



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NSIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**CIVIL CASE NO 21 OF 2019**

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

**VERSUS**

**MOSES KASAINI LENOLKULAL.....DEFENDANTS/ APPLICANT**

**RULING**

**BACKGROUND**

1. The plaintiff/respondent commenced asset recovery proceedings against the Respondent/Applicant herein by way of originating summons dated 19<sup>th</sup> March, 2019 and by a ruling thereon dated 14<sup>th</sup> August, 2019 obtained freezing orders in respect to funds then in the applicants named bank accounts.

2. The plaintiff/respondent by a plaint dated 9<sup>th</sup> September, 2019 sought for a permanent injunction restraining the applicant/respondent from selling, alienating, charging and further dealing with property named as follows:-

A) LR NO 2259/7xx

B) LR NO 2259/7xx

C) LR NO 2259/7xx

D) LR NO 2259/7xx all situated at Karen within Nairobi

3. The plaintiff further sought for an order of forfeiture of the above name parcels of land together with developments there on and a sum of Kenya shillings fourteen million six hundred thousand (Ksh.14, 600, 000) held at the plaintiffs named bank accounts held at KCB Maralal Branch in the name of the applicant.

4. In the alternative the plaintiff sought for the sum of Kenya shillings Eighty million seven hundred sixty-three thousand, seven hundred and fifteen thirty-five cents. (Kshs.80.763,715.35) together with interest thereon at court rates from the date of receipt until payment in full. The plaintiff also sought for the cost of the suit.

5. By a ruling dated the 6<sup>th</sup> day of December, 2019 this court (Onyiego J) granted the preservative orders sought by the plaintiff against the Defendant's assets and as at the time when the current application, the subject matter of this ruling was filed, the main suit had been fixed for hearing.

**APPLICATION**

6. By a notice of motion dated 27<sup>th</sup> April 2021 the Defendant/Applicant moved the court for the following orders:

a) Pending the hearing and determination of this application, the Honourable Court be pleased to issue a temporary injunction restraining the plaintiff/respondent, their agents servants employees representatives and or any person acting under its authority from conducting any further investigations on the Defendant/Applicants assets namely:- LR NO. 5259/7xx, LR NO. 2259/7xx, LR NO. 2259/7xx, LR NO. 2259/7xx, Bank Accounts Numbers 1124XXXX91, 1103XXXX08, 1108XXXX41 and 1234XXXX47 held at

KCB and Bank Account No 1100XXXX606 and 110XXXXX314h held at Equity Bank, the Defendant's Mpesa Account No 0726XXXX57 and Motor Vehicles Reg. No KCD xx7P and KCH xx0M.

b) That pending the hearing and determination of the suit this, Honourable Court be pleased to issue an injunction restraining the Plaintiff /Respondent from conducting further investigation on the Respondents property, accounts and motor vehicles named in prayer A.

7. The application was based on the grounds that the plaintiff commenced investigations into allegations of corruption and economic crimes, conflict of interest and abuse of office of the applicant and other officials of Samburu County Government.

8. That in the course of investigations the plaintiff obtained search warrants to investigate the Applicants Bank accounts and the manner in which he acquired properties named herein, for which the applicant was required to record statements which he did and was thereafter charged with various corruption related offences in Anti-Corruption Criminal Case No. 3 of 2019.

9. That the plaintiff further instituted Miscellaneous Application No. 15 of 2019 **EACC v MOSES KASAINI LENOLKULAL** where it obtained an ex-parte order prohibiting the applicant from dealing with funds in the named accounts, pending the conclusion of investigations and or institution of recovery proceeding, which was thereafter instituted to which the applicant filed statement of defence dated 17<sup>th</sup> October, 2019 and the matter settled down for hearing.

10. It was contended that for the plaintiff to institute recovery proceedings, investigations must have been completed and that while conducting the investigations, the plaintiff did not afford him reasonable opportunity to explain the disproportion between his property and or assets and his known legitimate sources of income, as stated in his statement of defence.

11. That on 21<sup>st</sup> April, 2021 the plaintiff served him with a notice requiring him to explain the alleged disproportion within 14 days and the assets named in the notice were the same ones in the recovery proceedings and that the said notice should have been sent prior to the institution of the recovery proceedings, as per the provisions of Section 26, 28 and 55 of ACECA.

12. It was stated that should the defendant comply with the said notice and provide information sought, he would be prejudice and his defence will be defeated and that any further investigations in the matter currently being carried out by the plaintiff during the pendency of the suit in court are malicious in bad faith unlawful and are intended to deny him right to fair hearing, as failure to respond is an offence punishable with a fine of up to Ksh.300,000 or imprisonment for a term not exceeding three (3) years or both.

13. The application was supported by an affidavit sworn by the defendant/applicant, in which he deposed that any further investigations into his property currently being carried out by the plaintiff during the pendency of the suit was intended to deny him the right to fair hearing and it was in the interest of justice that the orders sought be granted.

## **RESPONSE**

14. In response to the application, the plaintiff filed grounds of opposition dated 6<sup>th</sup> May, 2021 in which it was stated that the application was wholly misplaced, misconceived and bad in law for being premature and an abuse of the court process. It was contended that the application had been overtaken by events, as the investigations the subject matter of the application had been concluded.

15. It was contended that it was grounded on a misconception by the applicant as to the nature of the proceedings and investigations under Section 55 of ACECA.

16. The grounds were supported by annexed affidavit sworn by one EVANS RONO in which it was deposed that he was in the team that investigated the matters relating to the applicant herein, which led to the same being charged in Anti-Corruption Case No. 3 of 2019 and that the suit herein was unrelated to the Notice issued to the applicant under Section 55 of ACECA, as the same is founded under Section 45 of ACECA which established that the applicant had supplied fuel amounting to Kenya shillings eighty million (80,000,000) to the County Government in conflict of interest, through an entity known as Oryx Service Station.

17. It was contended that the said suit for recovery of the said sum of money which constituted proceeds of corruption or corrupt conduct as against the proceedings under Section 55 of ACECA which is founded on unexplained assets.

18. It was deposed that the properties named herein, whose value was established to be a sum of Kenya Shilling 60 million were found to had been acquired by the applicant through investing the proceeds of corrupt conduct, by supplying fuel in conflict of interest and interest thereon as well as 14 million preserved in the suit. It was contended further that the plaintiff intends to recover the same as civil forfeiture.

19. It was deposed further that the investigations which led to the issuance of the notice complained of, relates to unexplained wealth as provided for under Section 55(2) of ACECA, for which the plaintiff has not instituted any suit, but had only asked the applicant to explain the disproportion between his assets and his known legitimate sources of income, pursuant to investigations which established that he is in possession of unexplained wealth valued at Kenya shillings six hundred and sixty one million, two hundred fifty three thousand, nine hundred and six (Ksh.661,253,906.)

20. It was contended that in the event the applicant failed to satisfy the requirement of the notice, the respondent is mandated to institute forfeiture proceedings for the value of the assets found to constitute unexplained wealth and therefore the application herein was premature and misplaced as it was filed in a wrong suit.

21. It was contended that the applicant responded to the said notice by seeking for more reasonable time to explain the disproportion between

his assets and known legitimate sources of income but has however declined to offer an explanation and therefore the application is an abuse of the court process.

## **SUBMISSIONS**

22. Directions were issued that the application be disposed of by way of written submissions, which were duly filed. On behalf of the applicant, it was submitted that the Respondent having conducted and concluded investigation against the applicant's properties and proceeded to institute the proceeding herein, to recover the applicant's property and could therefore not turn around and commence other investigations in respect of the same property, the subject matter of litigation before the court. In support of the submissions reference was made to the case of **REPUBLIC v COMMISSION ON THE ADMINISTRATION OF JUSTICE & ANOTHER EX PARTE SAMSON KEGENGO ONGERI [2015] eKLR** where the court had this to say:-

*71. Having looked at the pleadings in the ELC and the subject matter which the 1<sup>st</sup> Respondent set out to investigate or which it did actually investigate and made findings on, I have no doubt that the subject matter was the same and the issues were also the same. It is not in doubt that the applicant was a party to those same proceedings. In my view the reason for barring the 1<sup>st</sup> Respondent from investigating matters which are the subject of Court proceedings is to avoid possibility of the 1<sup>st</sup> Respondent's findings running contrary to court decisions. I am therefore satisfied that the 1<sup>st</sup> Respondent ought not to have investigated the matter the subject of these proceedings. If it did unknowingly as it alleges, that does not render its findings valid."*

23. It was further submitted that as was stated in the case of **AZZURI LTD v GEORGE KADENGE ZIRO & 5 OTHERS [2017] eKLR** the national Land Commission could not proceed to hear and determine a matter that was pending before the court as that would of necessity offend the subjudice rule within the meaning of Section 6 of the Civil Procedure Rules where the court held that those proceedings would amount to nothing but affront on the powers granted to court under Article 162 of the constitution.

24. In further support of the applicant's position reference was made to the cases of **REPUBLIC v NATIONAL LAND COMMISSION & 2 OTHERS [2020] eKLR** and **DOMINIC MUKUI KIMATTA v NATIONAL LAND COMMISSION SAMSON KIPLAGAT NGETICH (interested party) [2020] eKLR**.

25. It was submitted that there was no provision of the law which allowed the plaintiff to commence and conduct investigations on subject matter seized by the court of competent jurisdiction and pending for hearing and determination, as investigations by the plaintiff could not run parallel to the proceedings of the Honourable court on the same subject matter, as that would undermine the jurisdiction of the court.

26. It was contended that the present proceedings intend to achieve the same purpose as the proceedings contemplated in Section 55 of ACECA, as the applicant's property will be forfeited to the state in the event the suit is allowed.

27. It was therefore contended that the plaintiff having elected to institute the instant recovery proceedings, cannot therefore purport to conduct other investigation on the same properties with a view of institution of another recovery proceedings relating to the same subject matter, while the suit is pending, as it is legally barred by the principle of sub judice and that the impugned investigations were for collateral purposes intended to achieve an ulterior motive, in bad faith and only meant to harass embarrass and vilify the applicant.

28. It was submitted that the investigations were prejudicial to the applicant and impeded his right to fair hearing, the same having filed a defence to the plaintiffs suit, where he challenged the manner in which the plaintiff conducted the investigations and in particular their failure to give the applicant opportunity to offer an explanation under the provisions of Section 26 and 55 of ACECA and in line with the Court of Appeal decision in **DPP v PROF TOM OJIENDA & ASSOCIATES ADVOCATE & 3 OTHERS [2019] eKLR** where the court stated as follows:-

*"It is obvious from the above-quoted sections of the ACECA that the Legislature's intention was for a person of interest or suspect to be aware of the intended action of EACC against him. It also intended for a person of interest to first be given a chance to voluntarily comply with the notice before any action is taken against him. This was not done by EACC who chose the easier general path of seeking warrants, ex parte instead of paying due regard to the preliminary steps required under its constitutive and operative statute. In so doing, it infringed on Ojienda's fundamental rights and affected his interests, hence the learned Judge's invalidating action, which we have no difficulty endorsing.*

*We heard the argument, which was difficult to fathom, that section 26 of the ACECA required notice to issue only to an associate and not to a suspect. The argument was that as Ojienda was a suspect he was not entitled to any notice. With respect, the plain and unambiguous text of section 26(1) puts paid to that argument. The framers of the Act intended that a suspect be furnished with a notice to provide details or information about property in the first instance. No such notice was issued to Ojienda and this vitiated its action of seeking warrants. The safeguard to the suspect is for good reason and it is an advantage to him that it was not open to EACC to deny at a whim.*

*Furthermore, the reading of section 23(4) of ACECA where it states that the police powers are conferred to EACC in "so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator."*

*This is a clear indication that the Legislature did not envision a situation where EACC conveniently falls back on the mere general and less regulated powers of the Evidence Act and the Criminal Procedure Code when executing their specific mandate under their parent Act. Therefore, EACC must adhere to the procedural guidelines set out in ACECA as to how it should handle investigations and not approbate and reprobate by a piecemeal invocation of its powers while disregarding its safeguards. Such guidelines and regulations also help EACC discharge its mandate better as it has a chance to summon suspects, be furnished*

*with the necessary information before preferring charges against individuals. This approach aids in the fair administration of investigation under ACECA.”*

29. It was finally submitted that the investigations by the plaintiff were not immune from the scrutiny by the court, which can interfere with the same as was stated in the case of **COMMISSIONER OF POLICE & DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT v KENYA COMMERCIAL BANK LTD & 4 OTHERS [2013] eKLR** where the court stated thus:-

*“Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.*

*By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain above of power that may lead to harassment or persecution. See Githunguri V. Republic [1985] LLR 3090.*

*It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others V. Attorney General [2002] 2KLR.”*

30. It was therefore submitted that the court should invoke its inherent jurisdiction and interfere with the plaintiff’s investigations, as the same are not intended to achieve any meaningful purpose which cannot be achieved with the investigations previously conducted, that led to the filing of the present suit.

#### **RESPONDENT’S SUBMISSIONS**

31. It was submitted by the respondent that the present proceedings relate to allegations of conflict of interest involving the applicant and 13 other officers of the Samburu county Government under Section 42 of ACECA whereas the current investigations being challenged by this application relates unexplained wealth as defined in Section 2 of ACECA for which the commission is yet to lodge a suit.

32. It was therefore contended that the application herein is misplaced as it relates to a separate and distinct investigations which has not yet materialized into a suit. It was stated further that the application is fatally defective, having been brought by way of a notice of motion without having sought the leave of the court and that it should have been brought under the provisions of Section 7 and 8 of the Fair Administrative Actions Act.

33. It was contended that the Notice issued to the applicant, was issued under the provisions of Section 26 of ACECA and that the applicant was expected to offer an explanation, which has declined to do so and that the commission may only commence proceedings thereon, which it had not yet done in compliance with Section 55 (2) of ACECA.

34. It was submitted that the investigations into unexplained assets for which the Notice was issued to the applicant under Section 26 of ACECA relates to unexplained assets valued at Kenya shillings six hundred and sixty one million, two hundred fifty three thousand, nine hundred and six forty eight cents (Ksh.661, 253, 906.48), which was different from the subject matter of the present suit and that for the applicant to be entitled to the injunctive reliefs sought against the plaintiff from doing what the constitution mandate it to do, there must be a clear violation or threatened violation of the constitution as was stated in the case of **DIRECTOR OF PUBLIC PROSECUTION & ANOTHER v CROSSY LTD & ANOTHER KISUMU COURT OF APPEAL CIVIL APPEAL NO 1 & 2 OF 2013 consolidated.**

35. It was contended further that the above principles were reinstated in the case of **BENSON MUTETI MUSILA & 5 OTHER v THE CHIEF MAGISTRATE MILIMANI LAW COURT & 4 OTHER HIGH COURT ACEC PETITION NO. 1 OF 2019** where the court stated that it was in public interest that the constitutional bodies are allowed to carry out their mandate without interference unless there are very clear and cogent reason for the court to do so.

36. In response to the applicant’s submissions, it was stated that the statement of defence filed in the present suit relates to conflict of interest and does not amount to a response to the notice issued herein, under the provision of Section 26 of ACECA and that the respondent in this present suit did not investigate the applicant’s properties in the present suit, which were only preserved for purposes of forfeiture in satisfaction of the decree.

37. It was contended that the respondent had not instituted another investigations relating to this suit which is founded on conflict of interest in respect of supply of fuel to Samburu county and that the notice complained of was in respect of investigations on unexplained wealth. The plaintiff further distinguished the authorities submitted in support of the applicant’s case and stated therein the **Samson Ongeri case**, the respondent admitted that it was not aware it investigated the matter while in **Azzuri case**, the National Lands Commission was having a parallel hearing of a matter which was before court and the **Tom Ojienda case** was in relation to searches.

38. It was contended that the respondent was acting in favour of public interest within its constitutional mandate and therefore the application should be dismissed.

### **ANALYSIS AND DETERMINATION**

39. From the material placed before the court, it is not in dispute that the present suit before the court is in respect of an alleged supply by the applicant of fuel to Samburu County wherein he is the Governor, in conflict of interest and in violation of Section 42(3) of ACECA for which he has filed a defence and the matter was fixed for hearing as at the time when the present application was filed.

40. It is also noted in dispute that the Plaintiff/Respondent issued to the applicant a statutory notice under the provisions of Section 26 and 55(2) of ACECA to explain the disproportion between his assets and the known legitimate sources of income, which as per that notice amounted to a sum of Kenya shillings six hundred and sixty one million, two hundred fifty three thousand, nine hundred and six forty eight cents (Kshs.661,253,906.48)

41. It is also not in dispute that the applicant through his Advocates on record, through a letter dated 3<sup>rd</sup> May, 2021 indicated that he will not provide the information sought, as the matters raised therein were already before this court and it is on that basis that the application herein was filed for court's intervention.

42. The issue therefore for determination before the court, is whether the said notice is related to the matter currently before the court as contended by the applicant or whether it is a fresh investigation as contended by the Respondent and what order should the court make in respect thereof.

43. To enable the court, make a determination thereof, one needs to look at the provisions of Sections 42 and 55 of the ACECA under which the present suit is instituted and Section 55 under which the impugned notice is issued and whether the applicant ought to have filed the present application in this suit or as a stand-alone in respect of the said notice.

44. Section 42 of ACECA creates an offence known as conflict of interest which is defined as (1) if an agent has a direct or indirect private interest in a decision that his principal makes, the agent is guilty of an offence if (a) the agent knows or has reason to believe that the principal is unaware of the interest and the agent fails to disclose the interest and (b) the agent votes or participates in the proceedings of his principal in relation to the decision and 42(3) provides that an agent of a public body who knowingly acquires or holds directly or indirectly a private interest in any contract agreement or investment emanating from or connected with a public body is guilty of an offence.

45. Section 46 of ACECA further creates an offence of abuse of office which is defined that a person who uses his office to improperly confer a benefit to himself or anyone else is guilty of an offence.

46. Section 2 of ACECA on the other hand defines unexplained assets to mean assets of a person (a) acquired at or around the time a 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.

47. A proper starting point for these decisions is whether the unexplained asset claim or investigation is independent from investigation relating to proceeds of crime or corruption, for which the plaintiff is entitled to institute civil recovery proceedings against the assets which are or were acquired through the said proceeds.

48. Unexplained assets or wealth is defined as the difference between a person's total wealth and their lawfully acquired wealth, whereas civil forfeiture targets the proceeds and instrumentalities of unlawful activity. Unexplained assets is against the assets and puts the burden upon respondent to show that the assets were lawfully acquired. Section 55(2) of ACECA empowers the commission to commence proceedings against a person if after investigation it is satisfied that the person has unexplained assets, after the person has been afforded reasonable opportunity to explain the disproportion between the assets and his known legitimate sources of income.

49. The proceedings under this provision is by way of originating summons, whereas the civil forfeiture which is now pending before the court is commenced by way of a plaint. The fact that the plaintiff has mandate under both civil forfeiture and unexplained asset to commence independent proceedings was stated by this Court in the case of **ETHICS AND ANTI-CORRUPTION COMMISSION v JAMAL BARE MOHAMED [2019] eKLR** where the court stated: -

*“31. Under section 11 of the ethics and Anti – Corruption Act and Section 55 of Ethics and Anti-Corruption Act No. 3 of 2003 the commission had mandate to undertake investigations into allegations of corruption or economic crimes and in appropriate cases to institute civil proceedings against any person for the recovery of assets whose value is disproportionate to his known sources of income.32 it is therefore in the interest of justice that the commission be allowed to exercise its mandate to determine whether the sum of money held by the defendant was rightfully acquired or whether the defendant is culpable of any economic crime. This can only be determined once originating summons ..... is heard and determined.”*

50. What constitutes unexplained assets was defined in the case of **STANLEY MOMBO AMBUTI v KENYA ANTI-CORRUPTION COMMISSION [2019] eKLR** where the court had this to say:-

*“68. Apart from the factual contestations in this appeal, the appellant urged the learned judge erred in law in her interpretation and application of Sections 26 and 55 of the ACECA in so far as relates to the concept of “unexplained assets.” We now consider this contention.*

69. *The Kenyan concept of “unexplained assets” is akin to “Unexplained Wealth Order” (UWO) under the United Kingdom*

*Proceeds of Crime Act 2002 ("POCA"). Section 362A of the UK POCA defines an unexplained wealth order is an order requiring the respondent to provide a statement—*

- (a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made;*
- (b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met);*
- (c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and*
- (c) setting out such other information in connection with the property as may be so specified.*

*70. In the UK case of National Crime Agency -v- Mrs. A [2018] EWHC 2534,*

*it was held that for an unexplained wealth order to issue, there must be reasonable grounds for suspecting that the known sources of an individual's lawfully obtained income would have been insufficient for the purpose of enabling the individual to obtain the property. The court observed that one of the critical factors to be taken in account is the "income requirement" and an individual required to explain source of wealth should lead sufficient evidence to defeat any "reasonable grounds for suspicion" under the income requirement.*

*71. The UK Section 362A of POCA is in pari materia to Section 55 (2) of the Kenya ACECA which lay emphasis on assets being disproportionate to an individual's known legitimate sources of income. Section 55 (2) embodies the concept of "income requirement" whereby an individual's assets should be proportionate to his/her legitimate known source of income."*

51. it is clear from the above that the suit now pending before the court is in respect of investigations commenced under the provisions of Section 11(1) (j) of EACC of which is a general civil proceeding for purposes of proceeds of corruption or related to corruption whereas the notice issued to the applicant, the subject matter of this ruling is in respect of unexplained asset, for which the law requires the plaintiff to issue a notice to the applicant to offer an explanation on the disproportion between his assets and known source of income and it is immaterial if there is interconnection between the property sought to be forfeited and the assets acquired by the applicant in disproportion to his known legitimate source of income.

52. It follows that one investigation can lead to establishment of two different causes of action and whereas the plaintiff/respondent has instituted the present proceedings, there is no law that bars the same from instituting a claim in respect of unexplained assets under the provisions of Section 55(4) (a) and before so doing must under Section 26 of the Act accord the applicant an opportunity to offer an explanation which it has done through the notice complained of.

53. I take the view that plaintiff/Respondent has accorded to the applicant an opportunity to offer an explanation as required by the statute and as per the provisions of Fair Administration of Actions Act and therefore the applicant's complaint herein has no merit, the notice having lawfully been issued.

54. It is therefore clear to my mind and I hold that the notice issued to the applicant herein was in respect of an independent investigation under unexplained assets and had nothing to do with the claim now pending before this court which as explained by the plaintiff and as confirmed through the pleadings is in relation to supply of fuel by the applicant to Samburu County Government in conflict of interest and will not prejudice the same in respect of the defence offered herein.

55. Having reached the above conclusion, it follows that the applicant complaint in respect of the notice issued to him under the unexplained assets claim is misplaced in this suit, I would therefore agree with the plaintiff's contention that the same should have been raised in an independent proceeding in respect of the matters stated in the said notice for the court to independently look at the issue raised by the Applicant.

56. Unless specifically proved that there is violation of the applicant's constitutional rights in the ongoing investigations, this court will be very reluctant in interfering with the plaintiff's constitutional mandate as provided for in the constitution and the statute establishing the same. From the material supplied to the court, I find and hold that the plaintiff has accorded to the applicant an opportunity as required under the provisions of Article 47 of the constitution and the Fair Administrative Actions Act.

57. Having established that the notice issued to the applicant by the Respondent is in respect of an independent investigation which is unrelated to the present prayers sought even though they both involve the same subject matter. It follows that the appellants has failed to establish a prima facie case with probability of success for the grant of injunctive reliefs sought on the application herein which I find to lack merit and is hereby dismissed.

58. On the issue of cost, I take the view that the same shall be in the cause, the application having been filed in the present cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2021**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Kenduiwa for the plaintiff*

*Mr. Barasa for Mr. Nyamodi for the defendant*

*Court assistant - Potishoi*