



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENT AND LAND DIVISION**

**ELC CIVIL NO. 1180 OF 2014**

**MUCHANGA INVESTMENTS LTD.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**HABENGA HOLDINGS LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JINA ENTERPRISES LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**TELESOURCE COM LTD.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**DIRECTOR OF SURVEYS.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**DIRECTOR OF PHYSICAL PLANNING MINISTRY OF LANDS & HOUSING....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**REGISTRAR OF TITLES.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**CHIEF LAND REGISTRAR.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**JOHN MUGO KAMAU.....8<sup>TH</sup> DEFENDANT/RESPONDENT**

**CATHERINE NGANGA FOR THE ESTATE OF CARMELINA MBURU.....9<sup>TH</sup> DEFENDANT/RESPONDENT**

**BARCLAYS BANK OF KENYA LTD .....1<sup>ST</sup> INTERESTED PARTY/RESPONDENT**

**RULING**

1. When this case came up on 14<sup>th</sup> December 2018 for further defence hearing, Mr Odera counsel for the 3<sup>rd</sup> defendant asked the Court to expunge the 4<sup>th</sup> to 7<sup>th</sup> defendant’s bundle of documents filed on 10<sup>th</sup> July 2018 on the ground that the entire bundle contained investigations by the Ethics and Anti-corruption Commission (EACC) which evidence according to him was obtained illegally. In support of his contention, he relied on a court of Appeal decision in Civil Appeal No.102 of 2016 between **Michael Sistu Mwaura Kamau Vs Ethics & Anti-Corruption Commission & 4 others ( 2017) eKLR.**

2. The application by Mr Odera was opposed by Mr Kamau for the 4<sup>th</sup> to 7<sup>th</sup> defendants on the ground that the decision relied on by Mr Odera did not make any finding as to illegally obtained evidence and that Mr Odera was present when the 4<sup>th</sup> to 7<sup>th</sup> defendants were granted leave to file the documents and that therefore he was opposing the documents in bad faith as he has been aware of the same since he was served with the documents.

3. Mr Miller for the plaintiff associated himself with the sentiments raised by Mr Kamau and added that the decision which is being relied on by Mr Odera dealt with the issue of the Commissioners of EACC being out of the office as at the time a report was forwarded to the Director of Public Prosecutions. He further argues that there was no finding made as to whether the evidence in the case cited was illegally obtained or not.

4. In response to the opposition to Mr Odera’s application, Mr Odera argued that though he was present when leave was granted to file the documents by the 4<sup>th</sup> to 7<sup>th</sup> defendants, that is not a bar for him to raise an objection based on their legality at any time in the proceedings.

5. I have carefully considered the application by the counsel for the 3<sup>rd</sup> defendant and the opposition to the same by the counsel for the plaintiff and the counsel for the 4<sup>th</sup> to 7<sup>th</sup> defendants. The only issue for determination is whether the bundle should be expunged on grounds that the evidence was illegally obtained.

6. I have looked at the bundle of the 4<sup>th</sup> to 7<sup>th</sup> defendants which was filed on 10<sup>th</sup> July 2018. The bundle mainly consists of statements recorded by various individuals before the officers of EACC at Integrity House. The statements were recorded from 14 individuals between October 2014 and February 2015. The decision which Mr Odera is relying on centred on the issue of whether a report recommending prosecution of the appellant based on a report which was forwarded to the Director of Public Prosecution after the Commissioners of EACC had left office was valid. The Court of Appeal found that though investigations started when the Commissioners of EACC were in office, the report, the basis of which the Director of Public Prosecutions charged the appellant was forwarded after the Commissioners had resigned from office. The court held that as the EACC was not properly constituted at the time the report to the Director of Public Prosecution was made, the Director of Public Prosecutions could not charge the appellant based on a report forwarded by the Chief Executive Officer of EACC.

7. There was no finding that the evidence which had been gathered was illegally obtained. The issue was whether the EACC was properly constituted and capable of making a report to the Director of Public Prosecutions.

8. The Chairman of the EACC resigned on 12<sup>th</sup> May 2015. Commissioner Onsongo had resigned on 31<sup>st</sup> March 2015 and Commissioner Keino resigned on 30<sup>th</sup> April 2015. As I have said hereinabove, the statements were recorded between October 2014 and February 2015 when the EACC was fully constituted. The evidence gathered then cannot be faulted and in any case, we are not dealing with a criminal case in this matter. I therefore find that the issue raised by Mr Odera is misconceived. The same is hereby dismissed with costs to the plaintiff and the 4<sup>th</sup> to 7<sup>th</sup> defendants.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **24<sup>th</sup>** day of **January 2019**.

**E.O.OBAGA**

**JUDGE**

In the presence of:-

M/s Gichoya for M/s Mulovi for Interested party

Mr Kamau for 4<sup>th</sup> to 7<sup>th</sup> defendants

Mr Gikera and Mr Njenga for 3<sup>rd</sup> defendant

Mr Miller and Mr Wena for Plaintiff

Mr Arusei and M/s Kiget for 9<sup>th</sup> defendant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**