



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, O’KUBASU & WAKI, J.J.A)
CIVIL APPLICATION NO. NAI. 39 OF 2011 (UR.25/2011)

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION APPLICANT

AND

STANLEY MOMBO AMUTI RESPONDENT

(An application for an injunction pending the hearing and determination of an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, (Rawal, J.) dated 4th February, 2011

in

H. C. C. C. No. 448 of 2008 – O.S)

RULING OF THE COURT

Although the matter before us is of immense public interest, what lies for our consideration is a straightforward interlocutory application seeking conservatory orders. It is an application under rule 5 (2) (b) of the rules of this Court seeking the following orders:-

“1. An injunction be issued against the Respondent, his servants, agents or any other person from wasting, damaging, alienating or in any other way further alienating or interfering with the property enumerated below pending the hearing and the determination of the Applicant’s Appeal.

- (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) Ngong/Ngong/26632;
- (e) Ngong/Ngong/38889;
- (f) Ngong/Ngong/38890;
- (g) Motor Vehicles registration numbers KBB

059 T; KBB 537 T; KAR 843 M; and KAH

223 F;

2. *Pending the hearing and determination of the Applicant's appeal an injunction do issue against the Respondent, his servants, agents or any other person or institution from withdrawing funds or in any other way dealing with the following bank accounts:*

i. *Account Number 8240656 Barclays Bank of Kenya, Enterprise Road.*

ii. *Account Number 8230790, Barclays Bank of Kenya, Enterprise Road.*

iii. *Account Number 0150175027800, Standard Chartered Bank Harambee Avenue*

iv. *Account Number 0101775027800, Standard Chartered Bank Harambee Avenue*

v. *Account Number 32757182, National Westminster Bank PLC-London, Branch 60-15-49*

3. *Pending the hearing and determination of the Applicant's appeal an injunction do issue against the Respondent, his servants, agents or any other person from demanding, collecting or withdrawing Kshs.4,308,000 seized by the Applicant from the Respondent's office and house.*

4. *The costs of and incidental to this Application to abide the result of the Appeal."*

The intended appeal arises from the decision of the superior court, Rawal J, made on 4th February, 2011 in which the learned Judge declared an originating summons taken out by the Kenya Anti-Corruption Commission (KACC) as null and void on the basis that **section 55 (5) and (6)** of the Anti-Corruption and Economic Crimes Act (ACECA) upon which the originating summons was predicated was inconsistent with the provisions **Articles 20, 25, 40 (3)** of the new Constitution. Those sections relate to application of the Bill of Rights, fundamental rights and freedoms that may not be limited, such as fair trial, and protection of the right to property. KACC immediately filed a notice of appeal and intends to challenge that decision by advancing about 19 grounds of appeal.

Applications under **rule 5 (2) (b)** have followed a well trodden path and therefore the applicant, in order to succeed must show that the intended appeal is not frivolous, that is to say, it is arguable even on a solitary ground. It must also be shown that if the orders sought are not granted, the success of the intended appeal would be rendered nugatory. In view of the provisions of **sections 3 A and 3 B** of the Appellate Jurisdiction Act, which are also invoked in the application, the Court must be guided by the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of the dispute. The first principle presents no difficulty as it is readily conceded by learned counsel for the respondent, Mr. Kilukumi, that the intended appeal is arguable. He vehemently argued, however, that the success of the appeal, if such be the eventuality, would not be rendered nugatory and therefore the parameters for grant of the orders sought have not been fully met. We shall examine the submissions on both sides of the argument shortly.

What is the short background to the application:

KACC is a body corporate capable of suing and being sued. It was established in the year 2003 under **section 6** of ACECA ("the Act") for the purpose of carrying out the objectives of the Act, that is; the prevention, investigation and punishment of corruption, economic crime and related offences. Among its functions spelt out under **section 7** of the Act is to:

“(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.”

KACC also has the power under **section 55** of the Act to seek forfeiture of unexplained assets in the manner spelt out in that section thus:

“S.55 (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.

(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 concerned does have unexplained assets, it may require 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.”

On 18th September, 2008, KACC filed an originating summon before the superior court invoking section 55 aforesaid and stating that it had conducted investigations which established that Stanley Mombo Amuti (“*the respondent*”, hereinafter) was engaged in corruption and economic crimes and was in possession of unexplained assets. On affidavit evidence, it swore, *inter alia*, that the respondent was employed in September 2007 as a financial controller by the National Water Conservation and Pipeline Corporation earning a gross salary of Kshs.306,000/= per month and a net salary of Kshs.180,031/=. Previously he had worked as the finance manager with the Water Services Regulatory Board earning a gross salary of Kshs.255,400/= for a period of 3 years. Then all of a sudden, the respondent amassed huge assets which were disproportionate to his known sources of income, thus inviting investigations by KACC. A search, authorized by the court, on his residence and office revealed cash amounts and cheques in excess of Kshs.21 million which were seized. Further searches on his bank

accounts established that the respondent had deposited substantial amounts in excess of Kshs.140 million and withdrawn in excess of Kshs.85 million over a period of ten months between September 2007 and June 2008. Several immovable properties were also traced to the respondent at different stages of conveyancing and development, the estimated value of which was in excess of Kshs.56 million. He also had four motor vehicles in his possession. According to KACC the explanations sought over those assets were not made by the respondent satisfactorily, hence the originating summons seeking determination of the issues whether the respondent had in possession unexplained assets and whether he should be condemned by the court to pay the Government the cash and value of properties acquired corruptly or in the alternative whether the cash, landed properties and motor vehicles should be forfeited to the Government. In the meantime KACC sought an interlocutory injunction to preserve the subject matter of the suit and a consent was recorded by the parties to that effect on 11th June, 2009 extending earlier interim orders made on 31st March, 2009 until determination of the suit.

For his part, the respondent believed that he had fully explained the sources of his income and assets over a period of 25 years of his working life and he made that explanation in a detailed letter addressed to KACC on 17th July, 2008. He also reiterated those explanations when he swore an affidavit in reply to the originating summons and refuted the allegations made by KACC that he had banked more than 140 million between September 2007 and June 2008 stating that he had only banked just over Kshs.39 million. He had also withdrawn about Kshs.24.7 million and not Kshs.85.8 million as alleged by KACC. He also complained about other factual inaccuracies publicly put forward by KACC which he concluded were tailored to damage his reputation and which had cost him his job. He sought enforcement of his right to protection from deprivation of property.

KACC responded in a further affidavit reiterating its contention that the respondent corruptly obtained specific assets at specific periods. The respondent then sought to strike out the suit on the basis that it was filed contrary to the provisions of the Act, specifically **section 55**. He also sought a mandatory injunction for return of his seized property. He had earlier successfully obtained an order of judicial review against the freezing of his bank accounts and the money in those accounts was moved. In a considered ruling delivered on 20th November, 2008, the superior court, Hatari Waweru J, rejected the contention that the originating summons was filed contrary to the Act and refused to strike out the suit. The learned judge however partly allowed the prayer for release of all the documents seized from the respondent by ordering only for supply of good copies of all those documents for purposes of preparation of the respondent's defence in the suit. The cash seized was to remain with KACC. The copies of documents were supplied, but the respondent went on appeal to this Court to compel release of his personal belongings, documents, money, title deeds and other documents pending the hearing of an intended appeal against the whole of Waweru, J's ruling. In a considered ruling made on 20th February, 2009, this Court refused to grant the application and dismissed it. It is not clear to us what became of the intended appeal after rejection of the application.

What is clear is that counsel for both parties filed written submissions in the superior court in November, 2010 dealing extensively with factual issues. It would also appear that the parties were granted leave to address the constitutionality of **section 55** of the Act and they filed further submissions in December, 2010. Thereafter the superior court, Rawal J, delivered her judgment aforesaid on 4th February, 2011.

The learned Judge did not deal with the factual issues raised in the originating summons or in the submissions of counsel, but dwelt on the constitutional issue raised on **section 55** of the Act. After examining the new Constitutional provisions relating to the interpretation of the Constitution (Article 259), limitation of Rights and Fundamental Freedoms (Article 24 (1)), the right to a fair trial (Article 25 (c)), the right to acquire and protection against arbitrary deprivation of property (Article 40), vis-à-vis the provisions of **section 55 (5)** of the Act which impose a reverse burden of proof, the judge found, as contended by the respondent, that the two provisions of the Act were inconsistent with the new Constitution. In her own words:-

“The Constitution has granted rights and freedoms to the 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' hereinbefore.

Due process covers fair trial and vice versa. Thus the question, which remains before the court, is whether provisions of Sec. 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 Sec. 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.

Sec. 55(6) provides what the court shall order if not satisfied that all of the assets were not acquired otherwise than as the result of corrupt conduct. I 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 Sec. 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."

The court further found that **section 55 (5)** of the Act stipulates a "higher standard of proof" than that of "balance of probability", and therefore lacked "proportionality or justified balance between the effects of the impugned measures on the protected right and attainment of the objective". She concluded, thus:

"The absence of fair trial in the process stipulated in Sec. 55 (5) and (6) of The Act, does render those provisions starkly inconsistent to the provisions of Constitution i.e. Article 20, 25 and 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.

However, I should not shirk from my duty to take any pertinent point of Constitutional law suo motu to develop the law in line with spirit and Article 20 (3) as well as to protect aspiration of the Constitution.”

As stated earlier, the facts and merits or otherwise of the originating summons were not considered and the court seized of the intended appeal will grapple with the legal issues which, it is conceded, are arguable.

In the meantime, Mr. Angote for KACC pleads with us to maintain the *status quo* lest the success of that appeal be rendered nugatory. He referred to the order made in the superior court with the consent of the parties maintaining the *status quo* which order was varied, again with the consent of the parties, after the judgment of the superior court to provide that the money held in the respondent's bank accounts and by KACC be placed in a joint interest earning account in the names of both parties, while the immovable properties would remain as they were. That order was complied with but it was only temporary for 30 days until 4th March, 2011, hence the need to obtain a substantive conservatory order, pending the hearing of the intended appeal. We have no reason to think that the respondent has acted contrary to the terms of that order pending the delivery of this ruling. Mr. Angote further drew our attention to prayer 2 of the motion and stated that there was only one bank account holding the sum of Kshs.13 million and a bankers cheque of Kshs.4.3 million, total 17.3 million, which was seized by KACC and which is sought to be preserved. The money in the other bank accounts has already been moved. As for the immovable properties, Mr. Angote submitted that if these were disposed of before the intended appeal was finalized, the appeal would stand on nothing and the success of it would be pyrrhic. It would irreversibly affect the substance of the originating summons which seeks forfeiture of the properties and monies the subject matter thereof. He cited the decision of this Court in **Otieno vs Ougo & Another [1987] KLR 400** where it was held:

“1. The established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action.

2. The object of granting an injunction pending an appeal is to safeguard the rights of the appellant and to prevent the appeal if successful from being nugatory.

3. There were no special circumstances in this case which could cause the court to decide differently from these principles.”

On the other hand, Mr. Kilukumi found no reason for granting the orders sought since in its draft memorandum of appeal, KACC shall be seeking an order for the hearing of the originating summons on merits before the superior court and they will be heard by a new Judge. The success of the intended appeal cannot therefore be rendered nugatory. He further submitted that there was no evidence of corrupt acquisition of property or other assets by the respondent and KACC's advocates virtually so admitted in their submissions before the superior court, and in any event the respondent had fully explained the source of his property and was entitled to Constitutional protection. Furthermore, he submitted, the investigations in issue were limited to the period of 10 months from September 2007 to June 2008, and it would be unjust and inequitable to issue an injunction on two plots of land and two motor vehicles which were acquired before that period. In point of fact the respondent swears that he has sold those plots and vehicles. An injunction would also not lie against three of the other plots since they were not part of the original investigations, while other plots listed in the application are only equitably owned by the respondent as they have not been legally transferred to him, and an injunction would be issued in vain. As for the money which has been deposited in a joint account by consent of the parties, Mr. Kilukumi submitted that there has been no appeal against that consent order and an injunction cannot therefore be issued. At any rate the respondent, on a balance, is suffering more hardship and prejudice and ought not to

be punished further. To underscore the futility of issuing the injunction sought, Mr. Kilukumi cited the case of ***Eric Makokha & 4 Others vs Lawrence Sagini & 2 Others [1994] e KLR CA*** where this Court in an application under **rule 5 (2) (b)** stated:

“An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, “Equity, like nature, will do nothing in vain”. On the basis of the maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it. In this case, the compulsory retirement which the applicants sought to injunct was effected on the 6th April, 1993.”

In responding to those submissions, Mr. Angote disputed the allegation that KACC had admitted that the respondent did not acquire the property or assets corruptly; asserted that the issue of disposal of some of the properties had not been raised at any time during the pendency of the suit; observed that the law in **section 55 (7) (a)** of the Act provides for forfeiture of properties held in trust; and affirmed that there would be no objection if the money continued to be held in joint account in terms of the order of the superior court, which had lapsed.

We have anxiously considered the issues raised by both counsel and we thank them for their incisive submissions and the authorities laid before us which we have considered. The starting point must be the observation, conceded on both sides, that the merits or otherwise of the originating summons laid before the superior court were not considered. The facts and other material therein, therefore still remain in the realm of allegations and contentions. If the applicant succeeds in the intended appeal, and the declaration that the originating summons is a nullity set aside, it would follow that the facts will be evaluated on their merits and the questions posed in the originating summons as to whether the contentious properties in form of land and motor vehicles should be forfeited would be answered. An order for forfeiture can only be made if the property was still available for such forfeiture and it follows therefore that if there was no conservatory order, the property may well have ceased to exist thus rendering the success of the appeal pyrrhic. We note the contention by the respondent that some of the properties were either not the subject matter of investigations or were acquired before investigations commenced or have since been sold or are only equitably held by the respondent. However, those are the same properties which form part of the subject matter in the originating summons filed on 19th September, 2008 and upon which an interim injunction was issued by the court on 31st March, 2009 before the parties confirmed it by their consent on 11th June, 2009. The same state of affairs was maintained by another consent order recorded after the judgment of the superior court with amendment relating to the money, and as stated earlier we have no reason to believe that the status quo has changed pending the delivery of this ruling. So that, the subject matter of the suit has or ought to have remained intact since the date of filing. The only concession made by the applicant is that some bank accounts listed in prayer 2 of the application have no money and only the sum of Kshs.17.3 million is available. We do not therefore understand the contentions raised by the respondent in respect of those properties.

It is our view in all the circumstances that the success of the intended appeal would be rendered nugatory if the orders sought are not granted.

In the event, we allow the application and grant prayer 1 as drawn. We also grant prayers 2 (i), 2 (iv) and 3 in terms of the consent order recorded by the parties on 4th February, 2011 and issued on 11th February, 2011, save for the limitation periods therein. Prayer 4 is also granted.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of May, 2011.

P. K. TUNOI

.....
JUDGE OF APPEAL

E. O. O’KUBASU

.....
JUDGE OF APPEAL

P. N. WAKI

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR