REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CRIMINAL APPLICATION NO. 25 OF 2016

(FORMERLY HCCC NO. 1477 OF 2005)

KENYA ANTI-CORRUPTION COMMISSION……..….....PLAINTIFF

VERSUS

JOHN MICHAEL NJENGA MUTUTHO.....1ST DEFENDANT

COUNTRYSIDE SUPPLIERS LIMITED……..…….2ND DEFENDANT

R U L I N G

1. Before the Court is a Preliminary Objection (hereinafter P/O) by John Michael Njenga Mututho and Countryside Suppliers Limited (hereinafter the 1st and 2nd Defendants respectively). It is dated 21st September, 2016 and it raises the following issues:

a) That the Plaintiff lacks jurisdiction to institute and prosecute the instant suit, since it does not fall under its mandate as provided for under the Anti-Corruption and Economic Crimes Act by which it was established.

b) That the Suit as a whole is incompetent, misconceived and a non-starter.

c) That the Plaintiff lacks *locus standi* to institute and prosecute the suit.

d) That the suit is otherwise an abuse of Court process and ought to be dismissed with costs to the Defendants.

2. In their submissions filed on 16th November, 2016 by Learned Counsel Mr. Gichuki King'ara, and upon which learned Counsel Mr. Njenga who appeared for the 1st and 2nd Defendants relied during the hearing on 7th December, 2016, the Defendants argued that there was no violation of the **Anti-Corruption and Economics Act of 2003** as they had not committed any offence related to corruption.

3. This argument was premised on the fact that the Accused (1st Defendant) was acquitted of the charges leveled against him both in person and as a Director of the 2nd Defendant in **Criminal Case No.2400 of 2005**. That the charges made in the criminal case were the same as the particulars of fraud in the present suit, instituted by the Plaintiff on behalf of the Kenyatta National Hospital Board.

4. Mr. King'ara further argued that the suit should never have been instituted by the Plaintiff as it had not met the requirements under **Section 53 (3) the Anti-Corruption and Economic Crimes Act**. That such a suit should only be instituted when there is something to be recovered and not to litigate as to whether there is something to be recovered.

5. Mr. King'ara urged that recovery could not take place in this instance as the subject of recovery ceased to be an issue when the criminal case was finalized and no appeal has been preferred in that suit. Counsel argued that the issues raised by the Plaintiff in the present suit were also raised during arbitral proceedings with the Kenyatta National Hospital Board, whose award was granted in favor of the 1st Defendant.

6. Mr. King'ara contended that the suit is incompetent and misconceived as the Plaintiff has decided to conduct a witch hunt against the Defendants, by proceeding with the current suit instead of withdrawing the civil suit or appealing the decision of the criminal court. This, he urged, is a contravention of the mandate of the Plaintiff's under **Section 3 (b)** of the **Anti-Corruption and Economic Crimes Act**.

7. Mr. King'ara argued that the Plaintiff has no *locus standi* to institute the suit on behalf of the Kenyatta National Hospital Board, as the interest of the Plaintiff in representing the aforementioned body is based on **Section 53** of the **Anti-Corruption and Economic Crimes Act** which is to recover the amount alleged in the statement of claim.

8. Mr. King'ara thus submitted that **Section 53** as read with **Articles 23** and **258** of the **Constitution of Kenya**, **2010**, illustrates that the recovery must have been made by the Plaintiff and since the subject that formed the basis of recovery was found to be inaccurate by the decision of the criminal court, the Plaintiff has no *locus standi* to proceed with the suit.

9. Mr. King'ara finally urged that the suit constituted an abuse of the court process, relying in **Nyeri Misc. civil App. No. 53 of 2015 M N N v M N N [2016] eKLR** to compound his argument. He averred that the Plaintiff was forum shopping for justice in a matter that had come to a dead end. That the Plaintiff was wasting the court's time by proceeding with the suit in an attempt to save face. Counsel thus urged the Court in the penultimate to uphold the objection and dismiss the present suit.

10. In the submissions filed on 23rd November, 2016 by Learned Counsel Mr. Murei and upon which he relied during the hearing, the Plaintiff opposed the Defendant's Preliminary Objection. Counsel argued that the P/O did not qualify going by the definition given by Sir Charles Newbold in **Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd [1969] E.A 696.**

11. Mr. Murei contended that, the objections raised by the Defendants are not expressly, or impliedly evident from the pleadings and would require the Court to look outside the pleadings and the law to ascertain whether or not there is any truth to the points raised. It is his contention that these arguments can be canvassed during the full trial of the suit and that their introduction at this stage is in itself an abuse of the Court process.

12. Mr. Murei argued that it was an abuse of the court process for the Defendants to attempt to re-litigate the question as to whether or not the Plaintiff has *locus standi* to file the suit, as the Defendants had previously raised the issue in the Notice of Motion filed on 1st March, 2006 which was subsequently done away with by the consent entered into by the parties on 30th May, 2006.

13. Mr. Murei opined that the Plaintiff had locus standi to file the suit as it is given the mandate to investigate the extent of loss or damage to any public property and to institute proceedings for the recovery of such a loss under **Section 7 (1) (h)** of the **Anti-Corruption and Economic Crimes Act.** He submitted that the determination as to whether or not there was a loss is to be canvassed during trial. He relied on the statement by Maraga J (as he then was) in **Nakuru Civil Suit No.43 of 2008, KACC v Sammy Komen Mwaita and Hillary Kipkorir Mwaita** to support his argument.

14. Mr. Murei urged that the acquittal of the 1st Defendant in the criminal case does not exempt him from having a case proved against him on a balance of probability in a civil court. Counsel asserted that the findings of the criminal court are not binding on the civil court and that the civil court must still assess the evidence. He supported his argument with the finding of the court in the case of **CA No. 328 of 2012; Central Bank of Kenya v Kenya Akiba Microfinance Ltd and 14 others, 2012 eKLR**.

15. Mr. Murei was of the opinion that if the Defendants viewed the present suit as an abuse of the court process they were well within their means to invoke **Order 2 Rule 15 (1) (d)** of the **Civil Procedure Rules** and apply for the suit to be struck out. He consequently argued that the objections raised by the Defendants are misconceived as the finding of incompetence of a suit could only lead to an order for striking out and not a dismissal as sought by the Defendants. In light of these arguments, he urged the court to pay no mind to the diversionary tactics of the Defendants and dismiss the preliminary objection.

16. Having set out the respective parties' positions as above, the emerging issue for determination is whether the objections raised meet the threshold of P/O to occasion the dismissal of the suit.

17. A Preliminary Objection was defined in the case of **Mukisa Biscuit Company – vs- Westend Distributors Limited (1969) EA 696 at page 701** thus;

> ***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confusion of the issues. This improper practice should stop".***

18. I have perused the points raised by the Defendants in the Preliminary Objection and I am of the opinion that what has been raised are matters of fact not law. The determination of these facts would require scrutiny at trial level. In the authority of ***El-Busaidy v. Commissioner of Lands & 2 Others*** **[2002] 1KLR 508** Onyancha J. made the following observations;

> ***"The preliminary objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of section 136(1) to it to make the Plaintiff's pleadings a non-starter? But the Defendants defend this suit because they do not accept the Plaintiff's facts as pleaded. Clearly therefore, the Defendant's preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction."***

19. Upon perusing the rival arguments this court finds that the Preliminary Objection raised by the Defendants falls short of the confines of the **Mukisa Biscuits** authority as above cited. It is the court's finding that none of the limbs of the preliminary objection is feasible to sustain it as they would all require further interrogation and enquiry. For the foregoing reasons, this application fails and is hereby dismissed with costs to the Applicant.

SIGNED DATED and **DELIVERED** in open court this **9th** day of **February, 2017**

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L. A. ACHODE

JUDGE

In the presence of …….Advocate for the Plaintiff

In the presence of …….Advocate for the Defendants