



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC SUIT NO 16 OF 2019

ETHICS AND ANTI CORRUPTION COMMISSION.....APPLICANT

VS

ANDREW BIKETI MUSUYA T/A

MUKUYU PETROLEUM DEALERS.....RESPONDENT

SALOME WALEGHWA.....1ST INTERESTED PARTY

BHINDER CORPORATION LIMITED.....2ND INTERESTED PARTY

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

WACHENYA AUTOGARAGE.....4TH INTERESTED PARTY

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

LOLONG CONTRACTORS LIMITED.....PROPOSED 6TH INTERESTED PARTY

RULING

1 Before me is a notice of motion dated 22/10/2019 and filed the same day pursuant to Article 22 of the Constitution, orders 51 rule 1 and 1 rule 10(2) of the Civil Procedure Rules 2010 and, Section 3A of the Civil Procedure Act seeking orders that:

- (a) This honourable court be pleased to enjoin Lolong Contractors Limited as the 6th interested party in this matter.
- (b) This honourable court be pleased to grant leave to the firm of Wanja and Kirimi advocates LLP to come on record on behalf of the 6th interested party.
- (c) The proposed 6th interested party be allowed by this honourable court to file its response to the amended originating summons herein once it has been enjoined as the 6th interested party.
- (d) Costs of this application be in the cause.

2 The application is premised upon grounds :

- (1) That the Respondent and the proposed 6th interested party entered into various Construction Agreements on Credit in respect to some of the properties in issue.
- (2) That the proposed 6th interested Party and the Respondent executed an Agreement for Construction on Credit dated 14th April 2016, on the parcel of land known as LR No. MN/111/5698 measuring 0.0406 Hectares.
- (3) That the project costs in respect to the above named parcel was mutually agreed as Kshs. 10,900,000/-

(4) That further, the proposed 6th Interested Party and the Respondent executed an agreement for construction on credit dated 14th April 2015, on the parcel of land known as LR No. MN/IV/713 measuring 0.036 hectares.

(5) That the project costs of the said parcel was mutually agreed at Kshs Ten Million, Six Hundred Thousand (Kshs10,600,000/-).

(6) That subsequently, the proposed 6th Interested party and the Respondent executed an agreement for Construction on Credit dated 14th April 2016, on the parcel of land known as LR No MN/111/56

(7) That the project costs for the said parcel was mutually agreed at Kshs 10,900,000/-

(8) That the aforesaid parcels of land are part of the properties in issue in this matter and thus the need for this Honourable Court to enjoin the proposed 6th interested Party to protect its interests.

(9) That no party will be prejudiced if this Honourable court grants the order as sought in this application

3 In further support of the application, the applicant through its Director Conrad Wasike swore an affidavit on 22/10/2019 and filed the same day basically giving details of the construction agreements between them and the respondent. It was averred that on 14/4/2016, the proposed interested party entered into a contract with the respondent for purposes of funding construction of a five storey house on the respondent's property LR MW/111/5698 and thereafter had the said property as lien for the purpose of repayment of the loan and interest at Kshs 250,000 remittances being monthly collection as rent from the said premises.

4 A copy of the said agreement setting out the terms of the contract was annexed and marked as 'CW2'. He also attached a bill of quantities to show the cost of construction and the amount of work undertaken (see annexure marked CW3). That the total cost for construction as per the bill of quantities was Kshs 52,010,863. He averred that as per the repayment plan, by 6/3/18 the respondent had already repaid the contractor (6th interested party) Kshs 41,110,863 thus leaving a balance of Kshs 10,900,000 payable in instalments of Kshs 250,000 per month. A statement of accounts showing the repayment arrangements was attached and marked as "CW4".

5 It was further deponed that on 14/4/2015, the respondent and the proposed interested party entered into similar construction arrangement with the proposed 6th interested party for construction of a four storey house on LR MN/10/1713 Mtwapa comprising of 5 units of bedsitters, 11 one bedroom units, 8 two bed rom units and 2 shops. A copy of The construction agreement marked CW5 and bill of quantities marked 'CW6' was attached as proof of the terms of contract.

6 He further contended that, upon survey and preparation of the bill of quantities, the construction cost inclusive of duties and taxes, was Kshs 42,664,819. That as at 6th March 2018, the respondent had repaid Kshs32,664,332 leaving a balance of Kshs10,600,000 repayable at kshs 250,000 per month.

7 With regard to the construction of a 5 storey building with 30 one bedroom units on LR MN/111/5697, the parties allegedly entered into an agreement dated 14/4/2016. That the project was estimated at Kshs 10,900,000 and upon completion of the project, the respondent was to repay the loan at 250,000 per month until completion.

8 It is the 6th interested party's claim that as a creditor, they have a beneficial interest in the affected properties hence the need to be enjoined to protect the interest in the event the properties are forfeited.

Respondent's response

9 In response, the applicant/respondent (EACC) filed a replying affidavit sworn on 11th November 2019 by Yakub Adow Kuno an investigator with the EACC who is also in conduct of the investigations in relation to the subject matter herein. It is deponed that the suit is filed pursuant to section 55 of ACECA which only allows the court to determine whether the assets the subject matter of this suit constitute an unexplained assets to be forfeited to the state and that the proposed interested party is not a party nor have they been asked to account for any property.

10 He averred that the issues of credit as espoused by the proposed interested party is a commercial transaction which can be articulated in a different forum and not before this court. That the Chief Justice practice directions of 2015 and 2016 do not embrace commercial litigation in an anti - corruption court.

11 Further, that the proposed interested party had failed to demonstrate that its joinder is necessary or that it will enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit and that they have an identifiable stake in the outcome of the matter.

12 Regarding the claim of a lien, he deponed that the alleged contractual agreement is loaded with inconsistencies and at best it can be concluded to be an afterthought. He dismissed the cost of construction given as per the purported agreement at Kshs 10,00,000. That for the Bill of quantifies to claim over 52 million for the two projects and 42 million for one is a pure lie.

13 In its rejoinder, Conrad Wasike swore a further affidavit on 18/11/19 in which he stated that during the commission's investigations, it summoned and recorded a statement from him as the Director of the 6th proposed interested party in its capacity as the creditor to the respondent. That for the commission to claim that the proposed interested party have no stake in the said property is being unrealistic.

14 He further deposed that they will stand to lose if the properties are declared as unexplained assets without the lien being taken into account. That a court cannot declare properties as unexplained assets which are acquired partly using a credit facility

Hearing

15 During the hearing, Mr Simiyu appearing for the proposed interested party basically restated the averments contained in the affidavit in support of the application and a further affidavit aforementioned. Counsel further highlighted on his submissions filed on 4/11/19.

16 Learned counsel submitted that the proposed interested party has an identifiable stake and legal interest in the proceedings. To support that proposition, he relied on the decision in the case of **Constitutional Petition No 37 of 2017 Kenya Medical Laboratory Technicians and Technologist Board and Six Others Vs Attorney General As Consolidated With Petition No 49 of 2017 (2017) eKLR** where the court enunciated on various principles governing joinder of an Interested Party as follows:

“The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake or a legal interest or duty in the proceedings.”

17. On the other hand, Ms Odipo appearing for the respondent equally adopted the averments contained in their replying affidavit. She submitted that the presence of the proposed interested party is unnecessary and that the alleged lien is not registered in favour of a charge for purposes of a creditor's security. She contended that any credit advanced to the respondent can be recovered as a civil debt elsewhere. She urged that there was no proof of any identifiable stake or legal question in the suit to justify joinder.

17 To support her argument, learned counsel relied on the holding in the case of **EACC v Jared Oduyo & Others ACEC Civil suit No 32/2018** and **Joseph Leboo and 2 Others vs Director Kenya Forest Services and another (2013) eKLR** where the court stated that:

“... the guiding principles when an intending party is to be joined are as follows:

(1) he must be a necessary party

(2) he must be a proper party

(3) In the case of a defendant there must be a relief flowing from that defendant to the plaintiff

(4) the ultimate order or decree cannot be enforced without his presence in the matter.

(5) his presence is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit.

Determination

18 I have considered the application herein, supporting affidavit, response thereto and submissions by both counsel. The only issue that arise for determination is whether the proposed interested party has a recognizable legal interest or stake in the proceedings herein to warrant its joinder.

19 The application has been advanced pursuant to order 1 rule 10(2) of the Civil Procedure Rules which provides:

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

20 Will the presence of the proposed 6th Interested party in this case be necessary so as to enable this court effectually and completely determine this case? Before a party is enjoined to any court proceedings, it is incumbent upon that party to establish a prima facie case that he or she is a necessary party whose stake or legal interest or position in the said proceedings will assist the court arrive at a just and fair decision.

21 It therefore follows that entry to legal proceedings in either capacity or legal process is not a ritual or a matter of course. One must have a legally recognized stake in the suit. In the case of **Trusted society of Human Rights Alliance v Mumo Matemo and 5 Others (2014) eKLR** The supreme Court had this to say at para (18):

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause *ab initio*. He or she is one who will be affected by the decision of the court when it is made either way. such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause. on the other hand, the amicus is only interested in the court making decision of a professional integrity. An amicus has no interest in the decisions being made either way but seeks that it be legal, well informed and in the interest of

justice and the public expectation. As a friend of this court, this court is to ensure that a legal and legitimate decision is achieved.”

22 See also **Macadamia Nuts dealers v Horticultural Crops Development Authority and Another (2014) 14** where the court defined an interested party as follows:

“An interested party is a party who has a stake/interest directly in the matter before the court as though he is a party to the cause. He must be a party who is likely or who will be affected by the decision of the court and he or she is of the view that unless he or she is enjoined (sic) in the matter his or her interest will not be articulated or protected unless she or he is made a party to ventilate his or her case”

23 In the instant case, the commission has filed this suit against the respondents and five other interested parties under section 55 of ACECA seeking forfeiture of various properties suspected to have been obtained through corrupt conduct or generally unexplained wealth among them, the three properties which the proposed 6th interested party is laying claim over as having a creditor’s interest/stake.

24 The applicant(Commission) in this case obtained preservation orders in respect of the properties herein and proceeded to serve statutory notices under section 26 of ACECA in which the respondents were unable to justify possession of the property in issue and therefore the unexplained property liable to forfeiture.

25 The proposed interested 6th interested party is claiming that they entered into a contract for construction of the three properties the subject of this application and that the respondents were to repay them the loan at Kshs 250,000 per month until completion. Their argument is that if the properties are declared unexplained assets and then forfeited to the state, their money which was used in construction of those properties will be lost.

26 The interested party has attached various construction agreements and bill of quantities to prove that they had such an arrangement with the respondent. It is also admitted by both parties that even before this suit was filed, the respondent had declared existence of the said contract with the interested party and based on this response, the commission proceeded to interrogate and record a statement from its Director. Why did the commission go an extra mile to enquire the truthfulness of the respondent’s allegations from the proposed 6th interested party?

27 It has been alleged by the applicant that the agreements cannot stand as they are an afterthought and therefore not binding in law as there was no charge registered. I am not aware of any law prescribing registration of a charge in situations where parties enter into a private agreement or partnership to execute certain transactions or businesses affecting real estate property and in particular construction of a house or houses. There is no mandatory rule that a charge must be registered where people enter into a transaction business in the construction industry. Whether there were such contracts or not is a matter of evidence which cannot be ventilated at the interlocutory stage without calling or subjecting witnesses to cross examination. Registration of a charge is therefore not necessary.

28 Can the person claiming a creditor’s interest or lien in a property be enjoined in a suit where the property in question is the subject of civil proceedings for forfeiture? When the commission seeks to have certain unexplained assets and in particular real property like housing forfeited, courts must be careful to distinguish the actual or genuine contribution towards acquisition and or developments of the property in question. A property like a house may be acquired through a process including; buying the land and developing the same.

29 Supposing the land is acquired through corrupt means or monies whose source cannot be explained and the development is done using genuine money say from a bank, can the entire property be forfeited because of the tainted manner in which the land before development was acquired? The answer is no. What is forfeited is the portion of money put into the acquisition of the property or its development less the genuine money put into its acquisition or development.

30 In this case, the interested party is claiming creditors’ interest so that in the event judgment for forfeiture is entered, they should not lose and that the amount realized after the sale should take into account their credit facility. Does this justify joinder into the suit? The plaintiff made reference to Jared Odoyo case where this court rejected a request by the defendant to join the County Government of Migori as an interested party. In that case, the county Government of Migori did not seek to be enjoined to express their interest. They were being drag to court as a party in a matter involving two individuals fighting over unexplained property to which they were not claiming any interest nor stake. The facts of that case are therefore distinguishable from this case.

31 I am alive to the fact that it is within the court’s discretionary powers to grant a prayer for joinder of an interested party. In determining or arriving at the conclusion that a party ought to be joined or not, the court must balance the scales of justice so as not to shut out litigants from accessing justice. Further, the court must consider or weigh whether joinder will effectively forestall any future litigation over the same property hence a remedy to settle the matter once and for all.

32 In the case of **Departed Asians Property Custodian Board vs Jaffer Brothers Ltd (1999) 1EA 55** the court held that:

“... for a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one or two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit would legally affect the interest of that person, and it is desirable for avoidance of multiplicity of suits to have such a person enjoined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on application of a defendant) to be joined as a co defendant, where it is shown that the defendant effectually set a defence he desires to set up unless such a person is joined in it or unless the order to be made is to bind that person.”

33 Having evaluated the pleadings herein and the material placed before me, in my view, the proposed 6th interested party has a probable

interest in the property the subject of these proceeding and therefore, has a recognizable legal interest subject to adduction of evidence during the hearing. Further, the 6th proposed interested party will most likely suffer as a creditor if the property is to be sold entirely as an unexplained asset without taking into account its contribution in terms of credit which will then not be classified as unexplained asset. The outcome of this case will therefore have an impact or effect on their claim over the property in question subject to proof by way of evidence.

34 In the same vein, joinder of the interested party will also avoid future litigation e.g. third party proceedings stopping execution based on creditors interest. If the interested party is enjoined, they will have no reason to stop execution as the decision will be binding on them. Further, joinder of the interested party will assist in the defendant effectually setting out his defence as articulated in the Departed Asians properties case above quoted. Regarding whether the interested parties case should exclusively be determined in a commercial court, it is not correct.

35 As long as the suit property is a subject of acquisition through corrupt conduct or is classified as an unexplained property, a party who is interested in the property and has adequately proven his or her stake should not be locked out of the proceedings. The key consideration is the nature of the interest that is being advanced. Shall a bank for instance with a title deed deposited as collateral or charge in acquisition of credit facility with the statutory right of sale be barred from being a party to forfeiture proceedings? 36. To the contrary, time and again the commission has regularly enjoined third parties who are interested in one way or the other in the property subject of forfeiture proceedings among them banks and SACCOS. Each case shall be determined on its own merit. Having taken into account both parties presentations and arguments and further having considered all the factors necessary for joinder of parties, I am satisfied that the propped 6th interested party has met the criteria for joinder and there will be no prejudice in allowing the application.

36 Accordingly, the application is allowed with orders that:

- (a) The proposed 6th interested party be and is hereby enjoined as a party to this suit.
- (b) That the applicant shall serve the 6th proposed interested party with a copy of the amended originating summons.
- (c) That upon being served with the said originating summons, the 6th interested party shall file its response within 14 days from the date of service and thereafter, the plaintiff shall have seven days corresponding leave should to file a response if need arises.
- (d) The suit shall then be set down for pretrial directions.
- (e) Each party to bear own costs.

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

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J. N. ONYIEGO

JUDGE