

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**ACEC SUIT NO. E020 OF 2022 (OS)**

**ETHICS AND ANTI-CORRUPTION  
COMMISSION.....PLAINTIFF**

**=VERSUS=**

**FERDINARD NDUNG’U WAITITU.....1<sup>ST</sup>**

**DEFENDANT**

**SUSAN WANGARI NDUNG’U .....2<sup>ND</sup>**

**DEFENDANT**

**SAIKA TWO ESTATE DEVELOPERS**

**LIMITED.....3<sup>RD</sup> DEFENDANT**

**BIENVENUE DELTA HOTEL.....4<sup>TH</sup>**

**DEFENDANT**

**BINS MANAGEMENT SERVICES LIMITED.....5<sup>TH</sup>**

**DEFENDANT**

**AND**

**MAISAWA AND SPARE PARTS.....1<sup>ST</sup>**

**INTERESTED PARTY**

**LEXIS INTERNATIONAL LIMITED.....2<sup>ND</sup>**

**INTERESTED PARTY**

**EILEEN WANJIKU MBUGUA.....3<sup>RD</sup>**

**INTERESTED PARTY**

**EQUITY BANK (K) LTD.....4<sup>TH</sup>**

**INTERESTED PARTY**

## **JUDGMENT**

1. This is a civil forfeiture suit, filed by Kenya's Anti-Corruption Authority the **ETHICS AND ANTI-CORRUPTION COMMISSION (EACC)**, hereinafter referred to as the Commission. It is filed against one FERDINARD NDUNGU WAITITU a former Governor of Kiambu County (as the 1<sup>st</sup> Defendant), his wife SUSAN WANGARI NDUNGÚ (as the 2<sup>nd</sup> Defendant), and three companies associated with them- namely: SAIKA TWO ESTATE DEVELOPERS LIMITED (as the 3<sup>rd</sup> Defendant), BIENVENUE DELTA HOTEL (the 4<sup>th</sup> Defendant) and BINS MANAGEMENT SERVICES LIMITED (as the 5<sup>th</sup> Defendant).
2. Three other parties, and who are named as Interested Parties, are: MAISAWA AND SPARE PARTS (as 1<sup>st</sup> Interested Party), LEXIS INTERNATIONAL LIMITED (as 2<sup>nd</sup> Interested Party), EILEEN WANJIKU MBUGUA (as 3<sup>rd</sup> Interested Party). EQUITY BANK (K) LTD applied and was joined as the 4<sup>th</sup> Interested Party.
3. The suit, which was commenced through an Originating Summons dated 27<sup>th</sup> May 2022, was filed pursuant to Section 55 of the Anti-Corruption and Economic Crimes Act of 2003 (herein after referred to as the ACECA), and Order 37 Rule 14 of the Civil Procedure Rules. The Summons was supported by the Supporting Affidavit of JACKIE KIBOGY who was then an Investigator with the Commission, but now its Counsel in this suit.

4. This suit seeks the forfeiture to the Kenya Government, of funds, motor vehicles and tens of landed properties; for being unexplained assets within the meaning of Section 55 of the ACECA. The Commission estimates the total value of these funds and assets, to be Ksh 1,937,709,376/54.
5. The assets (landed assets as well as movable assets), and which the Commission has flagged and targeted for forfeiture as unexplained wealth or wealth it considers disproportionate to the Defendants' known legitimate sources of income, are tabulated in the Summons, as follows:

**A. THE 1<sup>ST</sup> DEFENDANT'S ASSETS**

**Table 2.1: Landed Properties belonging to the 1<sup>st</sup> Defendant**

	<b>Land Title No.</b>	<b>Descript ion</b>	<b>Transacti on Date</b>	<b>Value</b>
1.	House No.110 on LR No. 12825/195	Kencom Sacco-Runda	June 2018	30,000,000
2.	LR No 209/168	Lakisama	Jan 2018	7,500,000
3.	LR No. 29059 (Plots G 906 & G 907)	Migaa Estate	Sept 2017	20,000,000
4.	LR No. 7785/311	Runda Grove	Aug 2018	96,000,000
5.	Nairobi/Block 105/8848 & 8849	Embakasi	March 2015	10,000,000

		Ranching		
6.	Nairobi/Block 105/8851 & 8850	Embakas i Ranching	Feb 2016	33,000,000
7.	LR No. 28428/80	Thindigu a	May 2018	32,000,000
8.	LR No. 28428/77	Thindigu a	March 2019	32,000,000
9.	Nairobi/Block 187/485&484	Kayole	July 2018	20,000,000
<b>Total</b>				<b>280,500,000</b>

**Table 2.2: Motor Vehicles belonging to the 1<sup>st</sup> Defendant**

	<b>Regist ration No.</b>	<b>Model</b>	<b>Registered owner</b>	<b>Date of Transf er / Registr ation.</b>	<b>Estimated Value</b>
1.	KCP 200A	Toyota Land Cruiser	Ferdinand Ndungu Waititu	04/01/2 018	4,000,000
2.	KCJ 665X	Toyota D/ Cabin	Ferdinand Ndungu Waititu	30/11/2 016	4,000,000
3.	KCJ	Toyota	Ferdinand	23/11/2	600,000

	549X	Probox	Ndungu Waititu	016	
4.	KCJ 548X	Toyota Vitz	Ferdinard Ndungu Waititu	23/11/2 016	600,000
5.	KCC 333F	Toyota Land Cruiser	Ferdinard Ndungu Waititu	19/02/2 015	4,000,000
<b>Total</b>					<b>13,200,000</b>

**Table 2.3: Bank Deposits in the Name of the 1<sup>st</sup> Defendant**

	<b>BANK NAME</b>	<b>ACCOUNT No.</b>	<b>AMOUNT</b>
1.	Jamii Bora Bank	100182694900 2	89,537,090
2.	Equity Bank	032019180666 0	282,820,388
3.	Family Bank	001000040791	56,784,999
4.	Prime Bank	20000066556	3,600,000
5.	DTB Bank	0002750101	280,324,600
6.	Mwananchi Credit Limited (Loan Account)	CCIN000247- 100	1,600,000
7.	Co-operative	011000414474 00	90,011,431/4 0
<b>Total</b>			<b>804,678,508</b>

**B. THE 2<sup>ND</sup> DEFENDANT'S ASSETS****Table 3.1: Landed Properties belonging to the 2<sup>nd</sup> Defendant**

	<b>Land title No.</b>	<b>Date of transfer / registration</b>	<b>Value</b>
1.	LR Kabete/Lower Kabete/4318	19.02.2019	10,000,000
2.	Subdivision 43923 Kajiado/Kitengela/84909	04.07.2017	3,000,000
3.	Kajiado/Kitengela /66165	07.07.2017	3,000,000
4.	Kajiado/Kitengela /66166	07.07.2017	3,000,000
<b>Total</b>			<b>19,000,000</b>

**Table 3.2: Motor Vehicles belonging to the 2<sup>nd</sup> Defendant**

<b>N o.</b>	<b>Reg. No.</b>	<b>Model</b>	<b>Registered Owner</b>	<b>Date of Transfer/ Registration.</b>	<b>Estimated Value</b>
1.	KCK 784C	Toyota Racti	Susan Wangari Ndungu/ Ekeza Savings	07/12/2016	400,000

		S			
<b>Total</b>					<b>400,000</b>

**Table 3.3: Bank Deposits Belonging to the 2<sup>nd</sup> Defendant**

<b>No</b>	<b>BANK NAME</b>	<b>ACCOUNT NUMBER</b>	
1.	Equity Bank	0320191948938	33,663,151/3 5
2.	Equity Bank	0650262219421	238,352,507
3.	Equity Bank	0640175544245	4,227,000
<b>Sub-Total</b>			<b>276,242,658</b> <b>/35</b>

**C. ASSETS BELONGING TO THE 3<sup>RD</sup> DEFENDANT**

**Table 4.1: Landed Properties Belonging to the 3<sup>rd</sup> Defendant**

	<b>Land title No.</b>	<b>Description</b>	<b>Transaction Date</b>	<b>Value</b>
1.	LR No. 209/2582	Bienvenue Delta Hotel	March 2018	300,000,00 0.00
2.	LR No 209/4357	Biashara Street	Dec 2017	110,000,00 0.00
3.	LR No. 209/2540/01	Jamii Bora Bank	Feb 2017	200,000,00 0.00
4.	LR No. 209/4292	Solar House (Partial Payment)	Feb 2017	52,000,000. 00

5.	Nairobi block 168/940		Jan 2018	
<b>Total</b>				<b>662,000,000.00</b>

**Table 4.2: Bank Deposits Belonging to the 3<sup>rd</sup> Defendant**

No	BANK NAME	ACCOUNT NUMBER	
1.	Co-operative Bank	01161201155200	65,071,000.00
2.	Equity Bank	0010276786052	99,258,068.39
<b>Total</b>			<b>164,329,068.39</b>

**D. ASSETS BELONGING TO THE 4<sup>TH</sup> DEFENDANT**

**Table 5.1: Bank Deposits Belonging to the 4<sup>th</sup> Defendant**

No.	BANK NAME	ACCOUNT NO.	
1.	Equity Bank	00102740665 9	<b>58,813,981</b>
2.	Equity Bank (USD)	00102775622 07	USD <b>88,632.17</b> @100 <b>8,863,217</b>
<b>Total</b>			<b>67,677,198.00</b>

**E. ASSETS BELONGING TO THE 5<sup>TH</sup> DEFENDANT**

**Table 7.1: Bank Deposits Belonging to the 5<sup>th</sup> Defendant**

<b>N o</b>	<b>BANK NAME</b>	<b>ACCOUNT NUMBER</b>	
1.	Consolidated Bank	1013130200004	62,711,000
<b>Total</b>			<b>62,711,000</b>

6. Apart from EQUITY BANK (K) LTD the 4<sup>th</sup> Interested Party, which as Chargor was on its request joined in the suit by virtue of a charge that it has over one of these properties, the Plaintiff had in the Summons, sought for a declaration against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, to the effect that the following of their assets, constitute unexplained assets in terms of Section 55 of the ACECA.

**A. MAISAWA AND SPARE PARTS the 1<sup>st</sup> Interested Party**

	<b>Reg. No.</b>	<b>Model</b>	<b>Registered Owner</b>	<b>Transac tion</b>	<b>Est. Value</b>
1.	KHMA572J	Caterpi llar	Maisawa and Spare Parts	19/02/20 18	11,000,000 .00
<b>Total</b>					<b>11,000,00 0.00</b>

**B. LEXIS INTERNATIONAL LIMITED the 2<sup>nd</sup> Interested Party**

	<b>Land title No.</b>	<b>Description</b>	<b>Transaction Date</b>	<b>Value</b>
1.	LR No. 29059 (Plots G 906 & G 907)	Migaa Estate	Sept 2017	7,000,000.00
<b>Total</b>				<b>7,000,000</b>

**C. EILEEN WANJIKU MBUGUA the 3<sup>rd</sup> Interested Party**

<b>No.</b>	<b>Land title No.</b>	<b>Description</b>	<b>Transaction Date</b>	<b>Value</b>
1	LR No. 28428/80	Thindigua	May 2018	12,700,000
<b>TOTAL</b>				<b>12,700,000</b>

7. The Commission has in this suit contended that despite these properties being registered in the names of the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants and the Interested Parties, these other be deemed to hold those properties, in trust for the 1<sup>st</sup> Defendant and/or that they are the 1<sup>st</sup> Defendant's agents in terms of Section 55(7) of the ACECA.

8. It has also urged this Court to order the Defendants, to pay to the Kenya Government, the sum of **Ksh 1,375,638,433**, together with interest at Court rates thereon from the date of filing the suit until payment in full. Which it contends, is the cumulative amount of funds received in their bank accounts in the period of interest. It has in the Summons, tabulated these funds (comprising bank credits and bank deposits) in Table 10.1 thereof as follows:

<b>Name of Defendant</b>	<b>Total Credits/ Deposits (Ksh)</b>
Ferdinand Ndungu Waititu	<b>804,678,508/40</b>
Susan Wangari Ndungu	<b>276,242,658/35</b>
Saika Two Estate Developers Limited	<b>164,329,068/39</b>
Bienvenue Delta Hotel	<b>67,677,198</b>
Bins Management Services Limited	<b>62,711,000</b>
<b>Total</b>	<b>1,375,638,433</b>

9. The Commission has in this suit urged this Court to order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, to forfeit and surrender to the Kenya Government, ownership of all those landed properties particularized in tables 2.1, 3.1 and 4.1 above worth Ksh 961,000,000. It has further urged that in the alternative to paragraph 11 above, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be ordered to pay to the Kenya Government, an amount equivalent to the market value of all those landed properties

as have been particularized in tables 2.1, 3.1 and 4.1 in the Summons.

10. It has further urged this Court to order the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Interested Party, to pay to the Kenya Government, a sum of Ksh 24,600,000=. Being a sum equivalent to the market value of motor vehicles and equipment particularized in tables 2.2, 3.2 and 8.1 in the Summons. Further that in the alternative to paragraph, it be ordered by this Court, that the motor vehicles and equipment listed in tables 2.2, 3.2 and 8.1 in the Summons, be sold by public auction and the proceeds paid and/or forfeited to the Kenya Government.

11. The Summons has stated that this suit is based on the following grounds:

- (1) *That Under section 55 of the Anti-Corruption and Economic Crimes Act, 2003 (hereinafter ACECA), and Section 11(1) the Ethics & Anti-Corruption Commission (hereinafter the Plaintiff) has the mandate to undertake investigations into allegations of corruption or economic crimes, and in appropriate cases, to institute forfeiture proceedings against any person for the recovery of assets whose value is disproportionate to his known legitimate sources of income.*
- (2) *That the Commission launched investigations into an allegation that the 1<sup>st</sup> Defendant had amassed wealth that is not commensurate to his known and legitimate sources of income.*

- (3) *That the Commission pursuant to its investigations established that between January 2015 and July 2017 and August 2017 and January 2020 when the 1<sup>st</sup> Defendant served as Member of Parliament, Kabete Constituency and Governor, County Government of Kiambu respectively, he amassed wealth to the tune of Ksh 1,937,709,376/54 which is not commensurate to his known legitimate sources of income.*
- (4) *That the Commission further established that some of the assets were registered in the names of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants being the 1<sup>st</sup> Defendant's kin and their companies in a bid to conceal the public funds corruptly acquired.*
- (5) *That in addition, the Commission established the between January 2015 and January 2020, the 1<sup>st</sup> defendant did not submit his statutory declaration for his income, assets and liabilities under the Public Officer Ethics Act, 2003 and Leadership and Integrity Act 2012.*
- (6) *That in accordance with the provisions of Sections 26 and 55(2) of ACECA the Plaintiff afforded the Defendants an opportunity to explain the disproportion between the assets and their known and legitimate sources of income.*
- (7) *That the Commission Pursuant to section 26 of ACECA on 9<sup>th</sup> September 2021 issued Notices to the Defendants to explain the disproportion in*

*their assets with their known legitimate sources of income.*

- (8) That the Defendants did not furnish the Commission, with any explanation as to their sources of wealth despite extension of period as requested by the defendants and return of documents obtained during the search to enable them do so.*
- (9) That the Commission established that there were reasonable grounds to suspect that the 1<sup>st</sup> Defendant was, during the period he acquired the assets subject of these proceedings, engaged in corrupt conduct and economic crime within the meaning of Section 2 of the ACECA as he was, among others;*
- (10) That The 1<sup>st</sup> defendant was charged together with 12 others vide criminal case no ACC 22 of 2019 with corruption offences of conflict of interest and dealing with suspect property under the Anti-Corruption and Economic Crimes Act 2003.*
- (11) That on 29<sup>th</sup> January 2020, the 1<sup>st</sup> defendant was impeached by the Senate on three counts of gross violation of the Constitution, abuse of office/gross misconduct under national laws as contained in the special issue of Kenya Gazette of similar date.*
- (12) That the Commission has demonstrated that the 1<sup>st</sup> to the 5<sup>th</sup> Defendants, accumulated assets valued at Ksh 1,937,709,376/54 between January*

*2015 and January 2022 which value is disproportionate to their known legitimate sources of income and whose acquisition was at a time when the 1<sup>st</sup> Defendant was suspected of corruption.*

*(13) That despite the various correspondences received from the 1<sup>st</sup> Defendant, the Commission is not satisfied that an adequate explanation of the disproportion has been given and the assets should be forfeited to the Government of Kenya or their equivalent value in monetary terms.*

*(14) That the Commission pursuant to Section 55(2) of ACECA has instituted this suit seeking forfeiture of the above assets to the Government of Kenya as unexplained or where wasted or otherwise unavailable for forfeiture, an order for payment of the assets equivalent in monetary value as prayed for in the Originating Summons herein.*

*(15) That this Court has jurisdiction to grant the orders sought in this suit.*

### ***Analysis and Determination***

12. Save for the cross-examination of PW1 PAUL MACHARIA MUGWE the Commission's Investigator who was the Investigating Officer for this case, the suit proceeded by way of the parties' filed Affidavits and written submissions only. The parties, including the Interested parties, filed their respective submissions.

13. Upon distilling the parties' respective pleadings, this Court identified the following as the main issues for determination in this suit:

- (a) *Whether the Plaintiff has discharged its burden of establishing a prima facie case, that the assets it valued at Ksh 1,937,709,376/54 and listed in its Originating Summons dated 27<sup>th</sup> May 2022, constitute unexplained assets in terms of Section 55 of the ACECA.*
- (b) *Whether the Defendants have in their pleadings and evidence filed in this suit, satisfactorily explained the acquisition and status of the said properties or any of them.*
- (c) *What orders should be made in respect of the properties in respect of which there is no satisfactory explanation, and which should therefore be regarded as unexplained wealth?*
- (d) *What appropriate orders may be made in respect of the listed properties held in the names of the Interested Parties or in respect of which any of them has a registered proprietary interest.*
- (e) *Who will bear the costs of this suit?*

14. On unexplained assets, the Court of Appeal in **Stanley Mombo Amuti v Kenya Anti-Corruption Commission Civil Appeal Nai. No. 184 of 2018 [2019] eKLR** observed as follows:

**“In our considered view, a reading of Section 2 and 55 (2) of the Act establishes the threshold for existence of unexplained assets to be:**

- I. There must be set time period for the investigation of a person;**
- II. The person must be reasonably suspected of corruption or economic crime;**
- III. The person must have assets whose value is disproportionate to his known sources of income at or around the period of investigation; and**
- IV. There is no satisfactory explanation for the disproportionate asset.”**

15. In determining whether the impugned assets and funds should be declared unexplained wealth as asserted by the Commission in this suit, this Court has read the Originating Summons as well as its Supporting Affidavit and the documentary exhibits annexed to it. It has also considered the Affidavits that the Defendants and the Interested Parties filed in response, together with the documentary exhibits annexed to those Affidavits, and the answers that the Commission’s said Investigating Officer gave in cross-examination by the Defendants’ Counsel. The rival written submissions filed by the parties, have also been considered.

16. Under Kenya’s Anti-Corruption law, civil forfeiture suits can either be brought by the ASSETS RECOVERY AGENCY (ARA) or by the ETHICS AND ANTI-CORRUPTION COMMISSION (EACC).

EACC's forfeiture suits are filed under the ACECA, while the ARA's forfeiture suits are filed under the Proceeds of Crime and Anti-Money Laundering Act (Act No. 9 of 2009, popularly referred to as the POCAMLA).

17. Distinguishing forfeiture proceedings under the two legislations, **Okwengu JA**, in **Pamela Aboo v. Assets Recovery Agency & Another (Supra)**, observed as follows:

**“ACECA and POCAMLA provide for forfeiture of illegally acquired property and proceeds of crime, respectively. However, there is some distinction in the procedure provided in the two statutes. While in POCAMLA, Section 94 as read together with Section 92 empowers the court to issue an order of forfeiture of proceeds of crime if it is proved on a balance of probability that the property has been used or is intended for use in the commission of an offence or is proceeds of crime, ACECA provides under Section 55 for forfeiture of unexplained assets which is concerned with disproportion between the assets concerned and the known legitimate income of a person found with the assets.**

18. That legal burden to prove disproportionality lies squarely on the Anti-Corruption Agency and remains with the Agency throughout the suit; and at no time does it shift to the subject. This is because this burden rests on the party that will lose the case if no evidence is adduced at all on either side. That party in these suits, is the Commission as the instituter of the suit.

19. The burden borne by the subject to explain his/her income streams and also how the suspected assets were acquired, is only an evidentiary burden. Which like a pendulum will keep swinging between the Agency and the subject on particular assertions and counter-assertions. Which burden, at the onset of the case, rests with the Agency, and then shift to the subject once the Agency has established a *prima facie* case. A *prima facie* case is one that requires an answer from the other party.
20. This suit being a civil suit and these proceedings being civil proceedings and not criminal proceedings, the required threshold of proof (also called the standard of proof), is that of a balance of probability. This standard and which is also described as preponderance of doubt (or preponderance of evidence as referred to in the Black's Law Dictionary), is of a lesser degree than the criminal law's beyond reasonable doubt; and comparatively easier to achieve than the latter.
21. Applying this to civil forfeiture proceedings, I take the view that the standard of proof on a balance of probability, applies to both parties, and is the same for both of them. For the Agency, it has to establish a *prima facie* case on a balance of probabilities. So is the case with any explanation offered by the subject on his income and revenue streams, and on how the dubious assets or funds were acquired. If at the close of the evidence, an objectively-minded person seized of the facts, will say this fact is more probable than not, this standard will have been attained.

*The Cross-examination of PAUL MACHARIA MUGWE (PW 1)- the Commission's Investigator*

22. As already stated in this judgment, save for the cross-examination of PW 1 PAUL MACHARIA MUGWE the Commission's Investigator and Investigating Officer for this case, this suit proceeded by way of filed Affidavits and written submissions only. On cross-examination by MR OKEYO for the 1<sup>st</sup> Defendant, the said Officer stated that the period of interest for the investigation was the period when the 1<sup>st</sup> Defendant was Kabete Constituency Member of Parliament (the period from the year 2015 to the Year 2017), and the period when he was Governor of Kiambu County (the period from the year 2017 to the Year 2020).
23. He further revealed that apart from the cumulative salary totaling Ksh 29,514,018=, the Commission in its investigations, in computing the earned income, did not consider the amounts of the loans obtained by the subjects. He however admitted that loans are a legitimate and lawful source of income. He listed some of these loans as: **(a) Mortgage and car loans from the Parliamentary Service Commission, (b) A loan of Ksh 200 million from EQUITY BANK the 4<sup>th</sup> Interested Party, (c) A loan of Ksh 100 million from Co-operative Bank.** He conceded that the Commission did not include these loans in its pleadings in this suit. He also admitted that the Commission by error included certain properties in this suit, that belonged to third parties; and that these were included by error.

24. For LR 209/2582 (the BENVIEW DELTA HOTEL), he stated that this hotel was acquired through financing from EQUITY BANK (the 4<sup>th</sup> Interested Party), and that the same was charged to latter. He further conceded that the same was the case with LR 209/2540/91, which was acquired through financing from a financial institution. He admitted that neither the Originating Summons nor his Supporting Affidavit, stated these facts.
25. He also disclosed that Motor Vehicle Reg. No. KCK 784C TOYOTA RACTIS, although listed in this suit as belonging to SUSAN WANGARI NDUNG’U the 2<sup>nd</sup> Defendant, is registered in the joint names of the said SUSAN, and EKEZA SACCO that provided the loan with which the vehicle was purchased. He conceded that it was erroneous for him to have stated in his Supporting Affidavit, that SUSAN was the sole owner of this vehicle, and to list it as unexplained wealth. Such is a material concession made by the Investigating Officer the driver of the suit and deponent on the suit’s sole Supporting Affidavit.
26. As for LR/KABETE/LOWER KABETE/4318 which is listed among the properties of the 2<sup>nd</sup> Defendant the SUSAN WANGARI NDUNG’U, and which was listed as an unexplained asset, he stated that his investigations established that the property was charged to EQUITY BANK (the 4<sup>th</sup> Interested Party) for a credit facility of Ksh 6 million; which sum he said may have been used in the purchase of the property.
27. As for the funds stated to be on Bank Accounts, he stated that his focus was only on credits, and not debits. As that the Terms of Reference (TOR) for those investigations, were focused on the sources of funds; and that according to him, funds are

accumulated through credits (deposits) and not debits (withdrawals).

28. The Defendants in opposing this suit and the Commissions allegations and forfeiture bid, filed Replying Affidavits. Those affidavits contained explanations and justifications aimed at vindicating the flagged assets and funds. They also had annexures of the supportive documentary exhibits. They also filed written submissions in which they were propounding their defences and also discounting the Commission's assertions and plea.

*The Conviction in NAIROBI CM'S COURT ANTI-CORRUPTION CRIMINAL CASE NO. 22 OF 2019*

29. Notably, while the parties' pleadings disclosed the existence of related criminal proceedings against the Defendants, those proceedings were still on-going even at the time the proceedings in this suit were concluded. The Commission had on the same facts as in this suit, instituted against the Defendants, a criminal prosecution on corruption charges; and proceeded with both the criminal prosecution and this civil forfeiture suit.

30. That was NAIROBI CM'S COURT ANTI-CORRUPTION CRIMINAL CASE NO. 22 OF 2019 REPUBLIC v. FERDINAND NDUNG'U WAITITU & OTHERS. Where the Defendants were subsequently convicted for conflict of interest and unlawfully corruptly receiving public funds through irregular tenders during the period when the 1<sup>st</sup> Defendant was Kiambu County Governor (the period between the year 2017 and the year 2020).

31. At the time trial in this suit was concluded and the suit set for judgment, the trial in the criminal case was still on-going and had not been concluded yet. The judgment and conviction came later. Hence was not part of the evidence adduced by the Commission in this suit. In fact, it would be reasonably expected that out of diligence, the Commission should have applied for the arresting of the judgment herein and for leave to adduce additional evidence. The evidence of the said conviction. This it did not do; and instead decided to wait for the judgment.
32. That notwithstanding, this Court cannot close its eyes and ignore a valid judgment of a court of law. For that reason, although there is on record in the evidence by the Commission, no evidence of the said judgment and conviction, this Court is, on its motion and out of due diligence, taking judicial notice of the same. It is in this judgment taking into consideration, the said judgment of the criminal court, alongside the evidence so far on record.
33. I am of the view that a court should not knowingly close his eyes and pretend not to know about a valid judgment of another court within the same jurisdiction. If the same is related to the case at hand or to the same facts as the case at hand. Even though there was no conviction at the time the proceedings in this suit closed, and the conviction by the subordinate court came proceedings had closed and the suit was pending judgment, I in the interest of justice substance justice, fair play and due process, take judicial notice of it and considered it in this judgment.

34. Notably, in a civil forfeiture suit on unexplained or disproportionate wealth, the existence of a conviction does not automatically determine the outcome of the suit and suit does not automatically determine the suit in favour of the Anti-Corruption Authority (like the Plaintiff in this suit). The existence of a conviction, only disadvantages the Defendant. Hence even where there is such a conviction, the Plaintiff has still to discharge the legal burden of proof by not only laying a solid foundation for its claim against the suspected property, but also providing facts and evidence that establish a *prima facie* case.

35. Civil forfeiture proceedings on unexplained wealth, are not criminal proceedings. They are civil proceedings. They are essentially independent of criminal proceedings, even if based on the same facts. Hence the mere existence of conviction, does not *ex facie*, obviate the need for proof. It is however strong *prima facie* evidence that the questioned suspected assets may have been acquired through corruption or corrupt conduct. It only lends support to such an inference, but does not conclusively establish it.

Hence where there is an existing conviction, even if it is not part of the case put forth by the Anti-Corruption Authority, the Court may take judicial notice of it, even *suo moto*.

36. As already noted in this judgment, the existence of the said conviction does not automatically determine the outcome of the suit in favour of the Commission. Neither does the existence of the conviction replace the unexplained wealth inquiry. Accordingly, the conviction becomes strong *prima facie*

evidence; and not the sole consideration or basis for liability in a civil forfeiture suit such as this.

37. The *prima facie* evidence of unlawful conduct lends a strong support for the inference that some (not necessarily all) of the assets acquired during or after the offer period may be tainted. As the inference is on probability only, the existence of a conviction does not relieve the Commission of its statutory legal burden of proof. The burden to establish a *prima facie* case. It still bears the burden to at the outset establish facts that call for an explanation from the subject.

38. Notably, the legal burden is discharged, if upon stating its case and providing the evidence within its possession, a need arises for the subject to explain how the assets were acquired and an adverse inference starts to form in the absence of discounting sufficient evidence that sufficiently explains as well as exonerates the assets from such adverse inference.

39. The subject for his part discounts such adverse inference, by explaining his lawful sources of income and also explaining or justifying the acquisition of the assets. That the explanation need not be to the precision of a surgeon's blade. It need only be persuasive, convincing, and logically sufficient. As the proof is not beyond reasonable doubt, but on a balance of probabilities. If there is more than 50% probability that the facts as stated by the subject are true, then the burden is discharged. So long as the Commission's adverse facts and adverse inference are discounted, then the burden is discharged.

40. The duty of the court is to first, not only relate the period of the offence to the period of acquisition, but also consider any exculpatory facts that exonerate the subject as well as discounts any adverse inference. Such as proof of lawful income sources and income streams. Which explanation has to be credible and as practicable and reasonable as possible, cover the material period of the unlawful conduct, and the period shortly after.

41. This is on the basis that even where a subject has engaged in an unlawful conduct, not all his activities are rendered unlawful or corrupt. He may still have engaged in lawful activities such as lawful business, lawful investments, and maintained lawful income streams from which he obtained lawful income with which he acquired assets or invested.

42. After all any adverse inferences that the Anti-corruption authority invites the court to draw should be logical, rational, reasonable and supported by the trail of proof and the evidence. Not inferences that are fallacious, absurd, largely speculative, and unsupported by the evidence. In arriving at the adverse inferences, the court has to ensure that there has been:

- (a) *Procedural fairness and due process;*
- (b) *Supportive pleadings;*
- (c) *Asset based analysis; and*
- (d) *The authority has discharged its legal burden of proof on a balance of probabilities, yet that the subject has thereupon failed to discharge his*

*evidential burden of proof on balance of probabilities.*

43. Notably these proceedings being civil proceedings, the standard of proof for both the Commission and the subject, was that of a balance of probabilities; also called the preponderance of evidence. Even where there exists of a conviction, the court may decline forfeiture in the following circumstances:

- (a) Where the asset was acquired before the corrupt conduct;*
- (b) Where the asset is proved to belong to a third party;*
- (c) Where there is credible documentary evidence of lawful acquisition;*
- (d) Where the subject has sufficiently explained and justified;*
- (e) Where the conviction has been appealed and the evidence against the property is weak, non-existent and does not support an adverse inference.*

44. The 1<sup>st</sup> Defendant and his wife the 2<sup>nd</sup> Defendant were convicted of corruption charges relating to the period when the 1<sup>st</sup> Defendant was Governor of Kiambu County. Which is the period between the year 2017 and the year 2020. The conviction arose from tender irregularities by which they and their companies SAIKA TWO ESTATE DEVELOPERS LTD (the 3<sup>rd</sup> Defendant) and BENVENUE DELTA HOTEL (the 4<sup>th</sup> Defendant) traded with the Kiambu County Government where and when the 1<sup>st</sup> Defendant was Governor.

45. The conviction was also for the monies that they received from the Kiambu County as payments on those tenders. Ideally, it is those funds and such assets as were acquired with those funds, that are linked and tainted by those irregular tenders; and that can be relevant to that conviction. Not every asset that the subjects owns or have ever owned, and not every cent they have on their bank accounts, or have ever deposited on their bank accounts.
46. In terms of and arising from the conviction, the tainted assets and funds are proximately those purchased in that material period or in the period shortly thereafter. It is unreasonable and oppressive, to base on that conviction, suspicion that all the assets and funds so far accumulated by the two Defendants and their companies, even in the period before he became Kiambu Governor, resulted from that unlawful conduct. Here the materiality factor is key.
47. Drawing the inference that all the subject's assets and funds resulted from those unlawful transactions. Ordering their forfeiture, on such mere suspicion and without any link to the condemned transactions, will amount to sequestration, and will violate the subject's property rights. For any property to be liable for forfeiture, there has to be some basis for the suspicion, that makes it suspect property. It cannot just be an omnibus or arbitrary action where the Anti-Corruption Agency wakes up one day and declares that an individual or even all citizens in the country should explain how they acquired each of the assets they own or explain each cent of the funds they

have on their bank accounts, or have ever transacted on their bank accounts.

48. To require that of anyone, the basis will have to be that those assets and funds are suspected to have been acquired through corruption, or are disproportionate to the subject's legitimate sources of income. In the case of the 1<sup>st</sup> Defendant and his wife, they have in their responses to this forfeiture bid explained that they are a business family that have businesses which have traded for tens of decades.

49. That while some assets and funds were acquired through salaried employment, most of what they own was acquired through proceeds of trade and business, as well as investments and loans from financial institutions. They have in their Replying Affidavits and submissions supplied:

- (a) *Details of such salaried employment;*
- (b) *Details of the companies and business entities they have formed over the years;*
- (c) *Details of the business activities and trade they have engaged in;*
- (d) *Details of assets and how they were acquired;*
- (e) *Details of person they bought assets from and the transactions, including the purchase prices; and*
- (f) *Details of loans acquired from financial institutions and the amount lent and the assets acquired with those loans, e.g. JAMII BORA BUILDING, THE DELTA HOTEL and the MWANANCHI CREDIT BUILDING.*

50. They have in those filed Responses explained and demonstrated that many of the suspected properties were

acquired earlier before the 1<sup>st</sup> Defendant became Kabete MP and Kiambu Governor; and that their acquisition cannot therefore not be linked to those offices. The judgment in NAIROBI CM'S CRIMINAL ANTI-CORRUPTION CASE NO. 20 OF 2019 for instance, found that BENVENUE DELTA HOTEL was trading with Kiambu County Government. A finding that discounts an inference that this hotel was acquired with the proceeds of these tenders. If it was one of the entities that were in those irregular tenders trading with the County Government, then existed before those tenders.

51. Where forfeiture is based and/or flows from a conviction, or is subsequent to a conviction, there has to be a logical correlation between those assets or funds and the unlawful conduct for which the subject was convicted. Which correlation has to be with regard to the manner the assets or funds were acquired.
52. In the said judgment in the Criminal case, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and these two companies (SAIKA TWO ESTATE DEVELOPERS LTD and BENVENUE DELTA HOTEL) were convicted of conflict of interest, and of having through irregular tenders with the Kiambu County Government of which the 1<sup>st</sup> Defendant was Governor, received a sum of Ksh 25,624,500= from that County Government. In these proceedings on their part, the Commission has fingered and is seeking the forfeiture of almost Ksh 2 Billion in assets and funds. Many of them acquired before those controversial tenders.
53. SAIKA TWO ESTATE DEVELOPERS LTD (the 3<sup>rd</sup> Defendant) was found to have received from the proceeds of those irregular tenders a sum of Ksh12,410,500=. It was further found to have

paid to LAKE NAIVASHA RESORT LTD a sum of Ksh 6 Million. Being proceeds of those irregular tenders. The judgment also found BIENVENUE DELTA HOTEL (the 4<sup>th</sup> Defendant) to have received from TESTIMONY ENTERPRISES LTD Ksh 7,214,000= of the proceeds of those irregular tenders.

54. The said judgment and conviction found the 1<sup>st</sup> Defendant, 3<sup>rd</sup> Defendant and 4<sup>th</sup> Defendant, to have received from those irregular tenders and in the material period of 2017 to 2020 when the 1<sup>st</sup> Defendant was Kiambu Governor, the following sums:

- (1) FERDINAND NDUNG’U  
WAITITU (the 1<sup>st</sup> Defendant)- Ksh  
25,624,500=
- (2) SAIKA TWO ESTATE  
DEVELOPERS LTD  
(the 3<sup>rd</sup> Defendant)- Ksh  
12,410,500=
- (3) BIENVENUE DELTA HOTEL  
(the 4<sup>th</sup> Defendant)- Ksh  
7,214,000=

### ***The Final Findings***

55. This Court’s final finding as relates to the impugned funds and the impugned asserts are as hereunder.

#### *For the Funds on Bank Accounts*

56. Regarding funds on Bank Accounts and as already explained in this judgment, the Commission's case against those funds is neither sound, nor well founded, nor justified. What it did was to cite the cumulative total of funds over the years handled through the Accounts. Its investigations never did any analysis of the particular deposits (credits) and withdrawals (debits) on the accounts to establish a certain trend or trail. The suit papers herein have not even stated the balances on the said accounts at the time of filing this suit.

57. The Commission totally failed to established a *prima facie* case against the funds alleged to be on the bank accounts. This I have already explained in this judgment. It however made a *prima facie* case made against the movable properties and the landed properties listed in the Originating Summons. That was in the sense that the facts placed before this court were sufficient enough to require the Defendants to explain their income and the manner of acquisition of the suspected assets. Which evidentiary burden, the Defendants satisfactory discharged in respect of some assets and failed in respect of the others. This is their Affidavits as well as in the answers PAUL MACHARIA MUGWE (PW 1) the Commission's own Investigating Officer for this case gave in cross-examination.

58. For funds preservation, subsequent proceedings and eventual outcome, there was need to ascertain the balances, and also state in the suit papers an analysis of the said Bank Accounts. Stating the particular credits that were suspect. The Defendants have in their response to this suit, contended that part of the funds that were deposited on those Bank Accounts,

were loans from financial institutions, overdrafts on those Accounts, as well as the daily trade turnover from the subjects' lawful trade ventures and of the sale of services and goods.

59. A fact that was not only uncontested, but also admitted by the said PAUL MACHARIA MUGWE (PW1) the Commission's own investigator and Investigating Officer in this case; in cross-examination. Which admissions and concessions militates against a blanket inference that all the funds ever deposited on those Bank Accounts were solely from those corrupt activities.

60. This is clear from the Defendants' Replying Affidavits as well as in their submissions. It is also a logical and fair inference to draw from trade usage and the common sense of trade and commerce. These businesses were a going concern. They were trading and earning other income from lawful activities, save for the funds from those irregular Kiambu County Government tenders as based on the conviction by the lower court in the criminal case. The illicit proceeds from those irregular tenders were well detailed in the prosecution and conviction in said case; and were tabulated in that judgment.

61. For that reason, from the case stated in the Plaintiff's Originating Summons herein (and in its Supporting Affidavit), the Defendants' responses in their filed Replying Affidavits, as well as the documentary evidence annexed to parties' respective affidavits, and the cross-examination of the said PIUS MACHARIA MUGWE, this Court has found nothing to fault the funds on the Bank Accounts .

*For the Movable and Immovable Assets*

62. Upon carefully distilling the Summons (together with its Supporting Affidavit), the Replying Affidavits filed in response thereto by the Defendants, as well as the Exhibits annexed to all the Affidavits, this Court is satisfied with the explanations given in regard to all the landed and movable properties of these two Defendants, except the following:

**A. FERDINAND NDUNG’U WAITITU (THE 1<sup>ST</sup> DEFENDANT)**

**(1) Motor Vehicles**

- (a) Motor Vehicle  
Reg No. KCJ 549X  
(TOYOTA PROBOX)- Valued at Ksh 600,000=
- (b) Motor Vehicle  
Reg No. KCJ 548X  
(TOYOTA VITZ)- Valued at Ksh  
600,000=
- (c) Motor Vehicle  
Reg No. KHMA572J  
(Caterpillar)- Valued at Ksh 11 Million.

**(2) Land Properties**

- (a) LR No. 28428/80  
(Thindigua)- Valued at Ksh 32 Million
- (b) LR No. 28428/77  
(Thindigua)- Valued at Ksh 32 Million

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and SACCOs) as already stated in this judgment. For those assets, it is hereby ordered that they are consequently discharged, and the preservation orders earlier granted for their preservation, are hereby vacated forthwith.

**DATED and DELIVERED at NAIROBI on this 19<sup>th</sup> day  
December 2025.**

**PROF (DR) NIXON SIFUNA  
JUDGE**