



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC CIVIL SUIT NO. 16 OF 2019

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

VERSUS

ANDREW BIKETI MUSUYA

T/A MUKUYU PETROLEUM DEALERS RESPONDENT

SALOME WALEGHWA.....1ST INTERESTED PARTY

BHINDER CORPORATION LIMITED2ND INTERESTED PARTY

MILDRED KERUBO OBARE.....3RD INTERESTED PARTY

WACHENYA AUTO GARAGE4TH INTERESTED PARTY

SACHDEVA NABHAN & SWALEH ADVOCATES.....5TH INTERESTED PARTY

RULING

1. By a Notice of Motion dated 21st June 2019 filed together with an Originating Summons of even date, the applicant sought various injunctive reliefs and orders directing preservation of specified properties against the respondent and the 1st – 4th interested parties. The court having certified the application and granted prayers 2, 3 and 4 of the said application in the interim directed for service and inter partes hearing on 16th June 2019.
2. Vide a chamber summons dated 25th June 2019, the appellant sought leave to amend the Originating Summons as well as the Notice of Motion dated 21st June 2019. The application was determined in chambers on 26th June 2019 and leave granted. Subsequently, by application dated 9th August 2019, the applicant again sought to further amend the Originating Summons so as to include the 5th interested party (Sachdeva Nabhan & Swaleh Advocates). The said application was heard in chambers on 13th August 2019 and leave granted thus enjoining Sachdeva Nabhan and Swaleh Advocates as the 5th interested party.
3. Contemporaneously filed with the application dated 9th August 2019 seeking leave to amend the Originating Summons is a notice of motion seeking injunctive orders against the 5th interested party not to transfer or in any way dispose a sum of Kshs.3,500,000/= being part of the money paid to their account by the respondent for the purpose of buying property on behalf of the respondent which money was suspected to be part of the corruptly obtained income by the respondent while serving as a public officer with the County Government of Transzoia. A temporary order in that regard was granted pending hearing and determination of the application.
4. When the matter came for hearing on 25th September 2019, parties agreed to have the two applications consolidated and heard together.
5. The applicant in the Notice of Motion dated 21st June 2019 and filed the same day pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, orders 40 (1) and 51 (1) of the Civil Procedure Rules, Section 56 A of the Anti-Corruption and Economic Crimes Act, sought orders as hereunder:

(1) Spent.

(2) Pending the hearing and determination of this application, this honourable court be pleased to grant an order of injunction prohibiting the respondent, his agents, servants or any other persons from withdrawing, transferring, disposing, wasting and/or in any other way dealing with funds in bank account number [...] held at Equity Bank in the name of Andrew Biketi Musuya, funds in bank account number [...] held at Equity Bank in the name of Mukuyu Petroleum Dealers, funds in bank account number [...] held at Co-operative Bank in the name of Andrew Biketi Musuya, funds in account number [...] held at Co-operative Bank in the name of Mukuyu Petroleum Dealers.

(3) Pending the hearing and determination of this application, this honourable court be pleased to grant an order of injunction restraining the respondent, the interested party and the 4th interested party, their agents and servants from transferring, disposing, wasting and/or in any other way dealing with Motor Vehicles KBV 467Q Toyota Saloon, KCH 124M Toyota Harrier, KCB 863S Toyota Prado respectively.

(4) Pending the hearing and determination of this application, this honourable court be pleased to grant an order of injunction against the respondent, his agents, servants or any other persons from alienating, selling, charging or further charging, leasing, developing, sub-dividing, wasting, transferring, disposing and/or in any other way dealing with the parcels of land known as MN/III/5696, MN/III/5697, MN/III/5698, MN/III/5700, MN/III/5699 CR47909, Mainland North/III/2443, Kilifi/ Mtwapa/4497, MN/IV/713(PART) Bungoma/Kamakoiwa/4455, Bungoma/Naitiri/2534, Bungoma/Naitiri/2774, Bungoma/Naitiri/2724.

(5) Pending the hearing and determination of this suit, this honourable court be pleased to grant an order of injunction prohibiting the respondent, his agents, servants or any other persons from withdrawing, transferring, disposing, wasting and/or in any other way dealing with the funds in bank account number 0330292821653 held at Equity Bank in the name of Andrew Biketi Musuya, funds in the account number 1190165926592 held at Equity Bank in the name of Mukuyu Petroleum Dealers, funds in bank account number [...] held at Co-operative Bank in the name of Andrew Biketi Musuya, funds in account number 01148143758900 held at Co-operative Bank in the name of Mukuyu Petroleum Dealers.

(6) Pending the hearing and determination of this suit, this honourable court be pleased to grant an order of injunction against the respondent, the 1st interested party and the 4th interested party, their agents, servants or any other persons from using, transferring, disposing, wasting and/or in any other way dealing with motor vehicle KBV 467Q Toyota Saloon, KCH 124M Toyota Harrier, KCF 863S Toyota Prado respectively.

(7) Pending the hearing and determination of this suit, this honourable court be pleased to grant an order directing the respondent, the 1st interested party and the 4th interested party to surrender motor vehicles registration Nos. KBV 467Q Toyota Saloon, KCH 124M Toyota Harrier, KCF 863S Toyota Prado respectively together with their logbooks to the applicant within 7 days of the order failing which the applicant be at liberty to seize, tow and detain the motor vehicles for purposes of preservation.

(8) In the alternative to prayer 6 and 7 above, pending the hearing and determination of this suit, this honourable court be pleased to grant an order appointing a licenced auctioneer to seize and sell by way of public auction motor vehicles Nos. KBV 467Q Toyota Saloon, KCH 124M Toyota Harrier, KCF 863S Toyota Prado and the proceeds less auctioneer's expenses and fees be deposited in a joint interest earning account in the name of both the applicant and the respondent, for purposes of preservation of the current value of the said motor vehicles.

(9) Pending the hearing and determination of this suit, this honourable court be pleased to grant an order of injunction restraining the respondent, his agents, servants or any other persons from transferring, disposing, wasting and or in any other way disposing and/or in any other way dealing with the parcels of land known as MN/III/5696, MN/III/5697, MN/III/5698, MN/III/5700, MN/III/5699 CR47909, Mainland North/III/2443, Kilifi/ Mtwapa/4497, MN/IV/713(PART) Bungoma/ Kamakoiwa/4455, Bungoma/Naitiri/2534, Bungoma/Naitiri/2774, Bungoma/Naitiri/2724.

(10) Pending the hearing and determination of this suit the respondent be

restrained from demanding, collecting and/or receiving monthly rental income and leave be granted to the applicant to appoint a receiver for collection of the monthly rental income, management, control and possession of property known as MN/III/5697, MN/III/5698, MN/IV/713(PART), under the provisions of Section 56A of the Anti-Corruption and Economic Crimes Act.

(11) That this honourable court be pleased to issue any other or further orders it deems fit and just so as to preserve the suit property pending the determination of the suit.

(12) That the costs of this application be provided.

6. The application is premised upon grounds stated on the face of it and an affidavit sworn by Yakub Adow Kuno an investigator with EACC. The applicant's case is anchored on the allegation that, at unspecified time, the commission received information that the respondent who was serving as Principal Accountant with the County Government of Transzoia for the period covering 1st January 2013 to 31st October 2018 did engage in corrupt conduct and or dealings hence acquired unexplained wealth that was not commensurate with his known legitimate sources of income.

7. It is the applicant's case that the respondent exploited his official or professional role or position of trust in the said public office for private gain by engaging in transactions which were in conflict with public trust. That pursuant to a search warrant issued by the court on 9th October 2018, a search on the respondent's accounts No. [...] Equity Bank, [...] held at Co-operative Bank and [...] Equity Bank in the

name of his business trading as Mukuyu Petroleum Dealers was conducted.

8. That upon analysing account No. [...] held at Equity Bank, it revealed that the applicant had deposited a sum of Kshs.216,065,810/= for the period 1st January 2013 and 31st October 2018 (See bank opening documents marked YAK3). Concerning Mukuyu Petroleum account No. [...] managed by the respondent as the sole signatory, it emerged a sum of Kshs.9,075,000/= had been deposited within that period (See account opening documents marked YAK 4). With regard to account No. [...] Equity Bank held in the name of Mukuyu Petroleum, the same was opened on 7th December 2015 with the respondent as the sole signatory and several deposits in respect of that account made as follows:

(i) 7th December 2015 a deposit of Kshs.600,000/=

(ii) After 9 days i.e. 16th February 2016, the respondent deposited Kshs.2,564,346/=

(iii) The following day i.e. 17th December 2015, the respondent made two deposits of Kshs.1,000,000/= and Kshs.1,300,000/=

(iv) 12 days later i.e. 29th December 2015, a sum of Kshs.600,000/= was made. That the total sum in a span of 21 days since opening the account was Kshs.6,064,346/=

9. That further analysis revealed that; account No. [...] held at Co-operative account had a total deposit of Kshs.11,829,500/= for the period 1st January 2013 and 31st October 2018. In total the respondent had deposited Kshs.45,534,656 in his various accounts the source of which was allegedly related to corrupt activities relating to fictitious and irregular contracts involving the respondent and 3rd parties.

10. Upon search in the respondent's house, the applicant allegedly came across a memorandum of understanding between the respondent and one Walubengo in which the two agreed for Walubengo to open a financial consultancy firm in the name of Josim Instantaneous Consultium (K) Co. Ltd and that any income earned, would be shared in the ratio of 60:40 in favour of Walubengo and the respondent respectively. (See copy of Memorandum of Understanding YAK11).

11. In one of the transactions, a payment voucher worth Kshs.20,000,000/= by the County Government of Transzoia payable to Josim Instantaneous Consultium (K) Co. Ltd being payment for services allegedly rendered for preparation of asset register and finance management was also retrieved (annexure YAK12).

12. A search at the company registry revealed that the Directors of Josim Instantaneous Consultium (K) Co. Ltd were Isaiah Sykuna Walubengo and his wife Mildred Lodenyi. That despite not being a professional accountant nor registered by ICPAK, he purported to render financial consultancy services thus earning a sum of 52 million from the County Government of Transzoia out of which a huge junk was traceable to the investments of the respondent who was influencing contract awards to Josim Instantaneous Company being a member of the county government procurement board as well as a beneficiary in Josim Consultancy Firm.

13. That suspicious of the huge sums of money usually deposited in cash into Mukuyu Petroleum Dealer's account, it was apparent that the respondent was a beneficiary of payments made to Josim Instantaneous Company by the county government where he influenced procurement awards to the said company to which he was a beneficiary yet never disclosed his conflict of interest.

14. As a consequence, the applicant moved the court on 24th October 2018 vide ACEC Misc 48/18 and obtained preservation orders for a period of six months and later extended. That in the course of investigations, the commission discovered that the applicant had transferred a sum of Kshs.3,500,000/= to the account of Sachdeva Nabhan and Swaleh Advocate's which money is todate held in the said firm for the benefit of the respondent. On 23rd January 2019, a preservation order was granted against the firm of Sachdeva Nabhan and Swaleh Advocates.

15. It is further the applicant's averment that the records obtained from KRA revealed that the respondent has never declared his sources of income and filed tax returns. That Mukuyu Petroleum Dealers was not a registered entity and hence not a legal entity Capable of suing and being sued.

16. According to the applicant, some of the properties owned directly or indirectly by the respondent includes motor vehicle registration Nos. KBV 467Q valued at Kshs.1,000,000/= registered in his name, KCH 124M valued at Kshs.3,000,000/= registered in the name of Salome Waleghwa the 1st interested party herein who is his wife working with Messina K Ltd. as a document examiner at a monthly salary of Kshs.44,000/=.

17. That the commission also established motor vehicle KCF 863S Toyota Prado valued at Kshs million 5,600,000/= is registered in the name of Wachenya Auto Garage (4th Interested Party). Further documentation revealed that the said motor vehicle was imported upon the respondent's instructions to Bhinder Corporate Ltd (2nd Interested Party) who imported the same and sold it to the respondent who in turn caused it to be registered in the name of Mildred Kerubo Obare the 3rd interested party (See YAK 35(i) and ii copy of sale agreement of the 2nd interested party).

18. It was deposed that, upon interrogation of the 3rd interested party, she denied buying the said motor vehicle, importing it or even selling it despite a transfer form indicting her as the seller. Another statement signed by the 4th Interested Party the Director Wachenya Auto Garage confirmed buying the motor vehicle from the 3rd Interested Party who allegedly signed transfer documents but the respondent retained the motor vehicle implying that the motor vehicle is held by the 4th Interested Party for the benefit of the respondent.

19. It was the applicant's finding that the respondent's legitimate sources of income include salary from Kenyatta University where he is a part time lecturer earning a total of Kshs.5,845,245/= for the period in question. That his cumulative salary cannot justify the total value of his assets estimated at Kshs.284,087,664/= made up of;

(a) 3 motor vehicles worthy Kshs.9,699,000/=

(b) Land worth Kshs.226,800,000/=

(c) Cash deposit Kshs.45,596 000/=

(d) M-pesa Kshs.7,998,256/=

20. That despite issuing notice to the respondent to explain his sources of income, no satisfactory explanation was offered. In support of the application are three affidavits sworn by Charity Muniu one of the investigators, Boniface Waweru and James sworn on 21st June 2019 in their capacity as valuer and surveyor respectively giving a breakdown of the respondent's income and value of the property in question.

21. Based on the above information and evidence, it is the applicant's contention that the commission has established a prima facie case to warrant issuance of injunctive and preservation orders against the respondent and interested parties pending hearing of the main suit.

22. Turning into the application dated 9th August 2019 which sought injunctive orders against the 5th interested party, the applicant contended that advocate's client communication confidentiality does not cover criminal activities in which an advocate's firm is used to launder illegally acquired money.

Respondent's case

23. In response to the application dated 21st June 2019 the respondent filed a replying affidavit sworn on 15th July 2019 denying the allegations of corruption or impropriety. He averred that the impugned income was earned through legitimate means. He further stated that during the material time he was earning a salary of Kshs.101,000/= per month with effect from 1st October 2014.

24. He contended that the sum of 52 million paid to Josim Instantaneous Consultium was as a result of a financial consultancy tender award won competitively and awarded by the transitional authority of Kenya founded sometime 2012. He denied receiving any money from Isaiah Walubengo the Director of Josim Ltd. He attached an affidavit by the said Isiah Walubengo sworn on 15th July 2019 who confirmed the respondent's averments although he claimed that the respondent was a member of Josim Instantaneous co. who rendered independent professional financial services and was entitled to 40% of the income earned.

25. He denied benefiting from the Kshs 52,000,000/= paid to Josim Ltd. He also denied sitting in any procurement committee where Josim was a bidder and that in any event he only sat in procurement committees where the value was below Kshs.500,000/= of which Josim never tendered.

26. Further, the respondent stated that, if there is any claim that he benefited from 52 million paid to Josim, then, the plaintiff should confirm that claim. To that extent he contended that the application is misguided, misconstrued and made in bad faith by demanding that he forfeits his property which he has honestly acquired over a period of 10 years.

27. The respondent gave a breakdown of his sources of income among them a business club (Club Mtello) in Kapenguria where he used to make about Kshs.200,000/= per week. He attached a business permit from Kapenguria County Government and in total he made Kshs.23 million/= within one year. The other source of income was personal loans advanced to various people among them, Tom Kitui Khakame and Chengemtus Mukelu who could in turn refund with profit and at times also loaned him. He claimed to have loaned Tom Kitui a total of Kshs.24,112,520/= over a period of about 4 years. The 3rd source of income was earnings from maize farming in which he leased 50 acres at Kshs.5000/= per acre between 2008 – 2011. He claimed to have made a sum of Kshs.34,529,810/= for the entire period. He attached lease agreement to prove the allegation of farming.

28. Other sources of income included, salary where he earned a total of Kshs.894,000/= with Ministry of Health, Kshs.6,522,000/= with County Government of Transzoia; consultancy with Josim Ltd for which he earned Kshs.73,466,000 and lastly, earnings from Mukuyu Petroleum Dealers and rent from which he makes Kshs.4,860,000/= per month.

29. Concerning all his rental premises, he gave a breakdown on how he acquired the plots and had contractors built for him on credit to recover the costs from rent later.

30. Touching on motor vehicle registration No. KBV 467Q, he claimed to have purchased the same on 26th July 2013 at Kshs.1,000,000/=. He attached a sale agreement with delight motors Ltd (AnnxtureABM.37). As to motor vehicle registration No. KCH 124M, he denied knowledge of this motor vehicle as the same was purchased by his wife the 1st interested party. As to motor vehicle KCF 863S TOYOTA Prado, he denied owning the same. He claimed that he only participated in its purchase as a broker between the buyer M/s Mildred Kerubo Obare and (3rd Interested party) and the financier Tom Kitui. That he had only signed on her behalf because he was given the money by Tom Kitui on behalf of the 3rd interested party and that he collected the motor vehicle on her behalf.

31. That following Kerubo's default in repaying the loan of Kshs.5,600,000/=: he was forced to pay Tom Kitui Khakame on her behalf and then had the motor vehicle released to him. He further averred that, he later discovered the motor vehicle had a mechanical breakdown hence

preferred to have it repaired and sold. That as a consequence, the motor vehicle was sold to Wachenya Auto Garage the 4th interested party at Kshs.2,500,000/=. As to M-pesa transactions, he gave a breakdown of deposits and the sources thus justifying the transactions.

1st Interested Party's response

32. The 1st interested party Salome Waleghwa wife to the respondent stated that she was an employee to Messina (K) Ltd earning a gross salary of Kshs.40,000/= per month. She claimed that she was the owner of motor vehicle registration KCH 124M bought at a price of Kshs 2,470,000/= which was out of her income generated from salary earnings, bodaboda business and, sale of beans. She attached her bank statement showing salary credits and receipts for purported sales of beans.

2nd Interested Party's Case

33. Through a replying affidavit sworn by Ahmed Iftikhar on 26th August 2019, he confirmed that his company sold M/v KCF863S to Kerubo Obare (3rd interested party) through the respondent who signed for the buyer as a proxy. He confirmed that Kerubo did not personally appear as the buyer.

3rd Interested Party's Response

34. Kerubo Obare filed a replying affidavit sworn on 11th September 2019 denying having any connection with motor vehicle KCF 863S. She stated that her name was inserted as the purported buyer and seller without her knowledge. She disowned the whole transaction revolving around that M/V terming it as a shock to her and an act of fraud and forgery.

4th Interested Party's Response

35. The 4th interested party through an affidavit sworn on 21st August 2019 by its Director Wilson Muigai Wachira stated that, it was engaged in the business of repairing and sale of motor vehicle spare parts. He stated that sometime in February 2018, the respondent a person he knew very well took a motor vehicle KCF 863S to his garage for painting as it had hit another motor vehicle. That he repaired the said motor vehicle and the respondent took it away. However, sometime in May 2018, the respondent returned the motor vehicle alleging that it had broken down and it needed engine replacement.

36. He further averred that when the respondent offered to sell the motor vehicle, he expressed interest to buy it at Kshs,2,500,000/=. That he sold his plot (Sale agreement attached) so as to raise the money for the purchase of the motor vehicle. He stated that he signed a sale agreement with the 3rd interested party as the seller.

37. In conclusion, he urged the court to direct valuation of the motor vehicle and thereafter allow its repair and continue making use of it and in case of sale, he will pay the value at the current market price. Alternatively, he urged that the motor vehicle be valued and thereafter allow the 4th interested party to repair and then sell so that they can recover the difference.

5th Interested Party's Response to the application dated 9th August 2019

38. The 5th interested party duly filed a preliminary objection together with a replying affidavit sworn on 23rd September 2019 by Nabhan Swaleh in response to the application. The respondent opposed the application arguing that EACC has no constitutional mandate to carry out and execute investigations such as obtaining search warrants, seizing and inspecting bank accounts an act he termed as void abinitio. He further deposed that he has since realised that he ignorantly divulged his client's confidential information to the EACC investigating officer thus contravening Advocate client privileged communication (confidentiality).

39. He averred that although his law firm was in receipt of some money from the respondent for the purchase of property on his behalf, the same is no longer there hence nothing to injunct. He referred the court to the decision in **Tom Ojienda t/a Tom Ojienda and Associates Advocates v EACC and 5 others [2016]** where search warrants and inspection of accounts orders obtained without prior notice were declared void abinitio.

Submissions for the 1st Applicant

40. In her oral submissions, Mrs. Odipo appearing for the applicant basically reiterated the averments contained in the affidavits in support of the application and the annexures thereof. The respondent having indicated that they were not opposed to the grant of orders in respect of prayers 4, 5, 6 and 9, counsel proceeded to submit on the contested issues.

41. Counsel confined her submissions on prayers 7, 8 and 10 which prayers centred on surrender of motor vehicles in question and appointment of a receiver. She submitted that the 3 motor vehicles worth Kshs.9,600,000/= are unaccounted for and therefore the court should order for their surrender for safe custody or sale by public auction to preserve the same.

42. Counsel urged the court to appoint a receiver under Section 56A of ACECA to manage and be collecting rent from the rental properties pending the outcome of the main suit. She further submitted that if the properties were genuinely acquired, he should have declared the rental income and paid tax.

43. Counsel submitted that they had established a prima facie case to warrant issuance of injunctive orders. As regards the power for EACC

to investigate accounts and execute warrants of arrest under Section 180 of the EA and 118 of CPC, counsel submitted that the same was lawful. In support of this proposition, she referred to the decision in the **High Court between the County Government of Meru vs EACC and Anti-Corruption Commission (2014) eKLR** where Judge Mumbi held that;

“the commission was entitled to apply for warrants of search and seizure under Section 118 of the CPC....”.

Equally, learned counsel further relied on the decision in the Court of Appeal Civil Appeal No. 193/2014 where the court of appeal upheld Judge Mumbi’s finding in the **County Government of Meru vs EACC case (Supra)**.

Respondent’s submissions

44. Mr. Bwire counsel for the respondent made oral submissions adopting the averments contained in the detailed replying affidavit together with that of Isaiah Walubengo. Mr. Bwire submitted that the applicant had not met the threshold set out in the **Giella vs Cassman Brown** case for grant of injunction. Learned counsel submitted that until proved on a balance of probability, the properties in question still remains the property of the respondent. Counsel submitted that the facts contained in the replying affidavit regarding the legitimate sources of income have not been controverted. He urged that the court cannot direct on sale of property that has not been forfeited. He however conceded that log books to the subject motor vehicles can be surrendered.

45. Regarding appointment of a receiver, the applicant submitted that the respondent was dependent on his rental income to earn his living. Counsel did not however oppose preservation order in respect of prayer 5, 6 and 9.

46. There was no appearance on the 2nd interested part. Mr. Kuloba for the 3rd interested party did not submit on behalf of the 3rd interested party.

4th Interested Party’s submissions.

47. Mr. Kiongera for the 4th interested party relied entirely on the contents contained in the replying affidavit of Wilson Wachira the Director of the 4th Interested Party. Counsel submitted that the 4th Interested party was a purchaser for value for motor vehicle KCF 863S which they bought from the 3rd interested party. He contended that the applicant had not satisfied the elements for grant of an injunction as stipulated in **Giella vs Cassman Brown and David Ngugi Ngaari vs Commercial Bank Ltd (2015) eKLR** and in **Naftali Ruth Kinyua vs Patrick Thuita Gachure and another (2015 eKLR)** where it was held that property the subject of a suit cannot be sold while the suit is pending and before a determination is made.

Submissions by the 5th Respondent

48. Mr. Kuloba holding brief for Mr. Bryant for the 5th interested party also relied on a replying affidavit sworn on 23rd September 2019 and grounds of opposition of even date. Counsel submitted that there was no money held in their account on behalf of the respondent and that any search warrant and inspection of their account was illegal. Counsel relied on the holding in the case of **DPP vs Tom Ojienda t/a Prof. Tom Ojienda Associates Advocates and 3 others (2019) eKLR** in which the court declared any evidence obtained by search warrant and inspection of accounts without notice as illegal.

Determination

49. I have considered the application herein, affidavits in support and responses thereto. I have considered submissions by counsel representing their respective parties.

50. The respondent having conceded to prayers 5, 6 and 9, I will confine myself to the arguments advanced in respect of prayers 7, 8 and 10. Issues that crystallize for determination are:

(i) Whether the applicant has met the threshold for grant of an injunction.

(ii) Whether this court can order for surrender of motor vehicles the subject of this suit for preservation or in the alternative order for sale by auction.

(iii) Whether this court can order for appointment of a receiver to manage and collect rent from the rental properties.

51. Taking into account that prayers 1, 2, 3 and 4 are spent, and further considering that the respondent and interested parties have no objection with the orders of injunction and preservation in respect to the land, accounts and motor vehicles in question, the issue as to whether the applicant has established a prima facie case for issuance of injunction or preservation orders in relation to the application dated 21st June 2019 is spent. That leaves me with the task of determining the prayer for injunctive orders in respect of the application dated 9th August 2019 against the 5th interested party which I shall deal with last.

52. I will therefore deal with the remaining issues in respect of the application dated 21st June 2019 regarding the surrender of motor vehicles and the element of appointing a receiver to manage the properties and collect rental income from the properties in question.

Whether this court can order for surrender of motor vehicles the subject of this suit for purposes of preservation or in the

alternative, order for their sale by public auction

53. The subject motor vehicles are three namely;

(a) motor vehicle registration No. KBV 467Q valued at Kshs.1,000,000/=. According to the applicant, this motor vehicle was purchased through funds purported to have been obtained through corrupt conduct while the respondent was serving at the County Government of Trans Nzoia. In response, the respondent averred at paragraph 108 of his replying affidavit that he bought the motor vehicle on 26th July 2013 at Kshs.1,200,000/= using his legitimate sources of income. It is not in dispute that the respondent has been working as a public officer in various government departments even before he joined the County Government of Trans Nzoia.

54. He has been earning a salary even before he joined the county government. Considering the senior position he was holding at the time, it was possible that he could afford to buy the car at that price. In all fairness, the purchase price of the said motor vehicle is within the reach of a civil servant of that cadre. I am not persuaded prima facie that the respondent could not in the circumstances afford to buy such a car. For those reasons, I do decline to order for surrender of the motor vehicle. However, depending on whether the applicant will prove on a balance of probability that the motor vehicle was obtained through corrupt conduct or its acquisition cannot be justified during the main hearing, the respondent will surrender its log book to the EACC for safe custody.

55. (b) Motor vehicle KCH 124M worth 3 million. This is the 2nd motor vehicle alleged to have been obtained through corrupt conduct as there was no reasonable explanation given on the source of the money used to buy the same. According to the respondent, he has nothing to do with the motor vehicle as it belongs to his wife (1st interested party) who bought it using her own sources of income.

56. On her part, the 1st interested party averred that, she bought the motor vehicle from her own sources of income among them proceeds from her salary, sale of beans and boda boda businesses. She attached her bank statement reflecting her monthly gross salary during the material period at Kshs.40,000/=. When deducted she could take home between Kshs.31,000/= - 32,000/= net per month. She claimed that between the year 2013 – 2016 she used to earn Kshs.180,000/= per year from boda boda business. From the analysis of her bank statement which shows money in and money out, she has never saved beyond Kshs.377,000/= at any one time to be able to save and buy a motor vehicle at Kshs.2,470,000/=. The only credit entries shown in the bank statement are salary payments.

57. There is no document or evidence attached to prove that she used to receive Kshs.180,000/= per year from boda boda business for a period of 3 years. There are no deposits reflected in the bank statement to show that such money ever existed. It is doubtful that all that money was kept in the house for all that period. The same case applies to several receipts attached for the sale of beans in figures ranging from Kshs 959, 520 for the year 2013, Kshs 820,000 for the year 2014, Kshs 1,111,650 for 2015, and Kshs 930,000 for 2016. Has she been keeping all these money in the house yet the same was genuine sources of income? This will be a matter of evidence during the hearing.

58. I am not fully satisfied with the explanation offered by the 1st interested party at this stage. I am therefore persuaded by the applicant's explanation that they have established a prima facie case to warrant preservation of the motor vehicle. To avoid tear and wear, it is only reasonable that the motor vehicle be kept in safe custody pending hearing and determination of the suit herein. Accordingly, the 1st interested party has to surrender the log book to the motor vehicle and physical possession to the Investigating Officer for safe custody at the nearest police station possible or as the applicant may determine.

59. (c) Motor vehicle KCF 863S Toyota Prado worth Kshs.5,600,000/=. The purchase of this motor vehicle is surrounded by controversy, mystery and deceit if not drama between four individuals. According to the applicant, the motor vehicle belongs to the respondent having instructed the 2nd interested party to import the same and paid for it fully but caused the sale agreement drawn with the 2nd interested party as the seller and the respondent signing in the name of the 3rd interested party as the purchaser. The respondent denied buying the car as his but instead claimed that he secured a loan from his friend Khakame on behalf the 3rd interested party who bought the motor vehicle but refused to pay hence he took the motor vehicle and later sold it to the 4th interested party.

60. The 2nd interested party admitted selling the motor vehicle but had the money paid by the respondent and that it was the respondent who signed the sale agreement in the name of the 3rd interested party whom he never saw as the buyer. The 3rd interested party swore an affidavit and denied buying the subject motor vehicle nor seeking for any loan facility to buy the said motor vehicle. She finally stated that the respondent had fraudulently used her identification documents which she had previously given him to assist in importing a car but which transaction never took off hence the irregular use of her documents to buy a motor vehicle without her knowledge and authority. She denied selling the said motor vehicle to the 4th interested party.

61. According to the 4th interested party, they bought the motor vehicle from the 3rd interested party and that the motor vehicle was taken by the respondent to their garage for repair. From this uncoordinated, sad and unfortunate story by four people which does not add up, the only logical conclusion to draw is that the motor vehicle was most likely obtained through corrupt means and the whole transaction was meant to hide the true source of money used to purchase it. Since the respondent disowns ownership and the 3rd interested party denies ever owning that car, the only option available is to preserve it until the case is determined. The allegation by the 4th Interested party that they bought the M/v in question is questionable hence the need to preserve it in the condition it is.

62. The element of selling the property before a determination is made is not tenable. The alternative of repairing the motor vehicle and sell it is another opening to tamper with the status of the motor vehicle. I do not agree with the proposal by the applicant to sell the motor vehicles or the proposal by the 4th interested party who claims to have bought the motor vehicle from the 3rd interested party to have the motor vehicle repaired and then sold.

63. The property which is the subject of a dispute should not be alienated before determination of the suit (**See Naftali Ruth Kinyua v Thuita Gachure and another (Supra)**) where the court of appeal upheld the doctrine of lis pendens while quoting a decision in the case of

“it is a doctrine common to the courts both of law and equity, and rests as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings”.

64. Having held as above, the only viable option to preserve the property is to have the same kept in the nearest police station possible pending hearing and determination of the suit which should be fast tracked. Should the court finally find the motor vehicles were not legally obtained, it will forfeit them and if not, have the same released to the owner. The issue of wastage of the motor vehicles while stationary is an inevitable and attendant consequence of some legal recourse.

Whether the court can order for appointment of a receiver to manage the assets and collect rental income

65. It is the applicant's case that the respondent having not explained to the satisfaction of the commission how he acquired the property in question, the same should be managed by the commission. The respondent also stated that he had given sufficient explanation with proof through his replying affidavit which remains uncontroverted to date implying that the explanation given was sufficient. Section 56A of ACECA allows appointment of a receiver for purposes of management, control and preservation of the property for which he is appointed.

66. In this case, the impugned property is real estate having been acquired through mixed sources of income. Some of the income was allegedly obtained through corrupt means and some from legitimate sources like salary and business. It is a delicate situation to draw a clear boundary at the interlocutory stage. The applicant has tried to explain how he got the resources to acquire the properties. Some properties were acquired through personal loans, salaries and income from business which he has tried to demonstrate. All these issues will be canvassed during the main hearing.

67. On a balance of convenience and in exercise of my discretion under Section 56A, I find it prejudicial at this stage to exercise receivership powers as there is serious contestation as to how the property was obtained yet the applicant has not controverted the explanation given by the respondent in his replying affidavit. For a court to exercise powers directing appointment of a receiver in a case such as this one, it must act with restraint and extreme caution not to hastily paralyse operations of one's business in managing the impugned property unless the defence put forth is extremely hopeless on the face of it. For those reasons, I am reluctant to issue receivership orders.

Whether the applicant has met the threshold for the grant of injunction against the 5th interested party in respect of the application dated 9th August 2019.

68. It is trite and indeed an established principle of law that, for an applicant to obtain an order of injunction, he must satisfy the court that he has a prima facie case with a probability of success or, that he is likely to suffer irreparable loss or damage which cannot be compensated adequately in monetary value or, on a balance of convenience or, for any other reasonable cause, justice would tilt in his favour (**See Giella vs Cassman Brown Co. Ltd (1973) EA 358**).

69. The court of appeal went further to explain on what constitutes a prima facie case in the case of **Mrao Ltd vs First American Bank of Kenya Ltd and 2 others, Nairobi CA No. 39/2002 (2003)** eKLR as;

“A case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

70. It is incumbent upon the applicant to prove to the satisfaction of the court that there is sufficient evidence to warrant exercise of its discretion in their favour to the extent that the 5th interested party received some money from the respondent and that part of the money in this case Kshs.3,500,000/= is still with the 5th interested party.

71. According to the interested party, there is no money held in their account on behalf of the respondent and that the orders directing inspection of their account was unconstitutional. The prayer specifically is seeking an injunction (prayer 3) restraining the 5th interested party from authorizing, transferring, disposing or in any other way dealing with 3.5 million in account No.[...] held at Prime Bank in the name of Sachdeva Nabhan and Swaleh advocates pending hearing and determination of the suit.

72. According to the applicant a total of Kshs.7,500,000/= was deposited in the 5th interested party's account on various dates. That out of that amount, 4.3 million was used to buy property on behalf of the respondent and a balance of 3.5 million has not been spent. This fact has not been controverted by the 5th interested party by means of evidence that the money which they themselves disclosed to the applicant was spent thus implying that the balance of the money received from the respondent is still with them. It is unfortunate that the 5th interested party has conceded that they are the ones who voluntarily disclosed their financial dealings with their clients to the investigating officer. They can not turn around and plead privileged relationship with their client under section 134 of the Evidence Act. The decision in Tom Ojienda case above quoted is not applicable in this case as the facts are different and distinguishable given that the Interested party gave information voluntarily and the reliefs sought are not the same.

73. However, the manner in which the prayer sought is drafted is quite general. It is intended to injunct withdrawal of any money available in the law firm's account without specific reference to the respondent's money.

74. I take judicial notice that, an advocate's account holds several clients' monies. We cannot issue a blank order without specifying which

money in relation to which client. I do not agree with the 5th interested party's argument that the EACC has no powers to investigate accounts even when sufficient notice is issued. It is perfectly within the mandate of EACC to conduct any investigation touching on any suspected corrupt conduct against anybody lawyers and their businesses included. This statutory mandate is clearly spelt out under Section 23 of ACECA. There is no exception as long as due process is followed.

75. The information relied on by EACC in tracing suspected money obtained through corrupt conduct was facilitated by the law firm hence they cannot turn around and plead privileged communication under section 134 of the Evidence Act which in any event does not cover any criminal or illegal activities. Since there is no proof that the amount in question was ever released to the respondent, the only logical conclusion is that the money is still held in the 5th interested party's account.

76. Having established that the 5th interested party had received money from the respondent which is the subject of these proceedings on account of money obtained through corrupt conduct, it is prudent that the money be preserved. Considering that the 5th interested party has not fully challenged the assertion by the applicant, I am satisfied that the applicant has established a prima facie case against them to the extent that the said amount is in their possession and must be preserved.

77. However, just like the order issued on 23rd January 2019 in respect to ACC 2/19, the applicant should have sought orders prohibiting the respondent from accessing the 3.5 million held in the 5th interested party's account No. [...] held at Prime Bank.

78. Given the nature of litigation which borders on public interest, I will direct that the respondent be and is hereby restrained from accessing and or withdrawing a sum of Kshs.3.5 million held in the 5th interested party's account No. [...] Prime Bank and that the said law firm (5th interested party) is restrained and or prohibited from releasing the said amount to the respondent or any other person on his behalf pending the hearing and determination of the suit.

79. Having held as above, the court is satisfied that the applicant is entitled to the reliefs sought and issue orders as follows:

(a) That pending the hearing and determination of this suit, an injunction be and is hereby issued prohibiting the respondent, his agents, servants or any other persons from withdrawing, transferring, disposing, wasting and/or in any other way dealing with the funds in bank account number [...] held at Equity Bank in the name of Andrew Biketi Musuya, funds in the account number [...] held at Equity Bank in the name of Mukuyu Petroleum Dealers, funds in bank account number [...] held at Co-operative Bank in the name of Andrew Biketi Musuya, funds in account number [...] held at Co-operative Bank in the name of Mukuyu Petroleum Dealers.

(b) That pending the hearing and determination of this suit, an injunction be and is hereby issued against the respondent, the 1st interested party and the 4th interested party, their agents, servants or any other persons from using, transferring, disposing, wasting and/or in any other way dealing with motor vehicle KCH 124M Toyota Harrier and KCF 863S Toyota Prado respectively.

(c) That pending the hearing and determination of this suit, an order is hereby issued directing the respondent, the 1st interested party and the 4th interested party to surrender motor vehicles registration Nos. KCH 124M Toyota Harrier and KCF 863S Toyota Prado respectively together with their logbooks to the applicant within 7 days of the order failing which the applicant be at liberty to seize, tow and detain the motor vehicles for purposes of preservation within the nearest police station possible or any other convenient place as the applicant may determine.

(d) That pending the hearing and determination of this suit, and injunction be and is hereby issued restraining the respondent, his agents, servants or any other persons from transferring, disposing, wasting and or in any other way disposing and/or in any other way dealing with the parcels of land known as MN/III/5696, MN/III/5697, MN/III/5698, MN/III/5700, MN/III/5699 CR47909, Mainland North/III/2443, Kilifi/ Mtwapa/4497, MN/IV/713(PART) Bungoma/Kamakoiva/4455, Bungoma/Naitiri/2534, Bungoma/Naitiri/2774, Bungoma/Naitiri/2724.

(e) That pending the hearing and determination of this suit, an order is hereby issued directing the 1st interested party to surrender to the applicant log book in respect of motor vehicle registration KBV 467Q for safe custody.

(f) That the respondent be and is hereby prohibited from accessing a sum of Kshs.3.5 million held in account No. [...]Prime Bank held in the name of the firm of Sachdeva and Nabhan and Swaleh Advocates the 5th interested party and that the said firm is directed not to release that money or part of it to the respondent or anybody on his account or behalf until the suit is heard and determined.

(g) Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF OCTOBER, 2019.

J.N. ONYIEGO

JUDGE