



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC NO. 63 OF 2017

IN THE MATTER OF: BANK ACCOUNTS NUMBER EQUITY BANK [...], [...] AND [...] AND PARCELS OF LAND NO. THIKA MUNICIPALITY BLOCK 24/485

IN THE MATTER OF: THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO 3 OF 2003

BETWEEN

ETHICS AND ANTI CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

JAMAL BARE MOHAMED.....DEFENDANT

RULING

1 Both parties herein have filed their pleadings in respect to the originating summons dated 7th August 2017. When the matter came for hearing on 17th January 2019 the court was notified of a preliminary objection dated 15th January 2019 which had been filed on 16th January 2019 by the Defendant herein. The Plaintiff was served on 16th January 2019 3.30pm. The preliminary objection which attacks the jurisdiction of this court to hear the matter was set down for hearing by this court's directions of 17th January 2019.

2 This is what the preliminary objection states:

“Take notice that at the hearing of the plaintiff's originating summons dated 7th August 2017, counsel for the Respondent will contend as a preliminary point of law that:

1. This court lacks jurisdiction to enter into a merit consideration as the Applicant has not satisfied all the mandatory conditions precedent to bring a claim under section 55 of the Anti-Corruption and Economic Crimes Act.”

3 When the preliminary objection came for hearing Mr. Ngacha for the Defendant submitted that the Plaintiff did not comply with section 55 of the Anti-Corruption and Economic Crimes Act (ACECA) before filing the originating summons herein. He cited article 20 of the United Nations Convention as the backbone of section 55 ACECA, which should only deal with proceeds of crime deposited in Kenya from another country. He referred to section 55 (4) (8) and (9) of ACECA. He pointed out the following as lacunas in this case:

(i) There is no law enacted in Kenya for illicit enrichment as a crime in line with article 20 of the United Nations Convention and section 55 ACECA cannot be used as the substitute.

(ii) For section 55 ACECA to be applied it must be conviction based. That there must be a conviction, and section 54 ACECA is clear on what happens after conviction.

4 It was thus his submission that a confiscation order can be made by the sentencing court or the appropriate body given an order to pursue the recovery. He argued that in this case, a conviction was necessary. Referring to the case of **National Crime Agency vs Mrs A [2018] EWHC 2534 (UK)** he submitted that the Proceeds of Crime and Anti Money Laundering Act (POCAMLA) was now in place and could be applied in line with Article 20 of the U.N. Convention.

5 Mrs Litoro on behalf of the Plaintiff opposed the preliminary objection. She submitted that section 55 (2) ACECA provided for two conditions to be met before any forfeiture and that the procedure for the commencement is provided for. She argued that this procedure had been complied with and there is no requirement for a conviction. She referred the court to sections 55(4) and (5) of the ACECA to support

this.

6 Responding to the submission on article 20 of the United Nations Convention she argued that it directed State parties to enact offences on illicit enrichment. Some countries like Kenya elected not to criminalize illicit enrichment by Public officials. Instead they chose a way for recovery of such proceeds. She further argued that section 55 of the ACECA is not limited to transboundary corruption acts. She contended that there is civil and criminal forfeiture and the court can order for forfeiture after conviction.

7 Counsel while referring to the case of **Director of Assets Recovery Agency and others, R** (on application of) **v Green & Others [2005] EWHC 3168** said the case had only one issue of the preliminary objection to deal with. That the court mentioned a section that is similar to section 55 of the ACECA. Mrs Litoro further referred to two other cases namely:

(i) Kenya Anti-Corruption Commission vs Stanley Mombo Amuiti [2017] eKLR

(ii) Kenya Anti corruption commission vs James Mwathethe Mulewa & Another [2017] eKLR.

These cases dealt with civil forfeiture.

8 In a brief rejoinder Mr. Ngacha submitted that section 55 of the ACECA cannot be treated as a stand alone provision. It has to be read alongside section 54 of the ACECA. He further stated that with the enactment of POCAMLA, section 55 of the ACECA lost meaning.

Analysis and determination

9 I have considered the preliminary objection and the submissions and the issue I find falling for determination is whether this court has jurisdiction to deal with this case. It is the Defendant's argument that on the basis of article 20 of the United Nations Convention no such proceedings can be initiated without a conviction for illicit enrichment. The said article 20 provides as follows:

“subject to its constitution and the fundamental principles of its legal system, each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to is or her lawful income.”

The wording of this article is very simple and clear. The key words are “subject to its constitution and fundamental principles of its legal system”. This phrase does not in any way show that the application is compulsory. Each State has to consider its constitution and fundamental principles of its legal system before criminalizing illicit enrichment.

10 The Defendant has not pointed out how Kenya has breached this Article 20 of the United Nations Convention. In its efforts to deal with acts of illicit enrichment Kenya has enacted the following legislation:

§ Anti Corruption and Economic Crimes act (ACECA)

§ Proceeds of crime and Anti Money Laundering Act (POCAMLA)

§ Ethics and Anti-corruption Commission Act

§ In addition to this the Assets Recovery Agency under the Attorney General was set up. It's mandate includes the recovery of illicitly acquired assets.

11 The above cited legislation provides for a regime of dealing with illicitly acquired assets which is no different from illicit enrichment. When one is in possession of illicitly acquired assets it means the person has illicitly enriched himself or herself.

12 Mr Ngacha has attacked the operation of section 55 ACECA since it is not based on a conviction. Section 54 of ACECA deals with criminal forfeiture and explains the procedure very clearly. Under section 54 ACECA there has to be a conviction before any compensation can be made. Enforcement under this section is done by the person in whose favour the order has been made. The enforcement is done as if the order was made in civil proceedings.

13 Section 55 of ACECA which is the provision under which the originating summons herein has been brought deals with forfeiture of unexplained assets. This is a clear civil forfeiture and the procedure is set out under the said section. It does not require a conviction for this action to be undertaken. Had that been the case the ACECA would have clearly stated so.

14 Section 55 ACECA provides as follows:

(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.

(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.

(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.

From the above provisions it is nowhere indicted that a conviction is the foundation for any civil forfeiture.

15 In the case of **Kenya Anti Corruption Commission vs Stanley Mombo Amuti** (supra) the court explained civil forfeiture in the following words:

92 This is a claim for civil recovery. A claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct. The Plaintiff herein is therefore not required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA. In the case of Director of Assets Recovery Agency & Others, Republic versus Green & Others [2005] EWHC 3168, the court stated that

“In civil proceedings for recovery under Part 5 of the Act the director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”

94 I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence or a failure to discharge the burden of proof in a criminal trial. See- Kenya Anti-corruption Commission v James Mwachethe Mulewa & another [2017] Eklr.

16 I am persuaded that the civil procedure is different from criminal procedure. In the former the court deals with the element of possession of unexplained illicitly acquired assets. In the latter the court deals with the commission of a crime which resulted in the acquisition of the illicitly acquired assets. That being the case there must be a conviction for the operation of section 54 ACECA to take off. On the other hand section 55 of the ACECA is not funded on any conviction.

17 Mr. Ngacha also submitted that with the enactment of POCAMLA, section 55 of ACECA lost meaning. The Assets Recovery Agency is tasked with the application of POCAMLA. The Agency deals with proceeds of crime and money laundering. The Ethics and Anti corruption Commission investigates cases of corruption and economic Crimes. Where it finds assets to have been acquired as a result of the said crimes it takes out proceedings under section 55 of the ACECA. Each of the two bodies has its mandate clearly set out. It is therefore not correct to say that section 55 ACECA is not operational by virtue of the enactment of POCAMLA.

18 All in all I find that the Plaintiff did not have to base its originating summons on any conviction. The originating summons is properly filed and it's now the Plaintiff's duty to prove its case to the required standard. I therefore find no merit in the preliminary objection which I hereby dismiss with costs.

Signed and dated this 27th day of March 2019 by

H.I. ONG'UDI

JUDGE

Delivered on 9th April 2019

MUMBI NGUGI

JUDGE