



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC NO. 2 OF 2018

THE REGISTERED TRUSTEES OF

THE SISTERS OF MERCY (KENYA)

T/A “MATER MISERICORDIAE HOSPITAL”.....PLAINTIFF

VERSUS

DR. JOHN MURIITHI.....1ST DEFENDANT

JAMES MUTISO KALOKI.....2ND DEFENDANT

QUALITY HOSPITAL SOLUTIONS LTD.....3RD DEFENDANT

RULING

1 The Plaintiff is a charitable trust registered by the sisters of mercy under the trustees (perpetual succession) Act Cap 164 and trading as the Mater Misericordiae Hospital. The 1st Defendant was the Chief Executive Officer of the Plaintiff while the 2nd Defendant was the procurement and supplies chain Manager. The 3rd Defendant carries on the business of catering services and had been awarded a 2 years lease by the 1st and 2nd Defendants under a contract for provision of out sourced catering services at the Mater Hospital cafeteria.

2 As the parties continued filing their pleadings the 1st defendant filed a preliminary objection dated 6th June 2018 on the following grounds.

(i) The suit as instituted violates the right to fair hearing under article 50 of the constitution of Kenya 2010 and specifically the right to be presumed innocent until proven guilty.

(ii) The suit as instituted violates the rules of locus standi and specifically offends article 157(6) of the constitution of Kenya 2010 and section 5 of the Office of the Director of Public Prosecution Act No 2 of 2013.

(iii) The suit as instituted violates the autonomy of Constitutional Commissions and in particular offends Articles 79, 80 and 249(1) & (2) of the Constitution of Kenya 2010 and section 13 of the Ethics and Anti Corruption Commission Act No 22 of 2011 Laws of Kenya.

(iv) The jurisdiction of this Honourable Court is improperly invoked because the suit as instituted violates article 162(2)(a) and 165(5)(b) of the Constitution of Kenya 2010 as read with sections 12(1)(a) and 12(3) of the Employment and Labour Relations Court and section 4 of the Anti Corruption and Economic Crimes Act No 3 of 2003; and section 5 of the Civil Procedure Act Cap 21 Laws of Kenya.

(v) The trial of Anti-Corruption matters in the manner instituted under this suit in reliance on Kenya Gazette Notice Number 9123 of 2015 does not cure the mischief of clause 7 of the sixth schedule to the Constitution of Kenya 2010.

3 The same was disposed of by way of written submissions which were not highlighted. The 2nd and 3rd Defendants supported the preliminary objection by the 1st Defendant and did not file any submissions.

4 Mr. Wanjehia for the 1st Defendant submitted that the Plaintiff had filed this civil suit seeking damages in the form of compensation for purported acts of corruption and fraud under sections 51 & 53(1) of the Anti-Corruption and Economic Crimes Act (ACECA). It was his

contention that the above provisions must be construed with section 54(1)(a) and 54(4) of the said Act, as the law and practice on Anti-Corruption and economic crimes is aimed at investigation, prosecution and recovery of proceeds of corruption. He cited the case of **Director of Public Prosecution vs Nairobi Chief Magistrate's court & Another [2016] eKLR** where the Constitutional court stated:

“The fight against corruption including being tried for corruption related acts such as bribery is a public interest issue; prosecution of those investigated for corruption and economic crimes is undeniably a matter concerning the administration of justice.”

5 He framed five issues for determination. On whether the suit violates article 50(2) of the Constitution he submitted that natural justice demands that no one is condemned unheard. That a matter on Anti-Corruption and economic crime is criminal in nature and must be prosecuted to the standard required in criminal trials. Therefore compensation under section 51 and 54 of the ACECA can only be founded on a conviction. The 2nd issue is that of *locus standi*, which also arose in the case of **Registered Trustees of the Sisters of Mercy (Kenya)T/A Mater Misericordiae Hospital vs John Mureithi & 5 Others, ACEC civil case No 3 of 2018.**

6 In the above case Onyiego ,J stated as follows on this issue:

“50. The key question is, can a private citizen or body or organisation institute civil proceedings before the Anti Corruption High Court Division for recovery of money stolen from him or them under Section 51 and 52 of Anti-Corruption and Economic Crimes Act? Section 51 makes reference to liability for compensation by a person who does anything that constitute corruption or economic crime to a person who suffers a loss as a result. Section 53 (3) then goes further to provide that, an amount for which a person is liable under Section 51 and 52 to a public body may be recovered by the public body or by the commission on its behalf. What is the import of Section 51 as read together with Section 52 and 54 of Anti-Corruption and Economic Crimes Act.

51. From the wording of Section 51, it presupposes evidence of a compensation order before the person liable is call upon to compensate the victim of the corrupt and economic crimes Act. Who determines compensation? In order to have a complete understanding, Section 51 and 52 should be read together with Section 54 of Anti-Corruption and Economic Crimes Act which provides for compensation by the person found guilty of corruption or economic crime to pay any amount that person may be liable under Section 51 and 52. It is my understanding that, for Section 51 and 52 to stand, Section 54 should come to play first. It is for that reason that Section 53 (4) provides that “for greater certainty, nothing in the government proceedings act (Cap 40) prohibits the commission from instituting civil proceedings to recover amounts under Sub-section 3.

52. It then follows that any party who is a beneficiary of such compensation orders can institute civil proceedings to recover the amount so ordered. Where can such civil proceedings be instituted? Except for forfeiture and recovery of unexplained assets and an order for preservation of assets under Section 56 of Anti-Corruption and Economic Crimes Act and proceeds of crime and anti money laundering Act No 9/2009, the Anti-Corruption division has no business entertaining ordinary civil suits”.

7 Counsel submitted that section 51 of the ACECA cannot be interpreted in isolation. That the whole Act must be looked at holistically. He argued that the suit offends the provisions of article 157(6) of the constitution of Kenya 2010, section 5 of the ODPP Act No 2 of 2013, Article 157(6) of the Constitution.

8 The 3rd issue is that the suit violates the autonomy of the EACC and does not exhaust the laid down procedure. Counsel submitted that there is in place substantive law dealing with Anti-Corruption and Economic Crimes namely the ACECA. Also in place is a well established constitutional commission mandated to deal with matters of corruption. He argued that the Plaintiff could not therefore overlook such bodies and turn this court into an investigative body.

He referred the court to its own decision in the case of **Hon. Peter A. Imwok (MCA) v The Nairobi City County & 7 Others, Nairobi HC ACEC Petition No. 8 of 2018 at Paras 53 and 54** where the court stated:

“53. Thirdly the EACC and the Police investigate corruption and economic crime related offences which is part of the Petitioner’s complaint. There is nothing in this petition to show that the petitioner at any point made a complaint or report to any of these investigative bodies and no action was taken. These bodies are the ones endowed with the power and machinery to investigate complaints and more so complaints of the nature cited by the Petitioner.

54. This court has jurisdiction to deal with constitutional matters but where a clear procedure has been set out, that procedure must first be exhausted. This court cannot be turned into an investigating agency. It’s important that room is given to the various agencies mandated to carry out investigations to do so before a matter is rushed to the court.

10 On the 4th issue of this court’s jurisdiction being ousted by section 12(1)(a) & 12(3) of the Employment & Labour Relations courts Act No 20 of 2011, Counsel submitted this was a matter founded on an employer/employee relationship. It therefore fell under the jurisdiction of the Employment and Labour Relations Court. He referred to the cases of **OKiya Omtatah Okoiti & Another v A. G. & 2 Others [2015] eKLR; Seven Seas Technologies Ltd v Eric Chege [2014] eKLR; Owners of the Motor Vessel “Lollian S” V Caltex Oil (Kenya) Ltd [1989] KLR 1.**

11 Finally is the improper reliance on Gazette Notice 9123 of 2015. He submitted that the directions in the said gazette notice did not cloth the anti corruption and economic crimes division with power to hear anti corruption and economic crimes in the form of civil suits. He thus asked the court to strike out the suit with costs.

12 Mr Chiuri for the Plaintiff opposed the preliminary objection. Mr. Chiuri vide his written submissions submits that the matter before court is an exclusive civil matter, filed by the Plaintiff as a private matter. It cannot therefore be governed by Article 50(2) of the Constitution as it is not a civil matter. Counsel argues that the plaintiff's action is not a criminal case and cannot therefore be governed by Article 157(6) of the Constitution.

13 On the issue of this court's jurisdiction being invoked counsel submitted that jurisdiction of the High court is vested under Article 165 of the Constitution, and is unlimited save only as provided for by the Constitution. That it was important to establish the real cause of action or dispute in this matter. Citing the cases of **Patrick Musimba v National Land Commission & 4 Others [2015] eKLR & Co operative Bank of Kenya Ltd v Patrick Kangethe Njuguna & 5 Others [2011] eKLR** counsel submitted that the Plaintiff elected to file this suit because it could not be adequately compensated through the cases filed at the Employment & Labour Relations court.

15 Counsel submitted that a proper interpretation of the provisions complained of ought to be given in line with what was stated in the cases of:

- (i) H.C. Petition No 109 of 2016 consolidated with ACEC Petition No. 8 of 2017, Okiya Omtatah & 2 Others v A.G. & 4 Others
- (ii) Republic v Wigglesworth [1987] 2 SCR 54, 1987 can LII 41.
- (iii) Kenya Anti Corruption Commission v First Mercantile securities Corporation [2010] eKLR
- (iv) Dr Christopher Ndarathi Murungari v Kenya Anti corruption Commission & A.G. [2006] 2KLR 733.

16 It was his submission that a reading of Part IV, sections 51-56c of ACECA demonstrates that the Act has formulated two distinct measures to achieve the statutory objective of compensation or recovery of improper benefits. To him the first measure involves prosecution of criminal proceedings culminating with orders of compensation or recovery of improper benefits upon conviction (section 51, 52 & 54). The second measure entails institution of civil proceedings for compensation or recovery of improper benefits. (section 51, 52 & 53). Counsel therefore submitted that criminal proceedings and recommendations by Parliament could not be used as a basis to determine the reasonableness or otherwise the Plaintiff's claim as was held by the Court of Appeal in the case of **Prof James Ole Kiyapi PS, Ministry of Medical services & A.G. v Dol International Ltd & Another [2016]eKLR**.

17 Counsel distinguished the compensation by civil & criminal proceedings, under sections 51, 52, 53 & 54 ACECA. He argues that under section 51-56C ACECA an aggrieved person is permitted under sections 51, 52 & 53 of ACECA to maintain or sustain a private action for compensation or recovery of improper benefits. That the right accrues to "anyone who suffers loss." That "anyone" or "anybody" means *inter alia* "a private body" or a "public body". He referred to section 53(3) of ACECA which provides:

"An amount for which a person is liable under section 51 or 52 to a public body may be recovered by the public body or by the Commission on its behalf."

He therefore submitted that Ethics & Anti-Corruption Commission (EACC) filed suits for compensation or recovery of improper benefits, on behalf of public bodies. Therefore the private persons can only file such suits by themselves.

18 He finally submitted that civil proceedings for recovery of unexplained assets under sections 55, 56 & 56A are commenced by the Commission before the High court. It therefore by parity of reasoning followed that any private civil proceedings for compensation or recovery of improper benefits by a private person under sections 51, 52 & 53 ACECA would be commenced in the High court. He referred to para 5(d) (i) of the practice directions for the Anti-corruption and economic crimes division of the High Court on the jurisdiction of the Anti Corruption & Economic Crimes Court.

Analysis & determination

19 Upon consideration of the preliminary objection and the rival submissions I find the issue falling for determination to be whether this court has jurisdiction to entertain the Plaintiff's suit.

20 In the case of **"Owners of Motor vehicle" Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR Nyarangi JA** (as he then was) at page 14 stated thus:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction". It is for this reason that this court decided to first dispose of this issue of jurisdiction.

22 There is no dispute that the claim for compensation herein has been filed by the Plaintiff in its private capacity, under section 51 & 53 of the ACECA. For better appreciation of the relevant provisions I will set them out hereunder.

51 A person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered.

52. A person who receives a benefit the receipt of which would constitute an offence under section 39, 40 or 43 is liable, for the value of the benefit, to the following persons—

- (a) if the receipt constitutes an offence under section 39, to the agent's principal;
- (b) if the receipt constitutes an offence under section 40, to the person advised; or
- (c) if the receipt constitutes an offence under section 43, to the persons beneficially entitled to the property.

53. (1) A person liable for an amount under section 51 or

52 shall also be liable to pay interest, at the prescribed rate, on the amount payable.

- (2) Nothing in section 51 or 52 affects any other liability a person may have.
- (3) An amount for which a person is liable under section 51 or 52 to a public body may be recovered by the public body or by the Commission on its behalf.
- (4) For greater certainty, nothing in the Government Proceedings Act (Cap.40) prevents the Commission from instituting civil proceedings to recover amounts under subsection (3).
- (5) A person is not entitled to any amount under section 51 or 52 in relation to a particular instance of corruption or economic crime if that person was a party to the corruption or economic crime or that person did a related act that also constituted corruption or economic crime.

54. Compensation orders on conviction

(1) A court that convicts a person of any corruption or economic crime shall, at the time of conviction or on subsequent application, order the person—

- (a) to pay any amount the person may be liable for under section 51 or 52; and
- (b) to give to the rightful owner any property acquired in the course of or as a result of the conduct that constituted the corruption or economic crime or an amount equivalent to the value of that property.

(2) If the rightful owner referred to in subsection (1)(b) cannot be determined or if there is no rightful owner, the court shall order that the property or equivalent amount be forfeited to the Government.

(3) In making an order under this section, a court may quantify any amount or may determine how such amount is to be quantified.

(4) An order under this section may be enforced by the person in whose favour it is made as though it were an order made in a civil proceeding.

23 Under sections 54 the ACECA deals with compensation under criminal proceedings. This only takes place when there is a conviction. Under section 55-56A ACECA there is an express procedure for forfeiture by the EACC. Such proceedings are of a civil nature and are filed in the High court & in this case in the Anti Corruption and Economic Crimes division

24 Under section 51 -53 ACECA the prominent word is "Liability" It is not clearly expressed how this liability is to be arrived at. Under section 51 ACECA a person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result. Who is to determine whether a person's act constitutes a corruption or economic crime? Is it a criminal court, civil court or the offended person?

25 Unlike what has been clearly set out in sections 54-56A of the ACECA, sections 51-53 contains no procedure. It therefore follows that the court has to look at the ACECA holistically in order to put some flesh on these provisions. It's for this reason that Onyiego, J in the case of **The Registered trustees of the Sisters of Mercy (Kenya) T/A Mater Misericordiae Hospital v Dr John Muriithi & 5 Others NRB ACEC Civil suit No 3 of 2018** while dealing with a similar preliminary objection stated what I have already cited at Para 6 above.

26 If the plaintiff is relying on acts of corruption and economic crime as is pleaded in prayer (b) of the plaint for sure that forms a criminal element of the claim which must be investigated and proved and should fall under section 54 of the ACECA. I say so because corruption and fraud are criminal offences and for one to claim for damages based on the same, there must be proof of the said offences, before assessment of the damages can be done. In the present case there is no evidence that the Defendants have been charged and/or convicted of any corruption or economic crimes related case. The claim for general damages for corruption and fraud cannot therefore stand.

27 On the other hand the claim for Kshs 2,646,300/- can proceed to trial since its money alleged to have been siphoned by the Defendants in an employer/employee relationship. The same shall therefore proceed before the Chief Magistrate's commercial court Milimani Nairobi.

28 The preliminary objection therefore partially succeeds in that prayer (b) of the plaint is struck out. The file is hereby remitted to the Chief Magistrate's Commercial Court Milimani Nairobi for hearing and determination of the claim for special damages.

Costs shall be in the cause.

Orders accordingly.

Signed and dated this 27th day of March 2019 by:

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H I ONGUDI

JUDGE

Delivered on 9th April 2019

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MUMBI NGUGI

JUDGE