



**Ethics & Anti-Corruption Commission v Lodwar Midwest
Hotel Limited & 2 others (Miscellaneous Civil Application
E246 of 2023) [2024] KEHC 6240 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E246 OF 2023**

JRA WANANDA, J

MAY 31, 2024

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION APPLICANT

AND

LODWAR MIDWEST HOTEL LIMITED 1ST RESPONDENT

SAMUEL KUWOM EREGAE 2ND RESPONDENT

KENYA COMMERCIAL BANK LIMITED 3RD RESPONDENT

RULING

1. On 24/05/2023, in Eldoret High Court Miscellaneous Civil Case No. E109 of 2023 which involves the same parties herein and relates to the same subject matter as in this instant matter, I granted ex parte orders to the same Applicant herein as follows:

“That this Honourable Court be and is hereby pleased to prohibit the withdrawal, transfer, disposal of or other dealings howsoever with the sum of Kshs 3,684,208.80 and Kshs 2,866,884.15 or any amount thereof held in Bank Account No. [.....] and [.....] at Kenya Commercial Bank (Kenya) Ltd, which accounts are held in the name of the 1st and 2nd Respondents, for a period of six (6) months pursuant to Section 56(3) of the *Ant-Corruption and Economic Crimes Act*, 2003.

2. Now before the Court for determination is the Applicant’s Originating Summons dated 22/11/2023 filed through E.W. Githinji Advocate, and which seeks orders as follows:
 - i. [.....] Spent
 - ii. [.....] Spent



- iii. That this Honourable Court be pleased to extend the Order of Preservation issued on 25th May 2023 prohibiting the withdrawal, transfer, disposal of or other dealings howsoever with the sum of Kshs 3,684,208.80 and Kshs 2,866,884.15 or any amount thereof held in Bank Account No. [.....] and [.....] at Kenya Commercial Bank (Kenya) Ltd which accounts are held in the name of the 1st and 2nd Respondents, for a further period of six (6) months pursuant to Section 56(3) of the *Anti-Corruption and Economic Crimes Act*, 2003.
3. The Application is brought under Section 56 of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003, and “all other enabling provisions of the law”. The Application is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by one David Mutua.
4. In the Affidavit, the deponent stated that he is an Investigator with the Applicant, that on 8/05/2023, the Applicant received a report touching on fraudulent payments made by the County Government of Turkana to the 1st and 2nd Respondents without any justification, that the complaint alleged that the 1st and 2nd Respondents had received fraudulent and irregular payments totalling Kshs 67,107,743.10 transferred by the said County Government between 1/01/2019 and 11/05/2023 into the 1st and 2nd Respondents’ said bank accounts, that pursuant to the investigations, the Applicant on 23/05/2023 applied for preservatory orders under the *Anti-Corruption and Economic Crimes Act* (ACECA) which application was granted on 25/05/2023 prohibiting the Respondents from withdrawing, transferring, disposing or in any other way dealing with the amounts in the bank accounts, and that the preservation orders are set to expire on 27/11/2023.
5. The deponent stated further that since the preservation orders were granted, the Applicant has carried out extensive investigations and has made remarkable progress pertaining to the matter in issue. He then particularized a lengthy list of the matters established and which implicate the 1st and 2nd Respondents into the fraudulent and/or corrupt activities and stated further that there are however crucial investigative points yet to be covered and which the Applicant will require a further 6 months to investigate conclusively, that despite the Applicant making some headway, the pace at which the investigations is taking has been hampered by failure by the County Government to provide documents, that this has led to the Applicant issuing a notice to the County Secretary under Section 27 of the *ACECA* to provide the documents and record a statement to that effect, that a considerable number of statements from relevant persons have been recorded but due to the prevailing security and weather situation in the County, it has been impossible to travel to the County to record further statements from crucial witnesses.
6. The deponent further stated that due to the colossal amounts involved which were paid through more than 90 payments, more documents need to be collected from the County as well as other Government agencies and private entities thus protracting the investigations further, that the Applicant has also written to various Government agencies and private entities to provide information/documents which have not yet been provided as they require technical expertise. He deponed that this Court is clothed with special jurisdiction under Section 56 of the *ACECA* to entertain an application for extension of an order of preservation for a further period of 6 months, that the Applicant is apprehensive that if the order for extension of preservation is not granted, the Respondents may transfer, withdraw or dispose the funds in a manner that may frustrate the ongoing investigations and defeat the intended recovery proceedings and prosecution of persons who may be found culpable.
7. The Application came up ex parte before my brother, R. Nyakundi J who was the duty Judge at that time and who on 23/11/2023 granted the orders sought although on an interim basis and fixed the matter for inter partes hearing.



8. In the intervening period, the 1st and 2nd Respondents, through Messrs Nyachoti & Co. filed a Notice of Preliminary Objection challenging the Application. The grounds raised were basically that the said Eldoret High Court Miscellaneous Civil Case No. E109 of 2023 on the same subject matter and between the same parties was still pending for hearing and determination of the dispute, that the orders made by Nyakundi J on 23/11/2023 are final and thereby determining the ex parte Application without inter partes hearing of the Application which is contrary to law and that the orders should be discharged forthwith. It was further stated that the filing of these proceedings separately is an utter abuse of the Court process in view of the aforesaid Eldoret High Court Miscellaneous Civil Case No. E109 of 2023 and that the same should therefore be struck out.
9. Upon considering the matter, Nyakundi J on 10/01/2024 delivered a Ruling herein agreeing with the Respondents. In setting aside and/or discharging his said earlier ex parte orders, the Judge rendered himself as follows:
 - “3. The record therefore shows that the impugned orders being subject on ex parte hearing and as extracted by the Deputy Registrar prima facie by dint of it rendered substantially the originating summons determined as if it was on the merits. Subsequently from the filings made by the respondent undoubtedly there is a primary suit filed before the session judge Wananda referenced as Eldoret HC. Civil Application No. E109 of 2023, Ethics and Anti – Corruption Commission –vs- Lodwar Midwest Hotel Limited, Samuel Kuwom Eregae & KCB Bank (Kenya) Limited. Suffices to say that as the matter stands this cause of action is still pending before the High Court No. 2 which is a court enjoying concurrent jurisdiction with this court. I have gone to a long extent to appraise and understand the contents of affidavits filed by both the Applicant and the Respondent. It is clear before me that the applicant is a litigant in that other suit Indexed as Eldoret Mis Application No 109 of 2023 but elected to initiate Misc App. 246 of 2023 knowing very well that this same subject matter is still pending before High Court No. 2 a court with the same status of jurisdiction with this court.
 4. The question is whether this court has jurisdiction to admit or even hear the applicant on the same interlocking issues as those raised before that other High Court within the same territorial jurisdiction. Generally speaking a litigant who approaches the court must be clear which jurisdiction he or she intends to invoke for the various remedies pleaded in the plaint, originating summons Notice of Motion or Chamber Summons. From the onset of reading the materials placed before me the question that bothers my mind is whether High Court 1 and High Court 2 can exercise jurisdiction simultaneously on the same subject matter involving identical parties to the litigation to me the constitution and statute law abhors such procedural defects. Further it is not clear from the applicant’s perspective why it thought it fit to re-open fresh proceedings before this court. A jurisdictional question as raised by the respondent goes to the root of the court’s powers and as a judge presiding over this matter has to inquire into whether a matter under certificate of urgency like in the instant scenario



has prima facie met the jurisdictional threshold. As stated in *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* (2012) eKLR ,

“A court cannot assume jurisdiction by way of judicial craft or it will not assume jurisdiction by way of a litigant’s pestering it to do so. The court’s mandate is to do justice, however that justice can only be dispensed through the laid down framework. Consequently, this court is bound by the provisions of the *constitution* and the statute which instruments donates such powers on jurisdiction. Similarly, the applicant should have considered the relationship of the principle of comity to the above stated litigation. Briefly stated the principle of comity is that the first court to acquire jurisdiction over the subject matter of a cause of action shall retain this jurisdiction to the exclusion of any other court until its duty has been performed. It looks like comity is a legal principle well known and discussed but little applied by litigants.”

5. What is the challenge of this case is the sound concern of hopeless conflicts of decisions or orders likely to emanate from the two courts of concurrent jurisdiction. After a careful consideration of these points, I hold the view that this court should abate the action in favour of the jurisdiction of the court presided over by Wananda J in Eldoret Mis Application N0. E109 of 2023 because being an earlier suit filed the judgement rendered by it would be a bar to the action pending before me.
6. One question which might be raised is whether the result of this court would be the same with the findings and reasoning of that other court. The answer to me will be in the negative. The primary court upon which the suit was instituted has the powers to handle all issues within the jurisdictional limit of the court conclusively without invoking the jurisdiction of this court. Essentially this court is not a forum of conveniens. Handling this case unless the context dictates it would otherwise result in a mistrial.
7. Regarding the scope of the ex-parte orders as extracted a perusal of the record reveals that they appear fiercely conclusive whereas the spirit of it all was interim interdict pending the interparties hearing on the merits to give effect to the rights of the parties. While this may have been relevant the framers of the *constitution* enacted article 47 on Fair Administrative Action and article 50 on Fair trial rights. The right to a fair trial can be violated in many ways but as a general principle it has always been borne in mind that a party to a suit commonly referred to as the respondent /defendant must at all times be given a genuine possibility of answering the claim, challenging evidence, or as the case may be cross -examining witnesses and doing so is in consonant with procedural justice. It is of interest at this stage to point out that *ex-parte* orders parse are reserved and sustained in circumstances that may impair substantive justice. The essential feature of it is not to express finality of any rights in an adversarial proceeding.
8. However, notwithstanding that position the concerned proceedings before this court are affected by the principle of comity and whether the set



jurisdiction of this court was appropriately invoked given the initial suit pending before a court with concurrent jurisdiction. Had this court known of the existence of Miscellaneous Civil Application No. E109/2023 it would not have assumed jurisdiction. In any event, it is for the reasons of good order and good governance in the administration of justice. In my view therefore, I seem to be persuaded that the *ex-parte* orders extracted might as well occasion prejudice or mistrial in the pendency of the suit or application in E109/2023.

9. As I make this determination herein, I am conscious of the gravitas of the *ex parte* application and subsequent *ex-parte* orders extracted by the Deputy Registrar. The meaning and effect of it is that in the proceedings held the applicant while fully aware of the original suit on an act of avoidance initiated fresh proceedings in HCMA 246/2023. I think the question of deciding whether to maintain the *ex-parte* orders as extracted were not meant to dispose of the issues raised in the originating summons.
10. Consequently, the *ex parte* orders be and are hereby set aside and this case docket be transferred to High Court No. 2 presided over by Wananda J who on 5.12.2023 directed this matter be consolidated with that in his docket. In this respect, a further mention for directions be undertaken on the 15.1.2024 for a status conference. By this ruling both counsels are on notice to attend the conference as scheduled without fail. Each party to be at liberty to apply.”

10. It is pursuant to the above background that this matter was placed before me.

Hearing of the Application

11. It was then agreed, and I directed, that the Application, together with the Preliminary Objection be heard together, and by way of written Submissions. However, up to the time of concluding this Ruling, I had not come across any Submissions filed by either of the parties.

Further developments in Eldoret HCMA Civil Case No. E109 of 2023

12. During the intervening period, material developments occurred which have a direct bearing on the “survival” of this matter
13. As aforesaid, the 6 months preservation order given in Eldoret High Court Miscellaneous Civil Case No. E109 of 2023 was given by myself on 24/05/2023. The order was based on the provisions of Section 56 of the ACECA, Section 56 (1) and (3) whereof provides as follows-
 1. On an *ex parte* application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct
 2. An order under this Section shall have effect for six months and may be extended by the Court on the application of the Commission
14. It is therefore clear that the statutory lifespan of proceedings filed under Section 56 of the [ACECA](#), in the first instance, and unless extended, is limited to 6 months. Eldoret HCMA Civil Case No. E109 of 2023 having been filed under that provision of law, was therefore subject to this 6-month lifespan scenario. The preservation order having been granted on 24/05/2023, such statutory 6 months lifespan of Eldoret HCMA Civil Case No. E109 of 2023 therefore lapsed or was to lapse on or about 24/11/2023. As aforesaid however, Nyakundi J on 23/11/2023, in these separate proceedings,



extended the orders for another 6 months thus breathing some life into Eldoret HCMA Civil Case No. E109 of 2023 and thus salvaging it. As aforesaid however, on 10/01/2024, Nyakundi J subsequently vacated and/or set aside the orders granting the extension.

15. In light of the foregoing situation, when the parties appeared before me on 21/02/2024 for mention of Eldoret HCMA Civil Case No. E109 of 2023, it was appreciated that the same had long been overtaken by events and retaining it in the Court system would serve no purpose. I accordingly marked the matter as concluded and the file as closed.

Determination

16. The question that now arises is whether these proceedings having been instituted merely for the purposes of extending the preservation orders given in the separate Eldoret HCMA Civil Case No. E109 of 2023, can this action still be sustained and deemed to exist despite and/or in view of the fact that Eldoret HCMA Civil Case No. E109 of 2023, has itself since been already closed.
17. The indisputable answer is obviously that, no, these proceedings cannot be sustained any longer. With the closure of the file in Eldoret HCMA Civil Case No. E109 of 2023, this instant action, as a natural consequence, suffered a natural death. This Cause cannot therefore be sustained or salvaged as it now has no legs to stand on, its substratum having already ceased to exist.
18. Before I pen off however, like Nyakundi J and the Respondents' Counsel, I too, wonder why the Applicant opted to file these fresh proceedings when the same Applicant had already instituted Eldoret High Court Miscellaneous Civil Case No. E109 of 2023 on the same subject matter and between the same parties and which was still pending for hearing and determination. In the absence of a clear explanation for this irregular mode of litigation, there is merit in the 1st and 2nd Respondents' Counsel's assertion that the filing of these proceedings separately was an abuse of the Court process in view of the existence of the earlier filed Eldoret High Court Miscellaneous Civil Case No. E109 of 2023. In view thereof, even if these proceedings had not been overtaken by the natural death of Eldoret High Court Miscellaneous Civil Case No. E109 of 2023, still it would have been liable for striking out for offending the sub-judice rule, also referred to as the rule against duplicity, as stipulated under Section 6 of the *Civil Procedure Act*. The Section provides as follows:

“..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”

Final Orders

19. In the end, the Applicant's Originating Summons dated 22/11/2023 and by extension, this whole action is hereby dismissed.
20. I however make no order on costs considering that, despite the apparent blunder of filing parallel proceedings, I believe that the Applicant filed this action in the honest execution of its statutory mandate, namely, pursuit of recovery of property perceived to have been acquired as a result of corrupt conduct.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF MAY 2024

WANANDA J.R. ANURO



.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

