



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, OKWENGU & AZANGALALA, JJ.A)**

**CIVIL APPEAL NO. 213 OF 2011**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION**

***(The legal successor of Kenya Anti - Corruption Commission) .... APPELLANT***

**AND**

**STANLEY MOMBO AMUTI ..... RESPONDENT**

***(Appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Rawal, J.)  
dated 4<sup>th</sup> February, 2011 in***

***HCC NO. 448 OF 2008 (OS)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

[1] In September 2008, Ethics and Anti- Corruption Commission (**EACC**) (appellant) filed before the High Court civil case no 448 of 2008 against Stanley Mombo Amuti, (hereinafter referred to as the respondent). The respondent was at the material time an employee of a public body or a parastatal known as the National Water Conservation and Pipeline Corporation (NW&PC) where he held the position of a financial controller. The suit was by way of an originating summons and was filed pursuant to the provisions of **section 55** of the Anti- Corruption & Economic Crimes Act, (hereinafter referred to as the Act) which provides *inter alia*, as follows;

**“55. (1) In this Section, “corrupt conduct” means-**

- a. Conduct that constitutes corruption or economic crime; or**
- b. Conduct that took place before this Act came into operation and which-**
  - i. at the time, constituted an offence; and**
  - ii. if it had taken place after this Act came into operation, would have constituted corruption or economic crime.**

**2. The Commission may commence proceedings under this section against a person if:**

- a. after an investigation, the Commission is satisfied that the person has unexplained assets; and**
- b. the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.”**

[2]The questions that were set out in the said suit for determination by the court were framed as follows:

**“1. Whether the defendant is in possession of “*unexplained assets*” pursuant to the provisions of the Anti Corruption and Economic Crimes Act, No. 3 of 2003 as itemized hereunder in paragraph 3**

**2. Whether the under listed properties should be preserved pending the determination and or declaration on whether the said assets constitute unexplained assets pursuant to the provisions of section 55 of the Anti Corruption and Economic Crimes Act.**

**3. Whether declarations should issue that the following properties constitute unexplained assets pursuant to the provisions of section 55 of the Anti Corruption and Economic Crimes Act;**

- a. House No. a 18, Umoja Inner Core**
- b. House No. b, 35 – Umoja Inner Core**
- c. Plot No. C 37 Sector 1 – Umoja Inner Core**
- d. Plot No. C 37 Sector 1 – Umoja Inner Core**
- e. Ngong/Ngong/26632**
- f. Ngong/Ngong/38889**
- g. Ngong/Ngong/38890**
- h. Motor Vehicle Registration Numbers KBB 059 T; KBB 537 T; KAR 843 M and KAH 223 F**
- i. Funds in**
  - a. Account numbers 8240656 and 8230790,**

**Barclays Bank of Kenya, Enterprise Road between September, 2007 and 30<sup>th</sup> June 2008**

- b. Account numbers 0150175027800, 0101775027800 and 0100275027800, Standard**

**Chartered Bank Harambee Avenue between September 2007 and 30<sup>th</sup> June, 2008**

c. **Account Number 32757182, National Westminster Bank PLC London, Branch 60- 3**

**15-49 between September, 2007 and 30<sup>th</sup> June, 2008**

d. **Cash of Kshs. 4,308,000 seized by the plaintiff's agents on 2.7.2008 during execution of search warrants.**

**4. Whether the defendant should be condemned by this Honourable Court to pay to the Government of Kenya Kshs. 140,976,020.00 being the cumulative bank deposits made by the defendant between September, 2007 and 30<sup>th</sup> June, 2008 and Kshs. 32,500,000.00 being the value of the above landed properties constituting unexplained assets or any other amount that this Honourable Court finds to constitute unexplained assets and in default the said land properties be sold through public auction."**

[3]The suit was supported by an affidavit sworn by Mr. Anthony Kahiga an investigator with the appellant. He deposed that, following allegations and complaints received by **EACC**, that the respondent, in discharge of his duties as the financial controller of **NW&PC** and being a public officer, had amassed assets and income which were disproportionate to his known sources of income. The respondent was at the material time earning a gross salary of Ksh 306,000/= per month. The respondent was employed on 1<sup>st</sup> September 2007, by **NW&PC**, prior thereto he worked with another public body called Water Services Regulatory Board and he earned a gross salary of Ksh 255,400/= per month. According to Mr. Kahiga, **EACC** had carried out investigations which revealed the respondent as a public officer did not make a full disclosure of his assets, income and liabilities contrary to the provisions of Public Officer Ethics Act no 4 of 2003, and his assets were disproportionate to his earnings.

[4] According to Mr. Kahiga, when the appellant received complaints about the respondent, they applied for warrants to search the respondent's office at the **NW&PC** headquarters and residential house in Buru Buru Estate Phase V house no 231. Upon conducting the search, the investigators from **EACC** found at the respondent's house a sum of Kshs. 3,998,000.00 in denominations of Kshs. 1,000 amongst other items relevant to the investigations they were carrying out. At the respondent's office, they found a sum of Kshs. 310,000.00 in denomination of Kshs. 1,000, a Standard Chartered Banker's cheque No. 993604 dated 13.05.2008 for the sum of Kshs. 4,300,000.00 and a Barclays Bank banker's cheque No. 564369 dated 19<sup>th</sup> June, 2008 for the sum of Kshs. 13,999,000.00 amongst other items. The money and the bankers' cheques were seized and were held at the appellant's office.

[5] Further investigations regarding the respondent's bank accounts revealed that he had a bank account at Standard Chartered Bank Harambee Avenue with a cash deposit Kshs. 1,000,000. He also had bank accounts at Barclays Bank of Kenya Enterprise Road and National West Minister Bank, PLC London. Between September 2007, and June 2008, the respondent deposited a total of Kshs. 140,976,020.55 in his bank accounts and over the same period, made withdrawals of money through his various accounts totaling to over Kshs. 85,000,000 leaving a balance of Kshs. 55,000,000 in his accounts.

[6] There were also allegations by **EACC** that the respondent failed to make a correct declaration of income, assets and liabilities as provided for under Public Officer Ethics Act 2003. The respondent was obligated under the said Public Officer Ethics Act to declare all the income, assets and liability under his name. On account of the foregoing, the respondent was issued with the notice requesting him to furnish the appellant with written statements enumerating his properties pursuant to the provisions of **section 26** of the Act. The respondent did offer what he considered to be a detailed explanation; however, **EACC** was not satisfied with the explanation given by the respondent due to the disproportionate number of assets acquired in a short span of 10 months compared to his sources of income at the time of acquisition of the said assets. Upon filing the suit, **EACC** sought an interlocutory injunction to preserve the subject

properties until the determination of the suit and the orders were issued and later they were extended with the consent of the respondent.

[7] On the part of the respondent, he denied the allegations and in his sworn affidavits in reply to the originating summons, he gave explanations of the sources of his income and assets over the period of 25 years of his working life stating that he was nominated to manage his late father's estate. His late father was an executive officer with Kenya Railways Corporation for 30 years and his late brother used to work with the Teachers Service Commission. He consolidated their assets, sold them and the funds were invested for the education and upkeep of the children of his late brother. He denied a sum of Kshs. 140,000,000 was deposited in his account between September 2007 and June 2008. He produced an audit report by a firm known as **Mwathe and Associates** whose report showed that the sum deposited in the accounts of the respondent over the period between September 2007 and June 2008 was Ksh 39,000,000 and that he withdrew Kshs. 24,000,000 and not Kshs. 85,000,000 as alleged by EACC.

[8] The respondent stated in a pertinent part of his deposition as follows:-

**“The deposits included part of my salary and proceeds of two outstanding loans from Standard Chartered Bank that were used to finance some of the assets. I verily believe that it is the alarmingly inflated and fictitious figures presented to this Honorable Court that induced it to issue an interim order in favour of the plaintiff. Based on the accountant's finding, it is clear and evident that the plaintiff deliberately miscalculated the sums shown in my bank statements in order to mislead the court. It is also clear that the plaintiff knowingly made a false statement under oath, which amounts to the crime of perjury in order to deceive the Honourable court.**

**During my working life, I made investments and re-investments which were expected to grow over time. The plaintiff deliberately and without cause ignored to factor in these investments that were made over 25 years of my working life and also other family wealth/income that have been built for over 40 years for the plaintiff to arrive at its disproportionality theory. In this regard, I wish to state categorically and clearly that my assets were not disproportionate to my income. The disproportional displayed in the court at the interim stage was based on false information and malice. The sources of my assets and liabilities were fully explained to the plaintiff and supported with documentary evidence as a proof that they were not acquired as a result of corrupt conduct.”**

[9] EACC responded by way of further affidavits reiterating its position that the respondent obtained the specific assets corruptly and through abuse of office. They annexed several documents to wit: pay slips of the respondent from both employers, declaration of the respondent's, income assets and liabilities, bankers cheques and statements of the accounts, title deeds, sale agreement forms for various parcels of land located in different parts of the country and copies of log books, bank transaction documents in respect of 11 accounts held in different banks including one in the United Kingdom.

[10]The originating summons appeared to have been tried by way of written submissions. Both counsel for the appellant and respondent filed written submissions which extensively dealt with factual issues. However, the learned judge, **Rawal J.**, (as she then was) did not deal with the factual issues raised in the originating summons and in the submissions, but invited counsel for both parties to address the court on the constitutionality of **Section 55** of the Act *vis-a-viz* the provisions of **Articles 20 , 25 (c) and 40 (3)** of the Constitution.

[11] After hearing both counsel on their submissions on the aforesaid aspect, the learned judge found that the provisions of **section 55 (5)** of the Act was inconsistency with the Constitution of Kenya 2010 and dismissed the appellant's suit as null and void. This is what the judge said in her own words:

**“The Constitution has granted rights and freedoms to the (sic) Kenyans but those rights and freedom are not unlimited as is clear from the provisions of Article 24. The**

**Constitution has also given Kenyans unfettered rights enumerated in Article 25 and I have noted and specified one such right of “fair trial” herein before.**

**Due process covers fair trial and vice versa. Thus the question, which remains before the court, is whether provisions of Section 55 (5) and (6) of the Act provides or offers fair trial to the persons affected under those provisions?**

**The objective of the Act is to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith.**

**Section 55, which is in question, falls under Part VI of The Act entitled “Compensation and Recovery of Improper Benefits.”**

**It is thus clear that the Part VI deals with matters incidental or connected to the object of the Act.**

**The process under which the Commission has to come before the court is also the Civil process as it has to move the court by way of Originating Summons. I shall not be wrong if I find, which I hereby do, that the proceedings under section 55 is a Civil Proceedings and the same should be considered and interpreted accordingly.**

**The standard of proof also should be determined accordingly. In any event, the Commission has to adduce evidence which satisfies the court on balance of probabilities that the defendant has unexplained assets.**

**Thereafter, as per Section 55 (5) of the Act, if the court is so satisfied, the court may require the defendant to testify or adduce evidence “as the court deems sufficient to satisfy the court” that the assets were acquired otherwise than as the result of corrupt conduct.**

**Section 55 (6) provides what the court shall order if not satisfied that all the assets were not acquired otherwise than as the result of corrupt conduct. It shall order the person to pay to the Government an amount equal to the value of unexplained asset.**

**I may pause here and observe that by the use of words**

**“corrupt conduct” after the Commission has adduced evidence to show that the defendant has “unexplained assets,” the Act has created the presumption of corrupt conduct on the part of the defendant in acquiring unexplained assets.**

**The rebuttable presumption which is created against the defendant, as per the wordings of the section 55 (5) and (6), in my view, is a legal burden and not only the evidentiary burden. I say so because Standard of proof of satisfaction of the court is not stipulated or specified and it has to be noted further that the said satisfaction results in the court making order of forfeiture of the property of the defendant. The Act has though specified the Standard of Proof for the Commission.**

**I would further observe that the provision of Section 55 (5), to wit: “The Court to require the defendant to adduce such evidence as the court deems sufficient to satisfy it” seems to infer that the court has to indicate itself the nature and scope of the evidence which is expected to be adduced by the defendant to satisfy it otherwise this brings the court into arena of litigation which is definitely not the due process of law. I may not comment much on the wordings. Suffice it shall be to state that the same does not augur well with the**

**Rule of law or due process of Law. I shall stop here.”**

[12] This is the gravamen of the instant appeal which is predicated on some 17 grounds of appeal. We do not wish to reproduce them as Miss Kossy Bor, learned counsel for the appellant, combined them during her oral address to us. Firstly, she tackled the issue of whether the originating summons was null and void. She submitted that the respondent was a public officer who had accumulated assets that were disproportionate to his income. The issues that were before the Judge were properly framed in the originating summons but the judge took a trajectory of her own and invited parties to address the court on a matter which the judge raised *suo moto*; the judge erroneously observed that the appellant went to court under civil proceedings which should be considered and interrogated according to **section 55** of the Act which deals with forfeiture of unexplained assets; under that section, the burden of proof is of higher proportion and was shifted to the respondent to prove that he did not acquire the assets corruptly which was contrary to the tenets of fundamental rights of fair trial that are protected under the Constitution.

[13] According to counsel for the appellant, the standard of proof that is set under the Evidence Act in civil matters on a balance of probability was the same as under the Act; it did not shift, the burden remained with **EACC** through out to prove, on a balance of probabilities, that the respondent had acquired the said assets corruptly through abuse of office; under the Act, the respondent would have been given an opportunity in his defence, to show how he acquired the assets which were disproportionate to his known income. Counsel for the appellant went on to submit that the judge erroneously relied on a case of **Dr. Christopher Murungaru Vs. EACC and Another [2006] e KLR** which was different because in the present case, **EACC** had gone further to file a case against the respondent based on their own investigations. **EACC** had already written to the respondent to offer an explanation of the sources of income which explanation was given, but the appellant found it was unsatisfactory, they therefore moved to court seeking for forfeiture of the unexplained assets because there was evidence that they were corruptly acquired through abuse of office.<sup>1</sup>

[14] It was also counsel's submission that the Act provides that proceedings should commence by way of originating summons and should be conducted by way of civil proceedings. Within that frame work of the law and the Act, the respondent was given an opportunity to explain the sources through which he had acquired the assets as a public officer. That notwithstanding, the judge erroneously held that the provisions of **section 55** did not accord fair trial because the construction of the provisions of the said section appeared to place a higher burden of proof to the respondent by requiring him to prove that he did not acquire the assets legitimately whereas it is **EACC** who were supposed to prove, on a higher threshold than on a balance of probabilities, that the assets were not acquired legitimately but through abuse of office.

[15] It was the appellant's case that the learned judge fell in error by finding that **section 55 (5)** shifted the burden of proof and attributed to the respondent corrupt conduct thereby requiring him to exonerate himself. The second set of grounds argued by counsel for the appellant was whether the Act contravened the provisions of the Constitution. Learned counsel referred to **Act 50** of the Constitution which provides for a fair trial before a court in public. According to counsel, the proceedings were conducted in an open court and there was no infringement on the fundamental rights of the appellant. She also referred to **Article 259 (e)** of the Constitution which gives guidelines on how the Constitution should be interpreted to promote good governance; the fight against corruption and abuse of public office is one of the attributes of good governance. Counsel also faulted the learned trial judge for applying the provisions of the new Constitution retroactively because the case was filed in September 2008, before the promulgation of the new Constitution. Therefore the applicable Law was **Article 75 (5)** of the retired Constitution which provided for rights to property with certain limitations.

[16] Counsel for the appellant also cited the provisions of **sections 107, 108, 109, 110 and 119** of the Evidence Act to demonstrate the number of safety nets that are inbuilt in the law to safeguard the process of a fair trial which were also available to the respondent. She also cited the United Nations Convention against corruption especially **Article 1** which requires the state parties to the convention (Kenya is a

signatory to the said convention) to promote and strengthen their national laws and institutions to prevent and combat corruption and to promote integrity, accountability and proper management of public affairs and public property. Corruption is outlawed and Kenya has a duty to implement the convention. The respondent was a financial controller of the National Water and Conservation and Pipeline Corporation which is a public body. Therefore he was fiducially accountable to his employer and **EACC** has the statutory and constitutional mandate to stamp out corruption; he had a duty to disclose his assets which he did not do under the Public Ethics and Integrity Act.

[17] According to counsel the, judge did not deal with the factual evidence that was contained in several documents annexed to the originating summons that clearly showed the respondent had huge sums of money in his bank accounts which was in excess of Kshs. 140,000,000. The court also failed to consider that within that material period, there were contracts that were issued by the respondent's employer where the respondent received direct cheques from the suppliers; and although the employer did not file a complaint, **EACC** was mandated to receive complaints from any source. They had documents to show the respondent was receiving cheques from suppliers who were offering services to the respondent's employer; and the respondent had a duty to explain in the declaration of the assets and liabilities if indeed the assets were legitimately acquired. Finally counsel urged us to allow the appeal and refer the originating summons to the high Court for a fresh trial of those factual issues that were never addressed in the impugned judgment.

[18] This appeal was opposed. Mr. Kilukumi, learned counsel for the respondent, took a two pronged approach in his submissions; that is whether **section 55** of the Act is compatible with **Articles 20, 25, 40 and 50** of the Constitution of Kenya 2010 and whether the judge retrospectively applied the Constitution when she addressed the standard of proof *suo moto* an issue that was not addressed by the parties. Counsel conceded, on the onset that the originating summons was not determined on merit because the judge found the proceedings were null and void and it was not necessary to go into the merits.

[19] By way of background information, Mr. Kilukumi told us that the respondent is an accountant by profession who had worked in the public service for 25 years before he was terminated in 2008. His last work station was National Water Conservation and Pipeline, where his gross salary was Kshs. 306,000/=. It was alleged that he had deposited a sum of over 140,000,000 between July 2007 and June 2008 within a spurn of 10 months. The respondent swore an affidavit denying that he had deposited the said sum in his account claiming that he had deposited Kshs. 39,000,000 and properties that **EACC** sought to repossess from him were his properties that he acquired legitimately. Therefore, **EACC** could not forfeit these properties which were his only earthly possessions in contravention of his rights that are enshrined in the Constitution.

[20] Counsel for the respondent went on to argue that the order seeking for forfeiture of the respondent's assets was broad and it intended to dispossess him of everything that he owned. Counsel faulted the provisions of **section 55** of the Act which creates a rebuttable presumption of corruption. Corruption is a criminal offence and according to section 55, it would mean the property being forfeited was acquired as a result of a criminal act. There is no time limitation within which a person can be charged with a criminal offence. Therefore if the respondent was to be charged with a criminal offence at a future date, the information he would have given as to how he acquired his assets could easily be used against him.

[21] Learned counsel submitted that the respondent's premises were entered by **EACC**, officials who searched and obtained documents which were obtained against him. That is when the director of **EACC** wrote to him requesting him to furnish a statement in respect of properties pursuant to **section 26** of the Act. According to Mr. Kilukumi, this was tantamount to treating the respondent as a suspect who had committed a criminal offence; and if the statement of response given to **EACC** by the respondent were to be used in a criminal trial, that would contravene the provisions of Article 50 of the Constitution because the respondent is supposed to be presumed innocent, he has a right to silence and he cannot under the law incriminate himself. That is a fundamental principle of fair trial and cannot be compromised by the provisions of **section 55** of the Act; under the same section, the appellant was to prove to the satisfaction of the court, a threshold that is higher than on a balance of probability, that the respondent had acquired unexplained assets whereas the respondent was to prove that he had not acquired those assets corruptly.

To satisfy that, the respondent was supposed to produce evidence on a higher threshold than the balance of probability. Therefore the legal burden of proof was shifted to the respondent because if he failed to do so, his property would be forfeited. According to Mr. Kilukumi, this is the reason why the judge found the provisions of **section 55** incompatible with the fair trial principles that are enshrined in the Constitution. Counsel for the respondent cited the case of **Col. Dr. Besigye Kiiza V. Museveni Yoweri Kaguta, Election Petition No. 1 of 2001**. This was to support the proposition that the standard of proof that is required of the respondent under **section 55** is above the balance of probability. That is why the appellant's suit was found unconstitutional and was declared null and void.

[22] Counsel for the respondent went on to submit that parties before a court of law are entitled to a fair trial and equality of arms. However, **section 55** required the respondent to provide information and thereafter when he was sued, the law placed him at a disadvantage compared with the appellant. The properties of the respondent are protected under **article 40** of the Constitution whereas property that is not lawfully acquired is not protected by the Constitution. Thus counsel for the respondent argued that the allegations by the appellant that the property was illegally acquired were tantamount to accusing the respondent of corruption, which essentially shifted the burden of proof.

[23] On the issue of retroactivity of the application of the Constitution of Kenya 2010, to determine a dispute that was filed in 2008, counsel referred to Clause 7 of the Transitional and Consequential Provisions of the Constitution which obligates the court, when construing a statute that was in existence before the new Constitution, to do so in conformity with the Constitution. Nothing stopped the judge from construing **section 55 (5)** in accordance with the new Constitution. In any event, the judge was obligated to bring **section 55** in harmony with the Constitution. Also all the submissions were filed after the promulgation of the new Constitution. There was no justification for the judge to apply a repealed statute when there is a new one in operation. Mr. Kilukumi supported the judgment and stated that in dealing with the matter, a judge uses all the knowledge and skill to determine the issues before the court. In any event, a point of law can be raised at any time and a judge having taken an oath of office to uphold the Constitution, cannot withhold the best of her knowledge and ability to determine all the matters that are before the court. This is a case where the employer of the respondent which is a statutory body did not participate in the proceedings. The allegations that there was a breach of judiciary duty, conflict of interest and abuse of office were mere allegations that were not supported by the employer. Counsel urged us to dismiss the appeal with costs.

[24] In a quick rejoinder, Miss Kossy Bor submitted that there was a judicial relationship between the respondent and the public body that he served and **EACC** is mandated by the law to recover public assets that are obtained through misuse of office. The Act defines what is corruption and proceedings undertaken under **section 55 (5)** of the Act are of civil nature and standard of proof is on a balance of probability. The learned judge had, according to counsel, no basis for coining an interpretation that was based on an assumption as the Act provided that the legal burden remained with **EACC** throughout to prove that the properties listed were corruptly acquired. If after hearing the merits of the matter **EACC** failed to satisfy the test that is when the matter would have been dismissed.

[25] Having captured, albeit in summary, what transpired before the High Court in the instant appeal, we discern one broad issue for our determination which is whether the suit by **EACC** was null and void as **Section 55** of the Act on which the suit was founded, was in conflict with the principles of fair trial that are guaranteed in the Constitution 2010. There was also another issue of whether the Constitution of Kenya 2010 was applied retroactively to determine a matter that was filed in 2008. We may not wish to dwell on this issue too much because Clause 7 of the Transitional and Consequential Provisions of the Constitution of Kenya 2010 provides as follows;

**“All law in force immediately before the effective date continues and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution”**

We however, recognize that the suit was filed under the retired constitution and the fact that the judge did not at all give regard to the provisions of the old Constitution in contradistinction with the new one was tantamount to an ambush on the part of the appellant.

[26] It is common ground that the suit was determined on a preliminary point of law that was raised by the Judge *suo moto*. See page 901 of the judgment where the learned Judge stated:-

**“The absence of fair trial in the process stipulated in Section 55 (5) and (6) of the Act does render those provisions stately inconsistent to the provisions the Constitution ie Article 20, 25, 40 (3). The proceedings filed by the Commission by way of the present originating summons is thus null and void and I declare so. I have to observe that, the issue which I have taken up in respect of the standard of proof has not been canvassed by either of the counsel simply put burden of proof is a duty placed upon a party to prove a disprove or disputed fact. He who alleges has a duty to prove, or as it is defined in Black’s Law Dictionary, 9<sup>th</sup> Edition page 223, “A party’s duty to prove a disputed assertion or charge. The burden of proof includes both the burden of persuasion and the burden of production onus probandi.”**

”[27] The mandate or functions of EACC is set out under **section 7 (1)** of the Act includes,

**“a) to investigate any matter that, in the Commission’s opinion, raises suspicion that any of the following have occurred or are about to occur-**

- i. conduct constituting corruption or economic crime**
- ii. conduct liable to allow, encourage or cause conduct constituting corruption or economic crime**

**b) to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime;**

**c) to assist any law enforcement agency of Kenya in the investigation of corruption or economic crime.”**

[28] Further, under **Section 55 (3), (4), (5) and (6)** of the Act, EACC is provided with procedure to follow once they have carried out investigations and they are satisfied that the person has unexplained assets and the person has been given an opportunity to explain the source. If EACC is not satisfied with the explanation, they can institute proceedings by way of an originating summons and the burden remains with **EACC** to discharge, on a balance of probability, that the alleged assets were acquired through abuse of public office. **Sections 55 (3), (4), (5) and**

**(6)** of the Act provides:-

**“55. (3) Proceedings under this section shall be commenced in the High Court by way of originating summons.**

**4. In proceedings under this section –**

**a) the commission shall adduce evidence that the person has unexplained assets; and**

**b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.**

**5. If after the Commission has adduced evidence that the person has unexplained assets the**

**court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.**

- 6. If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.”**

[29] The above has to be looked at in the context of **Article 20** that provides guidelines on the application of the Bill of Rights. The Court, tribunal or other authority is required to:

- a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and**
- b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.**

[30] Also **Article 25** and **40** provides for rights that cannot be derogated from as

follows:-

**“25. Despite any other provision of this Constitution, the following rights and fundamental freedoms shall not be limited**

- a. ...
- b. ...

- c. The right to a fair trial;**

And **Article 4 (3)** provides:

**“40. (3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –**

- a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**
- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-**
  - i. requires prompt payment in full, of just compensation to the person; and**
  - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.”**

[31] Did the originating summons offend the respondent’s fundamental rights to a fair trial or to ownership of his property? In our own assessment of the matters that were before the trial court, and with tremendous respect to the learned judge, the evidence that was before the judge was not given any consideration. The entire evidence by both parties was overlooked and the matter was determined on an assumption that the evidence if applied, would offend the above articles. Speculation and apprehension rarely have a place in a court of law; the judge ought to have examined the evidence that was before court and to apply it against the provisions of the Constitution instead of postulating an assumption in theory. We say so, because the suit was filed according to the provisions of a statute. There was no complainant regarding the independence or the impartiality of the Court. The problem that was seen by the judge was the Act if applied would contravene the Constitution. Such a conclusion in our view without applying the facts or evidence and testing it against the particular enactments of the Constitution was not only impossible but left the contested issues of facts undetermined. It was important for the judge to

substantially deal with the contested facts so that the appellant at the end of the day would have a decision on their case.

[32] The Constitution also makes provisions for national values and principles of good governance that includes integrity, transparency and accountability. Declaring the appellant's suit null and void summarily on assumption that the respondent was going to be denied his right to property, before considering the evidence that was before the Judge, did not give the appellant its day in court. The trajectory adopted by the learned judge when on her own motion she teased out the provisions of the constitution clearly denied the appellant an opportunity to be heard on the three questions that were framed in the suit and a determination of the issues on merit. The same Constitution **Article 159 (1)** underscores the need for a Court or a tribunal to be guided by the principles that justice shall be done to all irrespective of status and it shall be administered without undue regard to procedural technicalities.

[33] The Act provides that the burden of proof remained with EACC and it was the court to determine that it was discharged on a balance of probability. It is at that stage the burden would shift to the respondent if the court so ordered. In our view, this is not an alien process in civil litigation. It also happens in defamation cases where there is a defence of justification. The allegations by the appellant that the respondent acquired the listed assets corruptly through abuse of office were hotly contested by the respondent according to the pleadings. Determining a matter that was founded on such contestation on a preliminary point of law that was raised by the court *suo moto* denied the appellant an opportunity to be heard on their evidence.

[34] In any event, it is trite that a preliminary objection cannot be founded on contested facts. The learned judge had an opportunity to consider the contested facts and make a determination one way or the other according to the law and the Constitution.

In **Mukisa Biscuit Co. V. Westend Distributors Ltd.** [1960] EA 696 701, this Court stated that a preliminary objection should raise a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. A preliminary point cannot be sustained if any fact is contested and has to be ascertained, otherwise the other side will always be left with a bitter taste in their mouth that certain aspects of their case were not decided. In the instant case, it was merely assumed the appellant was going to have a higher burden of proof than the respondent, and according to the respondent that could not afford him a fair trial. In this regard, the respondent relied on the judgment of Mulenga, SCJ in the Ugandan case of **Dr. Bisgye Kiiza V. Museven Yoweri Kaguta (supra)**, where the learned judge stated that the expression, "*to the satisfaction of the court*" as denoting a higher threshold than one of balance of probabilities. This is what the Judge postulated in his own words:

**"I do share the view that the expression "proved to the satisfaction of the court" connotes absence of reasonable doubt. Admittedly, the word "satisfied" is adaptable to the two different standards. It is not uncommon for a court to hold that it is "satisfied on a balance of probabilities", or that "it is satisfied beyond reasonable doubt." However, where the Court holds that it is satisfied per se, that a matter has been proved, or that a matter has been proved to its satisfaction, without more, then to my mind there can be no room to suppose that the court harbours any reasonable doubt about the occurrence or existence of that matter. By requiring that the ground for annulment of an election be proved to the satisfaction of the court, the legislature laid down the minimum amount or standard of proof required. The amount of proof that produces the Court's satisfaction must be that which leaves the court without reasonable doubt."**

[35] With respect, that case is only of persuasive value and in any event considered issues in an election petition unlike the matter before us. Before we pen off and allow this appeal as we are bound to do, we do not want to say much lest we prejudice the case by dealing with the facts, save to add that the Ugandan case of Dr. Bisigye Kiiza was a dispute over a presidential election and the evidence or the contested facts were being applied and tested. It would only have been possible for the learned judge to arrive at such determination and conclusions after hearing the contested issues and applying the evidence to the law. The other authority that was cited and it is imperative for us to comment on it was the case of

**Christopher Nderathi Murungaru** (*supra*) which is also distinguishable as the applicant was contesting the notice pursuant to the provisions of **section 26** of the Act which required him to provide information on his assets. The Court of Appeal found the notice requiring a person to give incriminating information contrary to the rights enshrined in the Bill of Rights. The instant case is different as **EACC** had carried out investigations and instituted civil proceedings.

[36] We think we have said enough to demonstrate that this instant appeal is merited and for the aforesaid reasons, we allow it, set aside the judgment of Rawal J. dated 4<sup>th</sup> February 2011 and order that the suit be referred back to the High Court for trial and determination on priority basis granted the suit was filed in the year 2008.

**Dated at Nairobi this 2<sup>nd</sup> day of October 2015.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**