Parkview, South C, situated within Nairobi and in the name of the 1st defendant;
- g. House No. HG. 60, L.R No. 146/69, Mugoya Estate, situated within Nairobi and registered in the name of the 1st defendant;
- h. Kajiado/Kitengela/20644, situated within Kajiado District and registered in the name of the 3rd defendant;
- i. Kajiado/Kitengela/20580, situated within Kajiado District and registered in the name of the 3rd defendant;
- j. Kajiado/Kitengela/20641, situated within Kajiado District and registered in the name of the 5th defendant;
- k. Kajiado/Kitengela/20609, situated within Kajiado District and registered in the name of the 4th defendant;
- l. L. R. No. MN/1/51 34, C. R. No. 35667 situated within the Municipality of Mombasa and registered in the name of the 6th defendant;
- m. Motor vehicle registration No. KAS 108X, Toyota Pick Up, registered in the name of the 1st defendant;
- n. Motor vehicle registration No. KAV 170C, Toyota Lexus, registered in the name of the 7th defendant;
- o. Motor vehicle registration No. KAU 105T, Mitsubishi Saloon, registered in the name of the 1st defendant;
- p. Motor vehicle registration No. KAS 336X, Toyota Saloon, registered in the name of the 2nd defendant;

q. Motor vehicle registration No. KAU 372M, Toyota Station Wagon, registered in the name of the 3rd defendant;

r. Funds held in the following bank accounts:-

i. Barclays Bank of Kenya, Queensway Branch, Account No. [...] in the name of Rick Seaside Villas;

ii. Co-operative Bank Limited, Co-operative House Branch, A/C No. [...];

iii. Housing Finance Company of Kenya Limited, A/C No. [...];

iv. Cash in the sum of Kshs. 1,990,000/- recovered from the 1st defendant's premises and held by the plaintiff;

2. I declare that the assets set out in order 1 above constitute 'unexplained assets' within the meaning of sections 2 and 55 of the Anti-Corruption and Economic Crimes Act and shall be forfeited to the government;

3. I direct that the funds held in the accounts set out in order 1(r) above and the sum of Kshs 1,990,000/- recovered from the 1st defendant's premises shall be forfeited to the government.

173. As costs follow the event in civil proceedings, I direct that the defendants shall bear the costs of this suit.

174. Orders accordingly.

Dated Signed and Delivered electronically this 10th day of March 2021.

MUMBI NGUGI

JUDGE