

- Truco Kshs 57,606,655.75.
- Gatoori Enterprises Kshs 37,400,417.10.
- Greentent Kshs 15,967,123.90
- HIWCO Kshs 9,898,219.60
- Hasoco Limited Kshs 3,909,103.45
- Njewaco Limited Kshs 3,331,644.15

b. From KERRA

- Peanco Kshs 5,503,134.00; and
- Truco Kshs 5,143,436.00.

c. From KURA

- Peanco Kshs 19,698,125.60; and
- Truco Kshs 438,045.20.

The deponent added that the funds were withdrawn immediately after it was deposited through cash, cheques or transferred to different individuals with the 1st respondent being the biggest beneficiary through his companies, Peanco and Truco. He also deponed that the companies received Kshs 171,722,379.90 and Kshs 71,100,269.95 from different departments of the government which were channeled to different accounts belonging to car dealers as follows;

- On 31-07-2018- Kshs 4,200,000.00 to Avic- Shacman (E.A) Company Limited;
- On 17-03-2021- Kshs 1,170,000.00 to Hazer Motors;
- On 26-04-2021- Kshs 801,504.00 to Auto Kenya Limited;
- On 9-06-2021- Kshs 1,500,000.00 to Hazera Motors Limited; and
- On 12-07-2021- Kshs 1,450,000.00 to Ramna Int. Motors.

The applicant's investigator added that a further Kshs 88,521,270 was received on a date he did not specify without a clear narration while an unexplained sum of Kshs 28,508,055.00 whose sources was unknown was received by the 1st respondent from various individuals. He stated further that the 1st respondent also received a sum of Kshs 490,000.00 from Njiru Building Construction Limited, a company which had traded with the government and had received funds amounting to Kshs 463,808,208.10.

On the 2nd respondent, it was deponed that his account received a sum of Kshs 7,883,334.50 between 2016 and 2024 half of which came from unclear narrations and was withdrawn almost immediately after they were deposited. The deponent explained that Kshs 3,542,300.00 which is part of the former had no clear narration was received by the 2nd respondent between 20-06-2018 and 26-08-2022 as follows;

- On 30-06-2018 - Kshs 900,000.00;
- On 19-07-2018 - Kshs 150,000.00;
- On 24-08-2018 Kshs 12,000.00;
- On 7-01-2019 Kshsh 450,000.00;
- On 10-03-2020 Kshsh 800,000.00;
- On 18-05-2020 Kshs 43,000.00;
- On 17-07-2021 Kshs 200,000.00;
- On 17-07-2021 Kshs 200,000.00;
- On 21-07-2021 Kshs 230,000.00;
- On 22-07-2021 Kshs 370,000.00
- On 17-08-2021 Kshhs 182,300.00; and
- On 26-08-2021 Kshs 5,000.00

The 2nd respondent also received a sum of Kshs 2,535,432.00 which was followed by several cash withdrawals within two weeks. It was alleged further that the 2nd respondent

received Kshs 373,000.00 from Greentent which trades with the government on 14-08-2021 and that Greentent had received Kshs 15,967,123.90 from the said government between 1-07-2019 and 5-07-2022. A sum of Kshs 4,456.290.00 was received from KeRRA on 2-10-2020.

The applicant maintained that the respondents had traded directly and indirectly with the government despite being an employee of the government thereby committing offences of abuse of office, conflict of interest and procurement fraud. It was alleged that the respondents were summoned by the applicant for an explanation but failed to give a satisfactory one. The deponent also alleged that the 2nd respondent admitted receiving funds from Greentent that he used to purchase the motor vehicle in question but claimed that the money was loan repayments.

The applicant added that the 2nd respondent had links with Greentent Enterprises Limited as the owners of the said company were his relatives. To the applicant there was clear sign of procurement fraud, conflict of interest and abuse of office.

In the supplementary affidavit dated 28-02-2025, the deponent stated that the 1st respondent failed to give proper account for funds received from the government and he had failed to provide documents to show when the tenders were advertised and the bidding documents with quoted prices that made his companies the lowest bidder. He also alleged that the 2nd respondent admitted in his replying affidavit that he orchestrated nepotism and influenced award of tenders to his relatives and financed companies that always won tenders with the government which to him was a clear case of conflict of interest.

When the deponent appeared for cross-examination, he told the court that he could not narrate all the persons who credited in respect of the amounts credited into the

respondent's accounts as shown earlier but the monies can be established from the bank statements. He insisted that the 2nd respondent committed offences of conflict of interest, abuse of office and procurement fraud as the 2nd respondent's relatives were doing business with the government.

He alleged that the process was flawed from the beginning since there was no competitive procurement but he did not have evidence that the 2nd respondent influenced procurement. Pressed further, he said that he did not know the procurement or user departments involved. He also did not know whether the Chief Officer of the user department who was involved in the tenders. He added that he did not have any tender documents in any of the tenders but was quick to state that the applicant came to court because there was evidence that the 2nd respondent received money from the government. The 2nd respondent did not receive money from the County Government.

The witness stated further that the Owner of Greentent was Mrs. Juliet Kabuthi Muriuki but he had not attached a CR12 form for the company. He admitted that there was nothing wrong with giving out loan and getting repayment and that there is no law prohibiting a public officer from receiving and giving out loans. He confirmed that the 2nd respondent joined the government on 15/12/2017. He stated further that their investigations period started in 2016 and added that they had no problem with Kshs 9,121,504.00 paid for motor vehicles between 31-07-2018 and 12-07-2021 as indicated elsewhere in his testimony.

When asked about the loan from KCB, the witness stated that they visited the bank to verify the 3.3 million and they established that the information tallied with what

the 2nd respondent told him but they still brought him to court as they had not brought him for borrowing.

He also said that they recorded statement from Juliet but they had not produced it in court. He added that the function of the Board is related to employment and it did not do procurement function. He confirmed that, the 2nd respondent did not do procurement function, he was not the head of procurement or user department. he was not a member of any evaluation or inspection and acceptance committee, he was not a member of contract implementation committee and he had nothing to do with procurement.

According to the deponent, the 2nd respondent admitted that he financed the tender and given the position he holds and the fact that he received payments proved that he influenced procurement. He added that although the bank did not flag the withdraws there was a red flag in the manner they were done. He had no evidence that Kin General and Mutcom Limited traded with the government neither was there evidence that the 2nd respondent traded with the government. He admitted that none of the companies was owned by the 2nd respondent's wife, children or parents. Paragraph 32 KCT 589V is owned by the 2nd respondent on 26/3/2019 is when he acquired the vehicle.

When he was cross examined by Mr. Ali for the 1st respondent Mohammed stated that the properties the applicant seeks to forfeit are not jointly owned and, in his investigations, he did not find nexus between the two respondents.

He stated that the 1st respondent got elected as MCA in 2017 and took office the same year and is currently the majority leader in the Assembly. He alleged that the 1st respondent did not furnish him with a copy of the declarations of interests dated

4-01-2018 but when he was shown the letters, he admitted that the 1st respondent declared interest. He confirmed that the 1st respondent's statement was recorded on 27/11/2023 while this matter was filed on 9/10/2024. He added that they never went back to the county secretary to verify the declarations. He insisted that under the County Government Act, the County Assembly and the County Executive is one arm but a County Assembly has different procurement process from the County Executive.

He stated further that the 1st respondent has never sat in any tender committee in the executive and admitted that was prudent for investigations to confirm whether the 1st respondent was in the committees of the Assembly to establish whether there was conflict of interest but they did not do that. He added that none of the 1st respondent's relatives sat in the procurement committees and there are no documents filed in court to show that the 1st respondent was involved in procurement malpractice. He however maintained that the 1st respondent violated Section 59 of Public Procurement and Disposal of Assets Act although he did not award a contract to himself. He also added that there is no evidence that the 1st respondent influenced award of tender to his spouse, children or his corporation.

The witness stated further that the contracts they investigated were advertised by the County Executive and Truco and Peanco competitively bid and that there was no evidence that the government did not get value for the money. He confirmed that he verified that the contracted works were done. He confirmed that the 1st respondent in his statement during investigations explained how he acquired the vehicles.

The 1st respondent's case

The 1st respondent at paragraph 9 of replying affidavit raised a preliminary objection on a point of law to the effect that the originating motion was filed out of time as the applicant despite obtaining preservation orders on 20-06-2024 did not serve the same on the respondent within 21 days as required under Section 83 of POCAMLA. He alleged to have been served on 25-09-2024 after the lapse of the preservation orders. He added that the suit against him was malicious, vexatious and an abuse of the court process.

The 1st respondent admitted that he was the serving Member of the County Assembly of Embu representing Mbeti North Ward since 2017 and is current leader of majority in the Assembly. He also admitted that he was a director of Peanco and Truco but denied that the companies received suspicious deposits from the government. He also admitted that the companies bid for business with the government but stated that the same was done lawfully and that the contracted works were satisfactorily completed and no complaint has ever been raised about the contracts. He denied that he was an employee of the County Government Executive but an employee of the Assembly.

The 1st respondent added that there was clear distinction between the County Government Executive and the Assembly with each having a distinct and independent tendering and procurement committees, records and staff. He added that prior his election to the assembly, he was working as a contractor and after his election, he wrote to the to the government informing it that he had been elected and enquiring whether there was any conflict of interest which was not responded to. He added that neither him nor his companies entered into any contract with the County Assembly Service Board which is the entity relevant to him as envisaged in Section 59 of the Public Procurement and Asset Disposal Act, 2015. He dined abusing his office or engaging in matters of conflict of interest.

He stated further that the issues of procurement fraud should be pursuant to Sections 5(1) and 38(1)(c) of PPADA addressed and investigated by Public Procurement Regulatory Authority and the applicant had no authority or powers to determine whether the 1st he had breached the Act or the Regulations thereof. He averred further that the applicant's actions were ultra vires and therefore unlawful within the meaning of Article 47(1) of the Constitution.

The 1st respondent went on to list the contracts his companies executed with KeRRA, KURA, and the government which were questioned by the applicant and denied that there were any integrity issues in the same. He admitted receiving money from Peanco and Truco to which he is a director and averred that there was nothing wrong with the receipt. He also put the applicant to strict proof of allegations that he received Kshs 171,722,379.90 and Kshs 71,100,269.95 from the government's various unspecified departments.

He blamed institution of these proceedings on his political opponents who see him as a potential area Member of Parliament who needs to be managed before the next general elections.

The 1st respondent explained acquisition of his motor vehicles as follows;

- KDD 932H - he bought on 12-07-2021 at Kshs 950,000.00 which was paid through Equity Bank;
- KCD 368R- he acquired through a loan facility of Kshs 4,620,000.00 granted by Family Bank vide letter of offer dated 13-05-2016 which was before he became a member of the Assembly.
- KDC 857D- he bought from Ramna International Company Ltd with purchase price being paid through Equity Bank Ltd on 17-03-2023 and 9-06-2021 and Family Bank on 25-03-3032.

- KDL 451F - he bought at Kshs 1,650,000.00 on 16-12-2022.
- KDK 837Y - he bought in 2022 at Kshs 4,500,000.00 through Family Bank on 25-10-2022, 22-12-2022 and Equity Bank on 26-10-2022.
- KDL 341G - the motor vehicle had been bought by Isaac and Timothy Company Ltd in which he is a shareholder. The vehicle was originally KCM 464C and was transferred to him in 2023. The purchase price for this was paid through Equity Bank on 25-09-2017, 25-08-2017, 31-07-2017 and 7-08-2017. It was acquired before he became an MNA.
- KDK 910T- he bought from Al-Madni Trading Co. Ltd for Kshs 1,420,000.00 with purchase price being paid through Equity Bank on 16-12-2022.

The 1st respondent denied that he failed to cooperate and stated that the same questions raised by the applicant were raised by EACC where he recorded a statement on 3-06-2024. He added that the Kshs 490,000.00 he received from Njiru Building Constructions Company Ltd was payment for hiring out his motor grader.

He was cross-examined by Miss Amadi for the applicant where he stated that he had not surrendered the motor vehicles despite having been served with preservation orders. He repeated that he was an elected member drawing salary from the Assembly and added that the Governor of the County does not have any role in payment of the Assembly's staff salaries and that the Assembly has different procurement process.

He sated further that he is a of the Assembly's Committee on Appointment, Trade and Investment, Powers and Privilege and Service Board. Paragraph 17. He admitted that the letter for declaration of interest was open and according to him, that is the right procedure for declaration of interest.

The 1st respondent stated further that all the tenders he bid were advertised and there were other people who bid and who could supply. He denied that his companies were not eligible to tender. He added that the directors of Truco are Peter Muriithi and Timothy Muita Muriithi and denied knowing Hiwco, Hasoco or Njewaco companies or their directors. He denied that the money he received from the companies were kickbacks for influencing the tenders.

He alleged that he bought KDD 123H in 2021 with car loan of Kshs 10,000,000/= he got from the Assembly by virtue of being an elected member. He also stated that he took his first car loan in 2018 and another one in 2022 but he could not remember which motor vehicles I bought using the loans from the Assembly. He added that Peanco was engaged in beer distribution business.

He concluded by stating that Section 59 of the Public Procurement and Assets Disposal Act, does not bar him from tendering and he was not in contravention of Section as he was not working with the County Executive.

The 2nd respondent's case

The 2nd respondent averred that he was a member of the Embu County Public Service Board (hereinafter referred to as 'the Board') between 15-12-2017 and 14-12-2023. He denied that he had links with Greentent either as a director, shareholder or employee but added that the company belonged to Juliet Kavutu Muriuki the wife of his elder brother one Daniel Kariuki Kithaka. He admitted that the company traded with the government long before he joined the Board. He added that Greentent never traded with the Board where he was a member. He contended that the County Government and Embu Public Service Board are constitutionally distinct entities.

The 2nd respondent averred further that the money he received from Greentent was not suspicious but a refund for a loan of Kshsh 2,000,000.00 the company borrowed from him on 24-05-2018 to fund construction of two classrooms at Muandani Primary School in Masinga Sub County which was awarded to it by Kenya Electricity Generating Company Limited. In order to give out the loan he borrowed Kshs 3,430,000.00 from Kenya Commercial Bank which was credited to his account on 11-05-2018.

He joined the 1st respondent in contending that the issue in question should have been taken up by the Public Procurement Regulatory Authority and not the applicant. He denied receiving money from KeRRA, KURA or the government as alleged and put the applicant to strict proof. He however admitted receiving money from Greentent, Mutcon Development Company Limited and Kins General Supplies Limited which he was entitled to. He stated further that if the applicant needed clarification on the narrations on the bank transactions, nothing stopped it from enquiring from the companies which transferred the funds.

He stated that Mutcon Development Company Limited is owned by his elder brother Daniel Kariuki Kithaka and Juliet Kabutu Muriuki while Kins General Supplies Limited is owned by his younger brother Charles Nyaga Kithaka and Faith Mwendia Kithaka and that these companies were not falling under Section 59 of Public Procurement and Assets Disposal Act and were free and qualified to contract with the government.

The Kshs 12,000.00 referred to by the applicant was received from Peterson Muthathai which was his benefit of airtime allowance from the Board. He concluded by stating in his supplementary affidavit that there was no proof that his motor vehicle registration number KCT 589V was purchased using proceeds of crime.

In cross examination, the 2nd respondent told the court that he was not employed but appointed on 18/12/2017 as a member of the Board. He admitted receiving money from Greentent which is owned by Juliet Kabutu Muriuki, a spouse to his elder brother. He insisted that this was payment of a loan he advanced the company in 2018. He added that the company was registered on 31/7/2018 but was a business name before it changed to a limited liability company.

Analysis and determination

This is forfeiture application under Section 90 and 91 of the POCAMLA. For the applicant to succeed in this application, it must demonstrate on a balance of probabilities that the assets it seeks to forfeit are proceeds of crime. Proceeds of crime has been defined in Section 2 of the POCAMLA as:

"proceeds of crime" means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed.'

The basis of this suit is the allegations that the motor vehicles in question were purchased using money generated through contracts between the government and companies said to be associated with the respondents. I have tried without success to understand why the respondents were sued jointly. I cannot see any nexus between the causes of action against them or between the respondents. If I understand the well, the applicant's case against the 1st respondent is that he used his office as an elected Member of County Assembly to influence award of tenders

by the Count Government to Peanco and Truco in which he had shares or was a director while and that against the 2nd respondent is based on allegations that he used his office as a member of the Board to influence award of tenders to Greentent which was owned by his relatives. As far as I can discern, these are two separate and distinct causes of action and I do not see the basis of combining the respondents in one suit. Be that as it may, I will consider the merits of the two matters irrespective of the misjoinder as the law provides that a suit cannot be defeated by virtue of misjoinder of parties. That is the purport of Order 1 Rule 9 of the Civil Procedure Rules which provides that;

‘No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.’

Before I go to the merits of the matter, I should deal with two issues of law which have been raised by the respondents. The first one is that the applicant had no powers to question the respondents on issues of procurement by virtue of Sections 5(1) and 35 of the PPADA. According to the respondents the said Sections gives exclusive mandate of investigating matters related to procurement to the Public Procurement Regulatory Authority including the investigations as the one in this matter. The Sections provide as follows;

Section 5(1)

This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.

Section 35

- (1) The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.*
- (2) An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.*
- (3) Investigation shall be conducted by an investigator appointed for the purpose by the Authority.*

In my view, the mandate referred to above covers procurements irregularities which go into execution of the contracted works. I see nothing in the cited Sections that bars any other government agency with statutory or constitutional mandate from investigating any offences or issues related to procurement in public organs. If the legislature had the intention of giving the Authority exclusive mandate to investigate, nothing would have stopped it from expressly stating so.

The Authority has no powers to investigate, trace, seize and forfeit assets which are obtained through irregular procurement. That mandate is reserved for the applicant under Section 90(1) of POCAMLA. The cause of action herein seeks to pursue proceeds of crime which are said to have been obtained in breach of procurement

laws and regulations. This being the case, the objection raised by the respondents is in my view misplaced and I hereby overrule it.

The other issue is that the preservation orders were allegedly served outside the 21 days period provided for by Section 83 of POCAMLA and for that reason, the originating motion is incompetent. The Section provides that;

‘If a court makes a preservation order, the Agency Director-General shall, within twenty-one days after the making of the order, give notice of the order to all persons known to the Agency Director-General to have an interest in property which is subject to the order; and publish a notice of the order in the Gazette.’

I have no affidavit of service to enable me ascertain the date of service. I also do not think that lack of service of the order should be fatal to the suit provided that the same was duly published in the Gazette. If the respondents intended to take this as a preliminary issue, they should have raised it before the hearing to enable the court to ascertain the date they were served. The objection the is also overruled.

I have found it difficult to understand where the tenders awarded to the 1st respondent’s company by KeRRA and KURA comes in this matter. None of the respondents worked for the two institutions or had any link with them. The applicant has not demonstrated what issue it had with KeRRA and KURA contracts. All that it has told the court is that the respondents did not produce the advertisements for the tenders and how they won them. It should be understood by the applicant that they should not drag individuals to court without giving any iota of evidence against them then ask the court to call upon the respondents to defend allegations whose basis has not been laid. It is the onus of the applicant to establish

a prima *fascie case* that the assets it asks the court to forfeit are proceeds of crime before the respondents are called upon to give explanations of their source of the assets. In ***Assets Recovery Agency v Ali Abdi Ibrahim (2022) KEHC 1906 (KLR)***, it was held that;

‘Likewise, in this case the burden of proof lies upon the Applicant to prove that the funds in the Respondent’s accounts are proceeds of crime as alleged but should that burden be discharged the evidential burden shifts to the Respondent to explain the source of the funds given that such evidence is within his special knowledge.’

Similarly, in ***Assets Recovery Agency v Akinyi (2022) KEHC 10116 (KLR)***, it was held that;

‘The Applicant therefore bears the legal burden to prove its case against the respondent on a balance of probabilities. Once the legal burden is discharged the evidential burden shifts to the respondent to prove that the assets were acquired legally or lawfully as this would be a fact(s) within their special knowledge. It is instructive that the evidential burden does not shift to the respondent unless and until the applicant has discharged the legal burden.’

In the matter before me, the only paragraphs of the supporting affidavit that makes reference to KeRRA and KURA contracts are 10, 12 and 24. Paragraph 10 states that preliminary investigations established that the respondents conducted suspicious transactions with the County Government of Embu, KURA and KeRRA. It does not tell us what was suspicious about the funds. One would be expected to after seeing reason to suspect, go further and do some investigations.

Paragraph 12 states that the respondents and the companies have both received a total of Kshs 686,723,619.15 from the County Government of Embu, Kshs 10,646,570.00 from KeRRA and Kshs 20,136,170.80 from KURA and went on to tabulate the figures without specifying the date of the transactions. Then paragraph 24 states that Greentent Enterprises has received Kshs 15,967,123.90 from the County Government of Embu between 1-07-2019 and 5th July 2022 and on 2nd October 2020, the company received a further Kshs 4,456,290.00 from KeRRA.

The applicant did not even find it fit to establish from KeRRA and KURA what these transactions were for. The applicant is in essence telling this court that they looked at the questioned bank accounts and suspected the transactions and that alone led them to file this matter and expect the court to find that it has established a *prima facie* case. The long and short of it is that, I have seen no reason to suspect the respondent's transactions with KeRRA and KURA. Having said this, I will proceed to analyse whether the applicant has established cases against the respondents in respect of the money paid from the County Government of Embu.

It is not in dispute that the 1st respondent is an elected member of the Assembly and as such an employee of and for purposes of the issue of conflict of interest and abuse of office an agent of the Assembly. There is also no dispute that the 1st respondent is a director of Peanco and Truco which are alleged to have traded with the government. There is also no dispute that monies were paid to the companies and subsequently some of it transferred to the 1st respondent. It is also common ground that the two companies and the 1st respondent did not trade with the Assembly. In my assessment of the evidence the dispute herein is whether the 1st respondent can be said to have traded with his employer in violation of Section 59(1) of PPADA.

The applicant has placed its reliance on the above issue on provision of Section 59(1) of the PPADA which states as follows;

A State Organ or public entity shall not enter into a contract for a procurement with-

(a) A public officer or state officer or a member of a committee or Board of that State organ or public entity; or

(b) An officer of that public entity or state organ.

The applicant has submitted that the County Government included and is the same entity with the County Assembly. County Government is a creation of Article 176(1) of the Constitution which states that;

‘There shall be a county government for each county, consisting of a county assembly and a county executive.’

No doubt from the above provisions the county government consist of the county executive and the county assembly. However, does that make the them one state organ? County Assemblies are created with the main function of overseeing the executive and legislating for the government. That in my view means that the two cannot be one state or public organ or body. If they were, the Constitution would not have separated their functions as it does in Articled 183 and 185 of the Constitution. It is also notable that the two have their own independent systems and Public Service Board. The formation and governance of County Assemblies is covered under Parts III and IV of the County Government Acts while Part IV of the same Act provides for the County Executive. Just as analogy, one cannot say that the National Assembly or Senate is the same public body or organ with the

presidency and the ministries formed under it otherwise known as the executive arm of the government.

It does not need special interpretation for one to understand that the County Executive and County Assembly are in law completely different in terms of operations and formation. Their functions and the systems they use are distinct. There is no way a Member of a County Assembly can be deemed to state or public officer working for the executive. the submissions by the applicant that the two are the same organs as envisaged in Section 59 of the PPADA is stretching it too far. To accept that position is to mean that all institutions with state or government control or presence are one organ and that in my view will constrict and strangle businesses and the economy to low levels.

The applicant has not disclosed which departments awarded the questioned tenders to Peanco and Truco and the only information to that effect has been supplied by the respondent. This position leads me to conclude that the applicant did little if any investigations and the result thereof is that that the case has insufficient evidence to warrant a finding in its favour.

It has been deponed that the 1st respondent influenced the award of the said tenders. If indeed he did, he would bring himself under Section 59(3) of PPADA which provides that;

A State officer or a public officer shall not award or influence the award of a contract to-

(a) himself or herself;

(b) the State officer's or public officer's spouse or child;

(c) a business associate or agent; or (d) a corporation, private company, partnership or other body in which the officer has a substantial or controlling interest.

However, the allegation about the influencing was a mere statement coming from an experienced investigator who should know that statements of this nature which are not backed by evidence cannot stand the test of probative value before a court of law. When the investigator was under cross-examination, he could not identify a single incident or act which would suggest that the 1st respondent influenced the award of the tenders.

The applicant has in its submission asked the court to find that the 1st respondent has failed to show the court that the tenders were advertised and competitively awarded to his companies. I do not take this to be a serious submission coming from the applicant who I believe knows that it has the burden of proving its case. The 1st respondent's burden in matters of this nature comes in after a case has been established against him as held in cases cited above.

Based on the facts before me and the evidence produced by the parties, I hold that the applicant has not established a case against the 1st respondent which would have demanded that he explain the source of the funds he used in purchasing the motor vehicles in issue. In any case the 1st respondent has been able to show that he used to trade in tenders with different entities before he joined the Assembly and there is nothing wrong with that.

The applicant had zeroed its case on the tenders in question and having failed to establish impropriety on the 1st respondent in respect thereof, the 1st respondent's

duty to explain the source of the funds did not crystalise. I have no option but to find the case against him unmerited and deserving of dismissal.

I now turn to the case against the 2nd respondent who has been accused of having influenced award of tenders by the county executive to companies owned by his relatives and also receiving kickbacks. The averments are that his brother and sister-in-law who own Greentent were awarded a contract by the county government. This tender has not been specified neither has the applicant shown any irregularity with the said tenders.

Just like in the case of the 1st respondent, the applicant avers that the 2nd respondent influenced award of tenders to Greentent without supplying evidence to that effect. It has produced letter dated 26th July 2023 as annexure 'MG2' which shows that the 2nd respondent was an employee of the County Government serving as a member of the County Public Service Board. Nothing in this letter or any document whatsoever that shows that the 2nd respondent did not sit or participate in the award of any of the tenders.

The vehicle the 2nd respondent is accused of having bought using the money paid to him by the Greentent was a either a kickback or share of his profits from the tenders yet he bought the motor vehicle on 26-03-2019 while he received money from Greentent in July 2021. In addition, if paragraph 24 of the supporting affidavit is anything to go by, Greentent is said to have received money from the government in July 2019 and 2022.

The applicant has leveraged his argument on a transaction in which the 2nd respondent receiving money from Greentent. The applicant did not bother to

establish the nature and purpose of the transaction and did not even seek to produce bank statement for Greentent or the tender documents. More importantly, the 2nd respondent has averred at paragraph 10 of his replying affidavit that Greentent traded with the government before he joined the Board and to prove that he annexed copies of purchase orders dated 27-01-2017 while his appointment was on 15-12-2017. The fact that the applicant did not see any need to pursue Greentent leads me to conclude that the money paid to Greentent was not tainted with any illegality. That means that if we were to believe the applicant, the money became dirty when it left Greentent to the 2nd respondent.

The 2nd respondent has explained the transaction by stating that it was a refund of money he advanced to the Greentent to carry out a tender in Kengen. This tender is not related to this suit and its legality has not been questioned. The 2nd respondent has also explained that the money he loaned Greentent was sourced from a loan by Kenya Commercial Bank and has annexed documents to that effect. The applicant submits that the loan the 2nd respondent took in purchasing the vehicle was paid using the alleged dirty money yet no evidence to that effect has been adduced. In fact, I am not satisfied that there was any dirty money linked to the 2nd respondent in the transactions between Greentent and the 2nd respondent.

The applicant's witness is on record saying that the 2nd respondent gave this explanation during investigations and when they went to verify with the bank, they found it to be correct that he applied and got the loan but it did not go back to the 2nd respondent for more clarification.

The applicant has downplayed the 2nd respondent's explanation by submitting that Greentent was registered on 31-07-2018 yet the resolution to borrow by the

company was dated 24-04-2018. The 2nd respondent explained that difference by stating that Greentent was a business name before it converted to a limited liability company. To me, it is not important whether the company was at the time of the resolution to borrow registered or not. What is important is that the 2nd respondent advanced the loan to individuals who were the directors of Greentent and he was paid back. There is nothing wrong or illegal with such arrangements and unless there is cogent evidence of impropriety, this court cannot impute illegality.

It has been submitted by the applicant that Greentent belonged to the 2nd respondent's relatives and therefore the award of tenders to it violated Section 59(3) of the PPADA. That Section has listed persons who a public officer is barred from awarding tenders and it is clear that the relationship between the 2nd applicant and the directors of the company do not fall under any of the categories. All what I have said about Greentent applies to Mutcom Limited and Kins General. This being the case and there being no evidence that the 2nd respondent influenced the tenders, I find that the applicant has failed to establish a case against the 2nd respondent on a balance of probabilities.

Having held as above on the issue of award of tenders and lack of proof on impropriety, I don't think that I should say much about whether a County Public Service Board is a separate and distinct entity from a County Government Executive save to state that in my view, Section 22 of the County Government Act makes County Public Service Board distinct legal entities with separately defined functions. In emphasizing this legal position, Honourable Justice Mathews N. Nduma held in that;

Whereas, the County Secretary is the head of Public Service and Secretary to the County Executive Committee, the County Secretary has no power or

authority to communicate on behalf of the County Public Service Board. The Board has its own Secretary appointed in terms of Section 58(1) (c) of the Act.

21. The County Public Service Board is a body corporate and with perpetual succession and a seal; and capable of suing and being sued in its corporate name in terms of section 57(a) & (b) of the Act.’

The conclusion from the above is that the applicant has failed to prove its case against the respondents to the required standards and the same is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this **14th** day of **November** 2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Amadi for the applicant, Mr. Ali for the 1st respondent and Mr. Gachuka for the 2nd respondent.