



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANIT CORRUPTIONA ND ECONOMIC CRIMES DIVISION

CIVIL SUIT NO 21 OF 2019

ETHICS & ANTI CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

VS

MOSES KASAINI LENOLKULAL T/A ORYX SERVICE STATION....DEFENDANT/RESPONDENT

RULING

1. Through a notice of motion dated 9/9/19 and filed on the same day, the EACC herein referred to as the Applicant(Plaintiff) moved this court seeking orders as follows:

(1) That this application be certified as urgent and service thereof upon the Defendant/Respondent be dispensed with in the first instance.

(2) That pending the hearing and determination of this application, this honorable court be pleased to grant an injunction restraining the defendant/respondent, his agents, servants or any other persons from alienating, selling, charging or further charging, leasing, developing, subdividing, wasting, transferring, disposing and/or in any other way dealing with the parcels of land known as LR No. 2259/744 (IR 134495/1) LR No 2259/745 (IR 134494/1) LR No. 2259/749 (IR 134510/1 and LR No 2259/750 (IR 134511/1) all located in Karen Nairobi.

(3) That pending hearing and determination of the instant application this Honourable court be pleased to issue an order prohibiting the defendant/Respondent by himself, his agents, servants or any other person from withdrawing, transferring or in any other manner dealing with the funds in account numbers 1103831208 and 1108168841 held at Kenya Commercial Bank Ltd.

(4) That pending the hearing and determination of this suit, this honourable court be pleased to grant an injunction restraining the defendant/Respondent his agents, servants or any other persons from alienating, selling, charging or further charging, leasing, developing, subdividing, wasting, transferring, disposing and/or in any other way dealing with the parcels of land known as LR No 2259/744 (IR 134495/1) LR no 2259/745 (IR 134494/1) LR No. 2259/749 (IR 134510/1) and LR NO. 2259/750 (IR 134511/1) all located in Karen Nairobi.

(5) That pending hearing and determination of the suit, this honourable Court be pleased to issue an order prohibiting the defendant/Respondent by himself, his agents, servants or any other person from withdrawing, transferring or in any other manner dealing with the funds in account numbers 1103831208 and 1108168841 held at Kenya Commercial bank Limited.

(6) That in the alternative, the Honourable court be pleased to order that the defendant/Respondent furnish as security and place at the disposal of the court the titles to the parcels of land known as LR No. 2259/744 (IR 134495/1) LR NO 2259/745 (IR 134494/1), LR No. 2259/749 (IR 134510/1) and LR NO. 2259/750 (IR 134511/1) all located in Karen Nairobi.

(7) That in the further alternative the Honourable Court be pleased to order that the parcels of land belonging to the defendant/respondent known as LR No 2259/744, LR no 2259/745, LR No 2259/749 and LR No 2259/750 all located in Karen Nairobi be attached before judgment in the suit filed herein.

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

(9) That costs of this application be provided for.

2. The application is premised upon grounds set on the face of it and an affidavit sworn on 9/9/19 by Joel Khisa an investigator with the applicant.

3. The applicants' case is hinged on the grounds that following investigations on allegations of corruption and economic crimes, bribery, conflict of interest amongst contractors and officials of the county of Samburu among them the defendant, the commission found out that;

(a) In the financial year 2013/14 to 2018/19 the defendant(respondent) while being Governor of the County Government of Samburu, unlawfully entered into a contract with the County Government for the supply of fuel through Oryx service station a business name registered solely in his name.

(b) That in the course of doing the said business, he received a total of Kshs 80,763,715 from the County Government through a/c No 1124724591 KCB held in the name of Oryx petrol station.

(c) That in so doing he engaged in conflict of interest thus committing an offence under section 42(3) of the ACECA.

(d) That upon obtaining a search warrant and inspection of accounts, it revealed massive cash transfers from the County Government to Oryx service station bank account which monies were later withdrawn and transferred to the respondent's personal accounts inter alia; KCB Maralal branch a/c Nos 1124724591, 1103831208 and 1108168841

(e) That through the said funds, the defendant invested in real estate assets thereby purchasing LR No. 2259/744 (IR No 134495/1), L.R 2259/745(IR134494/1), L.R2259/749(IR134510/1) and LR No2259/750(IR 134511/1) all situated in Karen Nairobi county with each plot valued at Kshs 22 million.

4. It was further averred that the defendant being a governor is a public officer by dint of Section 2 of the Anti - Corruption and Economic Crimes Act 2003 and Section 2 of the Public Officers Ethics Act 2003. That as a chief executive officer of the county who is a public officer, he knowingly held private interest in the subject contracts which private interest was in conflict with his powers and functions of his public office hence explicitly illegal.

5. It was further stated that all proceeds arising from the irregular and illegal contracts constituted proceeds of corruption or are related to corruption. That vide ACEC Misc. Application No 13 of 2019, the applicants sought preservation orders in respect of the subject properties and bank accounts and the same was on 22/9/19 allowed for a period of six months. That the defendant's prayers vide the application dated 24/4/19 seeking to discharge the said preservation orders was dismissed thus proving that the applicant has a prima facie case.

6. The applicant further contended that, they had established a prima facie case and unless the orders sought are granted, the substantive suit already filed will be rendered useless and the proceeds of corrupt conduct may not be recovered. That the suit herein is a matter of great public interest and the scales of justice does tilt in favour of the applicant.

7. In response, the defendant filed grounds of opposition on 30/9/19 contending that:

(1) That the Plaintiff/Applicant has not satisfied the mandatory conditions precedent set out in Section 26 and section 55 of the anti-Corruption and economic Crimes Act to bring the instant application and institute the recovery proceedings

(2) That the instant application and the recovery proceedings have been instituted in violation and/or infringement of the defendant/respondent's right to a fair administrative actions guaranteed by Article 47 of the constitution as the Defendant/Respondent was not given mandatory statutory notices as required by section 26 as read with section 57 of the anti Corruption and Economic Crimes Act.

(3) That the Plaintiff/Applicant has not disclosed to this Honourable court that the defendant/Respondent has been charged with offences under the anti corruption and economic crimes act in ACC No. 3 of 2019 Republic v Moses Kasaine Lenolkula & 10 Others, which raises similar issues as the instant suit and pending for hearing and determination in the Magistrate's court.

(4) That the Plaintiff/Applicant has not established a prima facie case with a probability of success

(5) That the Plaintiff/Applicant has not established any causal link between the properties subject to these recovery proceedings and the alleged corrupt conducts of the Defendant/Respondent.

(6) That the Plaintiff/Respondent has not demonstrated any imminent risk of transferring and/or disposing of the properties subject to these recovery proceedings.

(7) That the Notice of Motion application dated 9th September, 2019 is premature, incompetent, fatally defective and an abuse of the process of the court.

8. During the hearing, M/s Kenduiwa appearing for the applicant basically adopted the averments contained in the affidavit in support of the application as well grounds on the face of it. She contended that the applicant has met the threshold for grant of an injunction.

9. She further argued that they had established a prima facie case with a probability of success and unless granted, the suit will be rendered nugatory in the likely event that the defendant decides to dispose of or transfer the property to third parties or withdraw the funds. In support of this proposition, counsel made reference to the decision in the case of the **Anti corruption and economic crimes division ACEC No 62**

of 2007(OS) in which the court held that **the plaintiff would suffer irreparable damage or loss in the event the properties are sold and that the scales of justice tilted in favour of the plaintiff as it would be expensive to trace the disposed properties in the event the suit succeeds.**

10. Further reliance was placed on the decision in **Civil Case No 33 of 2016 Nrb High Court EACC vs Jimmy Mutuku Kiamba and 3 Others and equity Bank Ltd** (interested party).

11. On his part, Mr Nyamodi appearing for the defendant opposed the application vehemently. He reiterated the grounds of opposition herein above stated. He challenged the application on several grounds; First, that the suit is bad in law as it is filed vide a plaint instead of an originating summons pursuant to section 55(3) of ACECA. Second, that the commission did not give the respondents reasonable opportunity (notice) to explain the sources of income as required of it under section 26 ACECA and article 47 of the Constitution on fair administrative action.

12. In support of his arguments, counsel made reference to the decision in the case of the **Director of public prosecution vs Tom Ojienda t/a Professor Tom Ojienda & Associates and 3 Others 2019 eKLR** where the Court of Appeal underscored the necessity in the commission issuing notice to a litigant against whom proceedings under ACECA are instituted.

13. Third, Mr Nyamodi submitted that the application does not state the provision under which it is brought implying that there is no prima facie case. Fourth, learned counsel submitted that the applicant did not disclose that there is a criminal case pending before the lower court being ACC No 3 of 2019 where similar allegations have been made in a criminal version. On this ground, counsel submitted that the applicant is not entitled to an equitable relief of an injunction without full disclosure of all material facts. In support of that proposition, the court was referred to the decision in the case of **Stanley Amombo Amuti vs EACC (2019) eKLR**.

14. Fifth, it was Mr Nyamodi's contention that there is no causal link between the acquisition of the properties in question and the alleged proceeds of corrupt conduct. He further contended that there was no proof that the properties in question are likely to be disposed off and that the applicant will not be adequately compensated in monetary terms. Lastly, counsel urged that there were no title deeds attached to show that the properties in question belong to the defendant.

15. In their rejoinder, Miss Kenduiwa submitted that the suit herein is brought under section 11 of EACCA and not under ACECA. That this provision does not require a notice under section 26 of ACECA and the suit is therefore properly instituted vide an ordinary plaint and not an OS which only applies in claims based on forfeiture of unexplained properties under section 55 of ACECA.

16. Regarding the issue of establishing a causal link, she submitted that the award of illegal contracts, payment for the same and subsequent transfers of the said funds from Oryx to the defendant's fund account from which the impugned properties were bought is sufficient proof that there is a link between money obtained through the alleged corrupt conduct and the properties purchased out of such proceeds.

Determination

17. I have considered the application herein, supporting affidavit and the response thereto. I have also taken into account oral submission by both counsel. The only issue for determination is whether the applicants have met the threshold for issuance of an injunction.

18. The principles upon which injunctive orders can issue are well settled in the law and a myriad of judicial precedents. In the celebrated case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358**, the court set out the key elements to be satisfied before granting an order of injunction as follows: Proof of a prima facie case with a probability of success; the applicants must show that if the orders sought are not granted there is a likelihood of suffering irreparable damage which cannot be compensated in monetary terms and, where the court is in doubt, it will determine the motion on a balance of convenience.

19. Similar position was held in the case of **Ethics and Anti-Corruption Commission vs Jimmy Mutuku Kiamba and 3 Others and Equity Bank Ltd** (interested party) (supra) and **Mrao Ltd vs First American Bank of Kenya and 2 Others, Nrb CA No 39 of 2002 (2003)eKLR** where the court defined what constitutes a prima facie case 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.”

20. Before I proceed to determine on whether the threshold on grant of injunction has been met, it will suffice to first determine some preliminary issues raised by Mr Nyamodi. Learned counsel raised the issue regarding competence of the proceedings herein on grounds that the suit has been filed by way of a plaint instead of originating summons.

21. M/s Kenduiwa submitted that the suit is not brought under section 55 of ACECA but instead it is filed under section 11 of the EACCA. That section 11 (1) j of the EACCA provides;

“In addition to the functions of the commission under article 252 and chapter six of the Constitution, the commission shall institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption or the payment or compensation, or other punitive and disciplinary measures.”

22. On the other hand, section 55(2) provides- **“the commission may commence proceedings under this section against a person if –**

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

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

23. On the other hand, section 55(3) of the ACECA goes further to provide that proceedings under section 55(2) shall be commenced by way of an OS. From the wording of section 55, it is clear that proceedings for recovery are targeting forfeiture of unexplained wealth which is not commensurate into one's known legitimate sources of income. This section is specific in the category of targeted assets as those that are disproportionate to one's known legitimate source of income.

24. On the other hand, the commission can institute general civil proceedings for purposes of confiscation or freeze of proceeds of corruption or related to corruption. Under section 11 (1) (j) of EACCA, there is no specific provision on the format through which such civil proceedings shall be instituted. In a situation where the law is not specific on the format or the mode through which a specific suit is to be instituted, it is open to the litigant to institute a suit by way of a plaint

25. In this case, the claim against the defendant is not hinged on an unexplained wealth as provided under section 55 of ACECA but rather, confiscation of proceeds of corruption or related to corruption under section 11 (1) (j) of EACCA which can therefore be instituted by a plaint and not necessarily through an originating summons.

26. Does a suit instituted under section 11 (1) (j) require notice as prescribed under section 26 of ACECA and as per the holding in the DPP vs Prof Tom Ojienda case above quoted? Mr Nyamodi contended that the commission did not comply with section 26 of ACECA. In response, the applicant also argued that section 26 of ACECA was not applicable under the circumstances. Guided by the Court of Appeal decision in the case of Prof Tom Ojienda, notice is applicable for proceedings instituted under Section 55 of ACECA. In the instant case, the suit has been commenced under section 11 (1) (j) of EACCA and not ACECA hence section 26 of ACECA which is not couched in mandatory terms is not applicable.

27. Regarding the submission by Mr Nyamodi that the plaintiff has not established a link between the alleged proceeds of crime and the acquisition of the property in question, it is clear from the transfer signed by the defendant when buying the properties in question that they were all bought during the material time relevant to this case. At para 7 of the affidavit in support of the application, the applicant attached transfer documents in favour of the defendant in respect of the impugned properties all executed in the year 2014 (see annexure JKN 5 a, b & c)

28. Although the titles were not attached, the defendant does not deny ownership to those properties and therefore cannot claim that ownership has not been established by way of production of title deeds. Equally, the fact that the money paid by the Samburu County Government to Oryx oil services a business owned and managed by the defendant was paid to Oryx account and later transferred to the defendant's various accounts from which the properties were bought, is a clear link between the alleged proceeds of crime and the property in question details of which shall be fully articulated and subjected to cross examination upon conducting a full trial.

29. I will now turn to the main grounds for issuance of injunction. First, Mr Nyamodi urged the court that the application is not brought under any specific provision. However, the application before court is indicated at the heading that it is brought under section 1A, 1B and 3A and 63 of the Civil Procedure Act and Orders 39(5), 40(1) and 50(1) of the Civil Procedure Rules. I have no doubt that the application is filed through the correct procedure and relevant provisions.

30. Has the applicant established a prima facie case with a probability of success? It is the applicant's case that the properties and funds in question are proceeds obtained through illegal contracts awarded to the Governor of the said County Government who influenced the contracts awards to his company/business for supply of oil/fuel. It is not dispute in that Oryx is a business managed by the defendant a Governor in the said County. It is not in dispute also according to the defence that such contracts were awarded. The only defence given by the defence is that the defendant did not influence the award nor were the award illegal. In my view, this is a matter of evidence which will be ventilated when the trial begins.

31. Indeed, there is proof that contract awards were made to the Governor's business and there are allegations that in his position he influenced the said awards to his benefit. Should the court find that indeed he influenced the said awards, it will then forfeit the properties arising from the payments in respect to those contracts to the State. It is reasonable therefore, that such allegations which on the face of it sounds logical, be interrogated by way of evidence. These are not issues which can be disposed at the interlocutory stage and the same must be determined through a full trial. (see **Ethics and Anti Corruption Commission vs Jimmy Mutuku Kiamba**(supra). Accordingly, it is my finding that the applicant has established a prima facie case with a probability of success.

32. The second issue is whether the applicant will suffer irreparable damage if the orders are not granted. According to the plaintiff, in the event the orders are not granted, the property may be disposed off to a third party and the funds withdrawn. It is true that the applicant will suffer irreparable damage or loss should the properties be disposed or funds withdrawn as there will be nothing left to forfeit and recover in the event that the suit succeeds. It is therefore equitable that the orders sought seeking to preserve the properties and funds to issue as the defendant will not suffer any prejudice by so preserving them.

33. Regarding the convenience in granting the orders in the event of doubt, the scales of justice tilts in favour of the plaintiff in this case. This is because in the event the orders are denied, and the properties and funds disposed off, it will be difficult to track them and recovery will be so expensive or even impossible. On a balance of convenience, the orders sought must issue in favour of the applicants (see **Anti - Corruption and Economic Crimes ACEC 63/17 (OS) Ethics and Anti-Corruption vs Jamal Bare Mohammed Nrb High Court** where it was held;

“in my assessment of the competing arguments, I am of the view that the applicant has shown that unless the order is granted, the applicant will suffer irreparable loss in that, the defendants/respondents will be at liberty to deal with the mentioned properties in the manner stated on the motion. This will mean that the applicant will have nothing to recover in furtherance of its statutory mandate. This in my view is irreparable loss which cannot be compensated in monetary terms.”

The court went further to state;

“The balance of convenience do tilt in favour of the plaintiff which will be inconvenienced if the orders sought are not granted. It is the Commission that will expend the resources to trace and recover the money if successful in the application and the costs will be borne by the taxpayer.”

34. In view of the above findings and considering that the defendant is enjoying his salary and doing business with Oryx, he will not suffer any inconvenience or prejudice if the orders sought are granted.

35. Concerning the issue of non-disclosure of material facts that the commission did not disclose of the existence of ACC no.3/2019 where the defendant is charged of a criminal case related to the facts of this case, the same is immaterial. Under section 193A of the Criminal Procedure Code, civil proceedings will not be a ground for prohibition, stay or delay of criminal proceedings. It is trite law that criminal and civil proceedings can continue concurrently and nothing stops the other unless the court for good reason so finds and orders a stay.

36. In a nutshell, this court is satisfied that the applicant has met the criteria for issuance of the orders sought and therefore do allow the same in terms of prayer 4 and 5 of the application herein. Regarding costs, the same shall be in the cause.

Dated, delivered and signed at Nairobi this 6th day of December 2019.

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J. N. ONYIEGO

JUDGE