



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC NO.16 OF 2018

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

VERSUS

DR. SALOME LUDENYI MUNUBI.....1ST DEFENDANT

SOSTENAH OGERO TARACHA.....2ND DEFENDANT

PRISCILA NYAMBURA KAMANDE ALIAS RISPER BWARI.....3RD DEFENDANT

JUDGMENT

1. Pursuant to Section 55 of the Anti-Corruption and Economic Crimes Act No. 3/2003 (hereinafter the ACECA), the Ethics and Anti-Corruption Commission (hereafter the plaintiff), filed an Originating Summons dated 20th July 2018 and amended on 28th November 2018 against Dr. Salome Ludanyi Munubi (hereinafter the 1st defendant), her husband Sostenah Ogero Taracha (hereinafter the 2nd defendant) and Priscilah Nyambura alias Risper Bwari (hereinafter the 3rd defendant) seeking determination of the following questions;

i. Whether the defendants are in possession of ‘unexplained assets’ pursuant to the provisions of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 as itemized under paragraph 3;

ii. Whether the property listed in paragraph 3 should be detained 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 No. 3/2003;

iii. Whether a declaration should issue that the following properties constitute unexplained assets pursuant to the provisions of Section 55 of the Anti-Corruption and Economic Crimes Act, No. 3/2003;

a. U.S. Dollars 168,900

b. Kshs. 1,000,000/-.

iv. Whether the defendants should be ordered by this honourable court to forfeit to the government of Kenya the USA

Dollars 168,900 and Kshs 1,000,000/= both of which constitute unexplained assets or any other amount this honourable Court finds to constitute unexplained assets

v. Who is to meet the costs"

2. The said Originating Summons was amended on 28th November 2018 pursuant to a Notice of Motion dated 5th November 2018 seeking to enjoin one Priscillah Nyambura Kamande alias Risper Bwari as the 3rd defendant.

3. The application is premised upon grounds stated on the face of it and an affidavit sworn on 25th July 2018 by Pius Maithya an Investigator with the Ethics and Anti-Corruption Commission. Contemporaneously filed with the Originating Summons is a Notice of Motion in which the plaintiff sought custody orders to keep U.S Dollars 168,900 and Kshs. 1,000,000/- seized from the defendants' residence on 4th May 2017 pending hearing and determination of the main suit. Despite service of the said application, the same was not opposed hence allowed as prayed on 13th August 2018.

4. In response to the Originating Summons, the 1st defendant filed a replying affidavit sworn on the 12th October 2018 challenging the suit thereby denying ownership and or possession of the alleged unexplained assets. Equally, the second defendant filed his replying affidavit sworn on 12th October 2018 claiming ownership of the assets (property) the subject of these proceedings herein.

Plaintiff's Case

5. The Plaintiff's case is hinged on the averments contained in the affidavit of Pius Maithya sworn on 25th July 2018. According to Maithya, he and other officers of the Commission were tasked to investigate on allegations of irregular compensation of land following compulsory acquisition of land along the Standard Gauge Railway Line (SGR) by the Government through the National Land Commission. That following receipt of credible information that the 1st defendant then working as the Director Valuation and Taxation with the National Land Commission was engaged in corrupt conduct and had amassed assets well beyond her known legitimate sources of income, they commenced investigations.

6. He further averred that the 1st defendant was involved in a case of fictitious acquisition and compensation of land parcels No. 9085; 9086; 9087 and 9088 situate in Embakasi, Nairobi County which parcels of land fell within the Kenya Railway Reserve and therefore not subject of compulsory acquisition.

7. That despite the 1st plaintiff having initiated the process of verification of ownership of the aforesaid parcels of land and being fully aware that the alleged titles to the aforesaid parcels of land were duly revoked by the National Land Commission, she, in abuse of her office, engaged in fraudulent scheme for compensation of the illegally acquired land. He further deposed that the compensation approval by the 1st defendant was done despite the fact that the allocation of the aforesaid parcels of land had been revoked with the 1st defendant's knowledge and any compensation thereof on perceived rescission of the revocation of the allocation of the said parcels was not correct.

8. Mr. Maithya went further to state that in furtherance of the investigation, the commission executed a search at the 1st defendant's residence on 4th May 2017 following a court order vide Misc. Criminal Application No. 1461 of 2017 issued on 3rd May 2017. That during the search, cash 1000 notes in denominations of one thousand totaling to Kshs. 1,000,000/- and 1,689 notes in denominations of 100 USD \$ totaling to USD \$ 168,900 and 2 notes in denominations of U.S.D \$50 totaling to USD \$ 100 were recovered.

9. He further deposed that upon interrogation of the first defendant, she claimed that the money was not hers but belonged to her husband (2nd defendant). That upon further interrogation of the 2nd defendant, he claimed that the money was advanced to him by his daughter Risper Bwari (the 3rd defendant). That on 10th January 2018, the said daughter to the 2nd defendant visited Integrity Centre and recorded a statement claiming that she was known as Priscillah Nyambura Kamande alias Risper Bwari.

10. That she was a business lady dealing with supplies and that the 2nd defendant was her biological father who separated with her mother Asenath Kwamboka while she was 8 years old hence her movement to muranga where her mother got remarried to one Livingstone Kamande who gave her a new name 'Priscillah Nyambura' instead of Risper Bwari given by the 2nd defendant.

11. It was the plaintiff's allegation that, the 3rd defendant recorded a statement admitting that the money in question was given to her by her step father Ibrahim Issa, who had married her late mother after she divorced Mr. Livingstone Kamande from Muranga. It was further alleged that the 3rd defendant who had allegedly given contradicting information regarding her identity did not sufficiently explain the source of the money in question which she claimed to have lent her father the second defendant.

12. Having dismissed the 3rd defendant's claim that the money was hers, the investigating officer concluded that the money belonged to the 1st defendant which was obtained through fictitious and fraudulent means after compensation of land compulsorily acquired for SGR project, albeit illegally. In the alternative, Mr. Maithya contended that none of the defendants justified possession of the amount of money in question.

13. During the hearing, Mr. Maithya (PW1) adopted the averments in his affidavit sworn on 25th July 2018 and an undated supplementary affidavit filed on 28th November 2018. He told the court that the amount of money recovered from the 1st defendant's house was not commensurate to the legitimate earnings (salary) of the 1st defendant.

14. He further stated that the 3rd defendant was not a daughter to the 2nd defendant given contradictions in names given by her (3rd defendant) and the identification particulars given by the Registrar of Persons in which the 3rd defendant's ID card reflected her name as Priscillah Nyambura Kamande with her mother being Elizabeth Nyambura Kamande and the father Livingstone Kamande Waithaka. He further contended that neither the 1st nor the 2nd defendants proved legitimacy of the source of money recovered from their house nor did the 3rd defendant prove existence of a step-father and that the money was from the purported step-father one Ibrahim Issa.

15. Mr. Maithya maintained that the money was obtained by the 1st defendant through corrupt conduct by approving fictitious claims and overvalued awards in respect of illegally acquired land. On cross examination by Mr. Okubasu, he stated that there was no direct connection between the money confiscated and the land compensated for. In further cross examination, he stated that the Kenya Railways had no title in respect of the parcels of land the subject of these proceedings. He further responded that the officer who valued the parcels of land which the 1st defendant is accused of overrating was one Nzau. He also stated that they only assumed that the money in question may have been out of kickbacks.

16. PW2 Timothy Waiya Mwangi Deputy Physical Planner working with the Ministry of Lands adopted the content of his witness statement dated 2nd June 2018. He made reference to a PDP No. 42/14/90/20 approved on 22nd August 1991 as Development Plan No. 269 which was for purposes of industrial Site Development Embakasi. That the features surrounding the plot were Embakasi Railway Station, Nairobi National Park, Railway Reserve, Proposed Marshalling Yard, Mombasa Road and a road to JKIA. According to him, the Railway Marshalling Yard was not available for allocation for private use as it was part of the railway line(reserve). On cross examination, he denied knowledge of any alienation of the railway reserve.

17. On his part, PW3 Martin Weldon Senior Land Surveyor in charge of authentication recorded his witness statement on 6th July 2017 and adopted the same as his testimony. He made reference on survey map sheet No. SE 15 in alignment with PDP No. 269 in which L.R. Nos. 9088, 9087, 9086, 9085 and 9084 lay on a railway reserve. On cross examination, he stated that, for a PDP to pass the credibility test, it must be approved and signed by the Commissioner of Lands. On further cross examination, he stated that he was not sure whether the named plots were on a railway reserve considering the Cadestral Checking officer's approval report. He further confirmed that he could not tell whether there were subsequent PDP's after PDP No. 269.

18. PW4 Abubakar Kisilwa a Surveyor (Chief Cartographer) working with the Ministry of Lands simply gave a brief procedure on how public land could then be allocated to an individual after applying for allocation. He stated that, after applying for allocation of land, and upon the Commissioner of Land's approval, the Physical Planner could plan the land (area) before a letter of allotment could issue subject to survey works being done for purposes of issuing a title deed after payment of the requisite fees.

19. According to the witness, the Survey Plan No. 293/86 in respect of Embakasi area, the subject of the parcels of land in question was approved for data only meaning that the survey work was correct and all the documentation was proper although not enough by itself to allocate and issue a title deed. He stated that as at the year 2003, the survey plan for the plots in question was approved for data control and not for issuance of title deeds due to the missing documents. On cross examination by Okubasu, the witness explained that the survey plan through which the plots in question were approved has never been cancelled and that deed plans were issued at different plans.

20. PW5 Livingstone Kamande Waithaka confirmed that he was married to one Elizabeth Wanjiku whom they separated with and remarried the year 2018. He stated that they were blessed with two sons and three daughters among them Priscillah Nyambura. In his witness statement dated 11th December 2018 which he adopted as his testimony, he stated that he had been ambushed in a bar by EACC officers to record a statement whose purpose he did not understand.

21. He further stated that he knew the 2nd defendant as a father to Vincent Kyalo a husband to Priscillah Nyambura. He denied knowledge of one Asenath Kwamboka. He insisted that the 2nd defendant was Nyambura's father in law.

22. PW6 Paul Thiongo area Chief Saba Saba Muranga then and a relative to PW5 confirmed that he knows Elizabeth Wanjiku as the wife to PW5 and their children among them Priscillah Nyambura. He further confirmed that he was the one who introduced Kamande (PW5) to the EACC officers who recorded his statement. The witness stated that, PW5 has never separated with his wife.

23. PW7 Mr. Thurairaja Murungi Kinagwi record manager strategy, research and compliance Kenya Railways adopted his witness statement recorded with the EACC officers on 4th July 2017.

24. He confirmed that Kenya Railways has both titled property and vested assets. That they also have registered maps and station mapping separating railway stations from marshalling areas. The officer acknowledged that Plot Nos. 9089, 9088, 9087, 9086, 9085 and 9084 were not part of the railway reserve or the railway line. On cross examination, the witness stated that he was not sure whether the properties were part of the railway reserve.

25. PW8 Brian Ikol an employee of the National Land Commission working as a Deputy Director Legal Enforcement stated that he was a secretary for the review of grants and disposition of Public Lands Committee. He also adopted a witness statement recorded before the EACC on 22nd November 2018. He identified L.R. Nos. 9084, 9085, 9086, 9087 and 9088 which were the subject of dispute as their acquisition and subsequent claim by the alleged owners for compensation by SGR was questionable as they were part of the railway reserve.

26. That following that information which was raised by the 1st defendant, they concluded investigations in respect of L.R. 9084, 9088. Pursuant to Section 14 of the National Land Act. During their inquiry, M/s Desale Investment Ltd claimed private ownership of L.R. Nos. 9087, 9084 and 9088. That Olomotit Atate Ltd claimed L.R. No. 9086.

27. According to the witness, none of those claimants submitted title deeds. He however admitted that they did submit letters of allotment. He further stated that the plots were a railway reserve hence recommended for further verification on the authenticity of the allotment letters. In attendance in that committee were Chairman NLC Prof. Swazuri, Commissioners Abigail Mbagaya, Evans Njogu, Dr. Rose Musyoka, Abdulkadir Khalif and himself.

28. That after receiving the report, they revoked allocation of the parcels of land along the railway reserve as the same was not available for allocation for lack of proper PDP hence not eligible for compensation. He however later saw a letter dated 11th October 2016 (annexture PM 6) in support of the Originating Summons signed by Swazuri stating that a review had been undertaken in Plot Nos. 9085, 9087, 9088 and 9086 and the revocation rescinded on account of purchaser's interest for value. In his testimony, the witness denied knowledge of such review although there was an appeal lodged by the land owners challenging the revocation.

29. On cross examination, the witness admitted that the process of compensation is ordinarily initiated by the consumer agency in this case the Kenya Railways who submitted the list of properties eligible for compensation among them the plots in question in these proceedings. He further confirmed that, he had no proof that the plots in question belonged to the Kenya Railways. He also could not explain why Kenya Railways was disowning ownership of the said property.

30. PW9 Catherine Ngare an investigator with the Ethics and Anti-Corruption and an Accountant by profession adopted averments contained in her affidavit sworn on 22nd March 2019. She told the court that, upon receipt of information that the 1st defendant was engaged in corrupt conduct by awarding overvalued and illegal compensation awards in SGR claims while working as a Valuation and Tax Director NLC, she initiated a search at her house culminating to the recovery of 168,900 US Dollars and an additional kshs1 million in cash. The witness corroborated the testimony of PW1 thus stating that the money recovered from the 1st and 2nd defendant's house was suspected to be kickbacks out of irregular overvalued properties.

31. The witness also corroborated the testimony of PW1 and PW8 to the extent that the parcels of land in respect of which compensation was made was part of a Railway reserve as there was no PDP fully approved.

32. She further stated that the letters of allotment were issued in 1999 long before the survey work could be done to generate allotment Numbers claimed by the purported allottees vide survey work allegedly done on 14th April 2000. She stated that the titles were issued out of fraud. She prayed for forfeiture of 168,900 Dollars and 1 million Kenya shillings arguing that none of the defendants justified possession of the money in question. On being cross examined as to whether notice under Section 26 of the ACECA was issued to the 2nd and 3rd defendants, the witness answered that it was not necessary.

Defence Case

33. In her defence, the 1st defendant denied the claim. She adopted the content contained in her replying affidavit. That the money recovered from her house was not out of abribe allegedly given by various claimants in compensation awards affecting land acquired by the NLC for the Kenya Railways for construction of SGR. That besides cash 1 million recovered from her house, Kshs. 600,000/- was also seized being money received as a gift from friends after her PHD graduation ceremony held in December 2016. That it included school fees for May 2017 Semester which money was not declared in the inventory by the EACC.

34. She confirmed signing the inventory of the money recovered from her house as 168,900 US Dollars, Kshs. 1 million cash 1 and 2 notes of 50 US Dollars which money she claimed belonged to her husband and that she was not aware that there was such money in her husband's suit case. She explained that her net worthy value was about 60 million. That her sources of income were her salary which was at Kshs. 450,000/- per month then, allowances from travelling and consultancy, besides sacco and bank loans.

35. Regarding illegal awards on plot Nos. 9089, 9084, she denied any foul play or fraud on her part. She stated that the plots in question were submitted by Kenya Railways for acquisition and compensation. She denied valuing the properties. She stated that the valuation was done by Nzau her Deputy and that her role was merely supervising. She claimed that she was the one who raised a red flag on ownership of the plots concern after noting multiple claimants.

36. She also claimed that she never used to sit in the Review Committee. That on 19th October 2015, she received a five Page direction authorizing payment. That nobody has ever challenged the review resolution and that there was no Kenya Gazette Notice revoking the allocation of any of the plots concern and that Kenya Railways has never complained of any Railway reserve having been acquired illegally.

37. Consequently, she denied claims that her assets do not reflect the legitimate sources of income. She claimed that her Kshs. 600,000/- was not reflected anywhere in the inventory although she did not complain anywhere.

38. DW2 Sostener Taracha adopted the content in his witness statement dated 6th November 2018 and replying affidavit sworn on 12th October 2018 in which he claimed ownership of the money recovered from their house. He alleged that the money was a loan advanced to him by his daughter Risper Bwari whose mother he had separated with long time ago after staying together for one year. He claimed that he was a business man dealing with transport, development of real estate, buying and selling of houses, operates a pharmacy, M-Pesa business and supplies. He attached several documents as proof of engagement in the said businesses. He claimed that his combined sources of income per month was over 2 million.

39. That the money recovered from their house was intended to construct houses before securing a loan he had applied for. He confirmed that the officers recovered 168,900 US Dollars, Kshs. 1 million and 2 notes of 50 USA Dollars. That they also took Kshs. 600,000/- belonging to his wife being money received as gifts for her graduation.

40. He further stated that the 3rd defendant Risper Bwari was his daughter he sired with the mother whom he never married. That when Bwari's mother got married to another man (pw5) she was given another name Priscillah Nyambura. He attached loan application forms to show that he had a project he was undertaking and that he was to refund Bwari her money using the loan. He demanded for return of Kshs. 18,000,000/- as it was money he had borrowed and he has started refunding the lenders using the loan he had acquired. On cross examination he admitted that they did not complain to anybody that Kshs. 600,000/- was taken from their house but was never accounted for.

41. DW3 Risper Bwari told the court that she was a biological daughter to DW2 and that Livingstone Kamande was a foster father who then married her mother after separating with DW2. That she was taken to Kamande's home when she was very young and when the mother separated with Kamande, she was left behind under the care of her step mother Elizabeth Wanjiku whom she referred to as her mother. That all along she did not know her biological mother until when in form two when a woman by the name of Asenath Kwamboka appeared at school and introduced herself as her biological mother. It was at that moment that the said Asenath told her that she was known as Risper Bwari.

42. She claimed that when she transferred school to Kariobangi Secondary School Nairobi, the mother again appeared with a man known as Sostenah whom she introduced as the biological father. She was later taken to Ogero's home in Kisii where she was introduced to her relatives. It was in the course of Kwamboka's frequent visits that she came to know that Kwamboka had gotten married to Ibrahim Issa a Sudanese in South Sudan and that she was doing business there. That after her mother died, Ibrahim Issa kept visiting her together with a son he had sired with Kwamboka. That Issa kept visiting her and her step brother.

43. At one point, Issa allegedly left her with 4 million to take care of the baby. That when he visited her the second time, he gave her KShs 21 million but in US Dollars. She subsequently informed DW2 to assist her buy a house. That she gave the money to her dad (DW2) as a refundable loan.

44. She claimed return of the seized money. She also informed the court that she was married to one Vincent Kyalo. On cross examination, she admitted that she had no proof that the money was from her step father Ibrahim Issa and whether Ibrahim got the same genuinely.

Plaintiff's Submissions

45. In submission for the plaintiff, M/s Kibogy filed her submissions on 28th October 2019. Counsel submitted on three issues namely;

- i. **Whether the money / subject matter of the forfeiture proceedings, comprised unexplained assets;**
- ii. **Whether the defendants were offered a reasonable opportunity to explain the source of the money;**
- iii. **Whether the defendants gave a cogent explanation as to the source of the money.**

46. From the onset, counsel admitted that the affidavit in support of the amended Originating Summons sworn by Pius Maithya was not dated. However, she urged the court to find that that is a procedural technicality which is curable under Article 159(2)(d) of the Constitution. To support this proposition, learned counsel referred the court to the decision in the Ugandan case between **Saggu vs. Roadmaster Cycles (U) Ltd (2002) I EA 258** where the court held that:-

“It is trite that the defect in a jurat or any irregularity in form of an affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (e) of the 1995 constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities”.

47. She submitted that upon conducting search in the 1st and 2nd defendant's house they recovered the money in question. That all the defendants were notified of the intended forfeiture proceedings and that they recorded statements with EACC to explain their position regarding the recovered money.

48. Concerning failure to give statutory notice upon the 2nd and 3rd defendants under Section 26 of ACECA, counsel opined that they were not originally people under investigation and that they were brought on board by the 1st defendant thus necessitating their being summoned to record statements which was sufficient notice. To support this position, counsel referred to the decision in **ACEC No. 19 of 2017 formerly Petition No. 385/2017 Sospeter Ogero Taracha vs EACC** and A.G where the court advanced similar sentiments by stating that;

“Paragraph 33: Strictly speaking, no notice could have been served on the petitioner herein by the 1st respondent. The reason is that the person targeted in the investigation is one Dr. Salome Ludyeni Munubi, the Director Valuation and Taxation at the National Land Commission (NLC). The search warrant was in respect of the said Salome Ludyeni Munubi and the officers went to her residence.”

49. Ms. Kibogy submitted that having established that there was suspicious monies obtained through corrupt conduct recovered from the defendant’s house the burden of proof to justify legitimacy of possession of such money under Section 55(5) of ACECA shifts to the defendants. To bolster this argument, counsel referred to the decision in the case of Stanley Mombo Amuti vs. Kenya Anti-Corruption Commission Civil Appeal Nai. No. 184/2018 (2019)eKLR where the court held that the cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income and that tied to this is the inability of an individual to satisfactorily explain the disproportionate assets.

50. Counsel submitted that it was upon the defence to show that the money was from legal sources of income.

51. Touching on the defence case, counsel argued that there was no proof that there existed a lady by the name of Assenath Kwamboka nor her husband known as Ibrahim Issa. She further submitted that the 3rd defendant did not prove of her travelling to South Sudan as evidenced by the report by the Department of Immigration which confirmed that there were no records to show that she ever travelled outside Kenya at any one time. She asserted that failure to call the two witnesses calls for reasonable inference that their evidence could have been adverse to the defence case. To fortify this contention, reliance was placed on the decision in the case of Stanley Mombo Amuti vs. Kenya Anti-Corruption Commission Civil Appeal Nai. No. 184/2018 (supra) where the court held that;

“... in principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent's evidence is true, or at least that the tenor of the evidence withheld would be unfavorable to his cause.”

52. Counsel further submitted referring to Stanley Mombo Amuti case that a person with lawful income has no trouble proving the legal origin of his or her assets.

Defendant’s Submissions

53. In submission, Mr. Okubasu appearing for the defendants filed his submission on 23rd October 2019. At the beginning of his submissions, learned Counsel took issue with the plaintiff regarding the legality of the amended originating summons which was supported by an undated supplementary affidavit sworn by Pius Maithya thus offending Section 5 of the Oaths and Statutory Declarations Act which provides that a jurat must reflect the place and date an oath or affidavit is taken. To strengthen his argument, counsel referred to the decision in the case of Sitelu Konchella vs. Julius Lekakeny Ole Sunkuli and 2 Others (2018)eKLR where the court dismissed a replying affidavit which was neither signed, commissioned nor dated hence the pleadings which were supported by the impugned affidavit were of no effect. Counsel referred the court to several authorities where pleadings were dismissed for non-compliance with Section 5 of the Oaths and statutory Declarations Act inter alia: Kenneth K. Mwangi vs. City County of Nairobi and 2 Others Civil Appeal No. 228/2009 (2017)Eklr, Election Petition No. 1/2013 Walter Enock Nyabati vs. Independent Electoral Boundaries commission and 4 Others (2017)eKLR and Talewa Road contractors Ltd vs. Kenya National Highways Authority (2014)eKLR where the court held that;

“For the reason that the said supporting affidavit did not comply with the statutory and mandatory provisions of the law, the Court hereby expunges and strikes out the said Supporting Affidavit of John Kihonge Wainaina. The Plaintiff’s Notice of Motion application stands automatically dismissed as it has no limb to stand on. The effect of this striking out of the said Supporting Affidavit is that all the exhibits attached to the said Notice of Motion application are also hereby struck out.”

54. On the basis of the above legal provision and authorities, counsel urged the court to strike out the affidavit and the annexures thereof and consequently the amended Originating Summons which lacks supporting documents hence fatally defective.

55. On the second issue regarding seizure of the money, counsel submitted that the investigations touching on the source of the money seized from the defendants’ house was unconstitutional, unprocedural and fatally defective. Mr. Okubasu argued that there was no notice issued to the 2nd and 3rd defendants under Section 26 of ACECA. To buttress this point, counsel referred to the

decision in the case of **Director of Public Prosecutions vs. Tom Ojienda t/a Prof. Tom Ojienda and Associates Advocates and 3 Others (2019)eKLR**.

56. That failure to serve the said notice infringed the 2nd and 3rd defendants' right to fair administrative action as envisaged under Article 47 of the Constitution and also the Fair Administrative Action Act of 2015. The court was referred to several authorities regarding the right to notice under the Fair Administrative Action Act inter alia; **Civil Appeal No. 149/2017 George Kingi Bamba vs. National Police Service Commission (2019)eKLR** where the court held that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision; prior and adequate notice; opportunity to be heard; statement of reasons, notice of report to legal representation, notice of right to cross examination, information or materials and evidence to be relied on.

57. Counsel submitted that, the fact that the 2nd and 3rd defendants were invited to record statements is not sufficient notice.

58. Turning onto the 3rd issue, Mr. Okubasu argued that confiscation of funds was unlawful. Counsel submitted that the search warrant issued in **Misc. Cr. Application No. 1466/2018** did not include confiscation of funds as it was only extended to search for documents relating to compulsory acquisition and compensation of the land. That Article 50(4) forbids any evidence obtained in a manner that violates the Constitution hence inadmissible hence violation of one's rights.

59. Regarding ownership of the seized money, Mr. Okubasu submitted that there was sufficient evidence that the 2nd defendant was a businessman whose net worthiness is over Kshs. 100,000,000/- and that the money in question was received from his daughter which money was to be refunded from a loan he had applied for. Counsel further submitted that the plaintiff had not disapproved the explanation given by the defendants and that in any event, the money the subject of these proceedings was not proved to have been obtained within the period of the alleged corruption under investigation.

60. Concerning the 2nd defendant's relationship with the 3rd defendant, counsel submitted that the explanation given by the defendants was not challenged.

Analysis and Determination

61. I have considered the claim herein, responses thereto and submissions by both counsel. Issues that crystallize for determination are;

i. **Whether the suit herein is defective by virtue of the amended Originating Summons filed on 28th November 2018 being supported by an undated supplementary affidavit sworn by Pius Maithya;**

ii. **Whether the seizure of the assets the subject of these proceedings was legally and properly done;**

iii. **Whether notice was issued against the 2nd and 3rd defendants.**

iv. **Whether assets the subject of these proceedings amounts to unexplained assets.**

Whether the suit herein is defective by virtue of the Originating Summons filed on 28th November 2018 being supported by an undated supplementary affidavit sworn by Pius Maithya.

62. There is no dispute that the amended Originating Summons is supported by an undated supplementary affidavit of one Pius Maithya. Mr. Okubasu vehemently challenged the legality of the whole suit given that the foundation of the suit is the amended Originating Summons dated and filed on 28th November 2018 supported by an undated affidavit which offends the mandatory legal requirement under Section 5 of the Oaths and Statutory Declarations Act. Mr. Okubasu quoted several authorities contending that the defect is not curable in law. On the other hand, M/s Kibogy sought refuge in Article 159(2)(a) of the Constitution and Court of Appeal Uganda decision in **Saggu vs. Roadmaster Cycles (U) Ltd [supra]** where it was stated that such omission is not fatal to vitiate the entire pleadings or proceedings.

63. Section 5 of the Oaths and Statutory Declarations Act provides that;

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

64. Indeed, a number of courts in Kenya have upheld the mandatory notice of the wording of Section 5 of the Oaths and Statutory Declarations Act. Among such case law which specifically addressed the issue of undated affidavits in support of pleadings is the **Election Petition No. 1/2017 Walter Enock Nyambati vs. Independent Commission and 4 Others (supra)** where the court stated that a Notice of Motion supported by an undated affidavit had no legs to stand on and had the notice struck out as there was no valid affidavit in place.

65. I have looked at the authorities submitted by Mr. Okubasu and in particular the case of **Gideon Sitelu Konchellahh vs. Julius Lekakenya Ole Sunkuli & 2 Others (supra)** which was heavily relied on by Mr. Okubasu in particular, where the Supreme court struck out the impugned replying affidavit for not being signed, dated or commissioned. According to the S.C, the affidavit contravened all the mandatory requirements of Section 5 of the Oaths and Statutory Declarations Act. The Supreme Court was categorical that the replying affidavit contravened all the legal requirements for making an oath. From that statement, in my view, it connotes that there are exceptions implying that, non-compliance of some of the requirements may not be necessarily fatal.

66. In the instant case, the affidavit was sworn before a Commissioner for Oaths, signed and stated the place where it was signed and sworn. The only omission which is the subject of contestation is lack of a date. With this in mind, the facts and particulars of this case are distinguishable from **Konchellah** case. While addressing a similar scenario in the case of **Kenneth K. Mwangi vs. City County of Nairobi and 2 Others (supra)** delivered on 14th July 2011 the Court of Appeal had this to say on a similar omission;

“There is no doubt at all that the use of the word “shall” connotes the mandatory nature of the requirement. The appellant does not dispute the fact that the affidavit was not dated. It must be appreciated that this Appeal was decided on 7th July 2005 before the advent of the current constitution as well as the overriding objective and or oxygen principles that now compel courts to look more to the substance of the case as opposed to technicalities. We are certain that if confronted with a similar application in the current dispensation the judge most probably may reach a different conclusion. However, we cannot fault the learned judge for applying the law as it was then.”

67. From the observation and remarks of the Court of Appeal, it is manifestly clear that had the omission been committed after the enactment of the new constitution and provision of the oxygen principle under Section 1A and B of the Civil Procedure Act, they could not have dismissed the objection. The Court of Appeal clearly indicated that under the new constitutional dispensation, failure to date an affidavit would only amount to a technicality.

68. I am in agreement with Ms Kibogy’s submission that the omission in not dating an affidavit which is duly sworn before a Commissioner of Oaths and signed by the deponent can only amount to a technicality which is curable under Article 159(2)(a) which provides that courts shall determine disputes without undue regard to technicalities. Equally, it is in the spirit of promoting the overriding objective of Section 1A and B of the Civil Procedure Act which in essence upholds the position in **Saggu** a Ugandan case above quoted. If the affidavit was not signed, it would lack ownership and if it was not commissioned it would lack legitimacy in terms of uncertainty as to the legal authority or capacity of the commissioner in commissioning documents which would attract even criminal proceedings against the Advocate.

69. Indeed, breach of some rules of procedure or omissions which do not affect or prejudice the substance of the suit or the interest of a party should not be allowed to curtail the attainment of substantive justice. To that extent, I will agree with the holding of Justice Ringera as he then was in the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd and Another Nairobi (Milimani) HCC No. 84 of 2001 (2001)KLR 430; (2001)2 EA 460** in which he stated:-

“Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it and where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a Complaint but has fallen short of the prescribed standard, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form, procedure, which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect,

ought not be treated as nullifying the legal instruments thus affected and the court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the Complaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”

70. In a recent decision of the Court of Appeal in the case of Toshike Construction Co. Ltd vs. Harambee Co-operative Savings and Another (2019)eKLR, the court upheld the holding by the Ugandan Court of Appeal in Saggu vs. Roadmaster Cycles (supra) where it was held that:-

“... the statutory provision which renders it mandatory to date the affidavit before tendering it in court simply means that an affidavit cannot be used without dating it or indicating where it was sworn and before whom. The errors and omissions regarding the date, place and the commissioner cannot vitiate an application”.

71. In view of the above quoted Court of Appeal decisions and considering the spirit of Section 1A of the Civil Procedure Act on the oxygen principle plus the underlying objective of Article 159 of the Constitution, it is my considered and humble view that failure to date the affidavit in question was not prejudicial to the defendants in any way. To that extent, that ground fails.

Whether the seizure of the assets/money of the subject of these proceedings was legally and properly done.

72. According to Mr. Okubasu, the money confiscation from the defendant’s house was unlawful considering that the seizure warrant issued vide CM’s Court Milimani Misc. Cr. Application No. 1466/2017 only authorized search and seizure of documents and not money. Learned counsel referred the court to the decision in the case of Recankanlil Shah vs. Director of Public Prosecutions and 3 Others (2016)eKLR where the court held that the seizure of goods albeit in good faith was illegal as the search warrants did not include search of goods.

73. According to the search warrant the plaintiff was authorized to;

“... search and take possession of all documents relating to the irregular and unlawful compulsory acquisition and compensation scheme in respect of the Standard Gauge Railway (SGR) project and any other documents / information that can facilitate conclusion of the ongoing investigations.”

74. From the wording of the order, the same was abid wide and general as it included any other document or information that could facilitate conclusion of the ongoing investigations. The purpose of the search warrant was to secure information or documents that was/were deemed to be relevant to the objective of the investigation which was corrupt conduct based on allegations of bribery made against the 1st defendant.

75. It follows automatically that the recovery of a sum of over 18 million in cash from the house of the defendants which was reasonably suspected to be part of the bribery allegations which they were investigating was inevitable and necessary hence one of the information indicated in the search warrant (see Abubakar Shariff Abubakar vs. Attorney General and Another (2014)eKLR where the court held that:-

“The conclusion from these cases is that when a policeman enters a house by virtue of a search warrant, he may seize not only the goods which he reasonably believes to be covered by the warrant, but also any other goods which he believes on reasonable grounds to contain material evidence on any other charge against the person in possession of the items.”

76. I do not find any illegality by the search not specifically providing that the officers were going to look for bribery money. They could not avoid to collect any other relevant information including exhibits which could reasonably be used in the intended criminal or civil proceedings. On that ground alone that issue fails. The confiscation of the money was therefore not illegal.

Whether non-issuance of notice against the 2nd and 3rd defendant under Section 26 of ACECA was prejudicial

77. From the onset of the plaintiff’s investigations, it was the 1st defendant who was the target. She was duly issued with the notice as required under Section 26 of the ACECA. Mr. Okubasu argued that the 2nd and 3rd defendants should have been issued with

notice before any search was or any charges could be levelled against them. Reliance was placed in the **Prof. Tom Ojienda** case (supra).

78. However, the requirement for notice upon a party under investigation pursuant to Prof. Tom Ojienda case has since been stayed by the Supreme Court in **Civil Application No. 21 of 2019** between the **Ethics and Anti-Corruption Commission vs. Tom Ojienda, S.C T/A Prof. Tom Ojienda and Associates.**

79. It was not legally or practically possible to issue notice of the intended search. Further, the original targeted person was the 1st defendant not the 2nd and 3rd defendants. Their joinder to these proceedings was a culmination of further information and investigation. Consequently, they were summoned and given a chance by the EACC officers to explain what they knew about the recovered money. They subsequently gave elaborate explanation claiming the money. In my opinion, in the particular circumstances, they are deemed to have been given an opportunity to explain their position before any action could be taken. Further, they were given sufficient opportunity to respond to the allegations against them which in my opinion suffices to be notice thus satisfying the objective of Section 26 of ACECA.

Whether the assets (money) the subject of these proceedings amounts to unexplained assets.

80. Although the Plaintiff investigated and identified several properties owned by the 1st and 2nd defendants purporting them to be unexplained properties, they did not specifically pray for forfeiture of any of those properties except for the money seized from the 1st and 2nd defendants. Equally, none of the parties made any submissions regarding those properties. I will therefore confine myself and delve on the assets specified in the Originating Summons' prayers which is; money recovered from the defendants.

81. What constitutes unexplained assets" Unexplained assets is defined under Section 2 of the ACECA as;

“Unexplained assets means assets of a person;

a. Acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

b. Whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.”

82. From the above definition, it is incumbent upon the plaintiff to prove that the seized assets amounts to unexplained property or assets (see **The Kenya Anti-Corruption Commission v Stanley Mombi Amuti Anti-Corruption and Economic Crimes Misc. 5 of 2016 formerly High Court Civil No. 488/2008 (OS)(2017)eKLR.**

83. The underpinning provision for forfeiture of unexplained assets is Section 55 of the ACECA which provides as follows;

“Sub-Section 1 – In this Section ‘corrupt conduct’ means-

a. Conduct that constitutes corruption or economic crime; a

b. Conduct that took place before this Act came into operation, and which-

i. At the time constituted an offence; and or

ii. If it had taken place after this Act came into operation, would have constituted corruption or economic crime

Sub-Section 2 goes further to provide that; the commission may convene proceedings under this Section against any a person if-

a. After an investigation, the commission is satisfied that the person has unexplained assets, and

b. The person was, 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.

84. In the instant case, the plaintiff claimed that the 1st defendant did engage in corrupt conduct by overrating and approving compensation for clients of various parcels of land which had been acquired by the National Land Commission on behalf of the Kenya Railway Corporation for the construction of SGR. What was placed before court was an allegation that the money recovered from the 1st and 2nd defendants was part of the kickbacks (bribes) received by the 1st defendant to facilitate illegal approval and compensation awards to claimants for land illegally acquired from the Kenya Railway Reserve.

85. Before me there was no evidence or proof of bribery negotiation or payment made to the 1st defendant directly or through any other proxy including her husband (the 2nd defendant). It is trite that it was the 1st defendant who first queried the ownership of the parcels of land the subject of compensation claims. It was also admitted that it was one Nzau her deputy who did the valuation of the land and that her approval for compensation was based on that valuation and clearance by her boss the Chairman NLC who gave clearance that the land in question had no encumbrances and that it had been cleared. Accompanied with the Kenya Railway's claim that the land in question was not part of the Railway reserve she made payment.

86. In the absence of any proof that the defendant did engage in any corrupt conduct, I will hold the evidence of PW1 one Maithya and Catherine Ngare the investigating officer (PW9) as lacking on factual basis or foundation. It is not enough to state that somebody engaged in a corrupt conduct simply because money was recovered from her house and which money her husband has claimed ownership of.

87. For those reasons, I will hold that the plaintiff has failed to rebutt the claim by the 2nd and 3rd defendant's claim that they were the owners of that money. To that extent, I am satisfied that the first defendant has given reasonable explanation that the money found in her house belonged to her husband and the same lacks any nexus or correlation with bribery claims. I am convinced that she has given reasonable defence which is corroborated by DW2 and DW3 thus shifting the burden to the two defendants. Accordingly, I do hold that there is no evidence to find the 1st defendant liable of the claim of being in possession of unexplained assets. The plaintiff has failed to discharge its burden to the required degree hence the suit against her is dismissed. Since I am not dealing with recovery of illegally acquired parcels of L.R. 904-9088 and eventual repossession, I will not waste my time to deliberate on whether the land in question belonged to the government or not. That is for another forum.

88. As stated elsewhere in this judgment, there is no dispute that the amount (assets) in question was found in the house of the 1st and 2nd defendants. The 2nd defendant claimed ownership on grounds that it was money lent to him by his daughter (DW3) whose mother he had married and separated with. He claimed that he was a business man dealing with a variety of businesses among them, real estate development, buying and selling houses hence earning a monthly income of Kshs. 2,000,000/=. He further claimed that he had taken a loan to offset the money lent to him by DW3.

89. He attached several business related documents and bank statements to prove his assertion. From the analysis of the said documents, there is no doubt he is a great businessman. However, that does not shield him from being found in possession of property which cannot be accounted for.

90. There was a lot of debate and contestation as to the relationship between the 2nd and 3rd defendants. According to DW2 he is the biological father. On her part DW3 said she was a daughter to DW2 and that her mother got married to Kamande where her Kisii name Risper Bwari was dropped for Priscillah Nyambura. That she was brought up by her step mother Elizabeth Wanjiku during her tender age after her mother again separated with Kamande and got married to Ibrahim Issa a Sudanese national.

91. She explained that all along she knew Elizabeth Wanjiku as her mother hence the reason why her identity card is reading her name as Priscillah Nyambura with Livingstone Kamande as the father and Elizabeth as the mother. From this explanation, one would reasonably be convinced that it makes sense although at some point contradicted by Livingstone Kamande who claimed to be her biological father. However, Kamande appeared to be an unreliable and evasive witness hence uncreditworthy from his general demeanor who even admitted to not being able to remember some events properly.

92. I am persuaded by the defence given by the defendants with regard to the relationship between them and the identity of the 3rd defendant. Having cleared the 3rd defendant's identity crisis, I am left with the issue whether the money seized from the house of

the 1st and 2nd defendants was from a legitimate source of income.

93. According to DW3, the money was part of KShs 21 million her Sudanese step father gave to her for purposes of buying a house for herself and her step brother (biological son to Ibrahim Issa). She claimed to have lent money to her father whom they had reunited with courtesy of her mother Asenath Kwamboka who died much earlier before Ibrahim gave the said amount.

94. From the defence pleadings and testimony by the defendants, there is no proof that the amount in question was given to DW3 by her step-father. There was no evidence of official declaration either to the Sudanese Embassy or Central Bank of Kenya that such a large sum of money had been brought into the country, when and by who.

95. There was nothing produced documentary or otherwise to show that the money was from Issa. Issa who is still alive did not come to court as a witness to claim the ownership of the money and establish that it was legal money not bribery or corrupt conduct like money laundering.

96. In the absence of any explanation as to how the money was obtained, the only logical conclusion is that failure to call Ibrahim Issa was intended to shield from the court evidence that would most probably be adverse to the defence case (see **Bukenya and Others Uganda (1972)EA 549**).

97. In the absence of my explanation as how the money was obtained from Sudan, the burden of proof shifts to the 2nd and 3rd defendants to justify possession. It is incumbent upon the 2nd and 3rd defendants to satisfactorily explain and justify the legitimacy or legal acquisition of the asset or forfeit such asset. To bolster this position, I am guided by the decision in **Stanley Mombo Amuti vs. Kenya Anti-Corruption Commission Civil Appeal No. 184/2018 (supra)** where the Court of Appeal held that;

“Para 79- under Section 55(2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired.”

98. Having held that there is no sufficient or concrete explanation given as to the legitimate source of the money which was under normal circumstances unusual, I am left with one logical conclusion to make and that is, the money in question was unlawfully obtained and the only nexus between these monies and the unlawful activity is that of money laundering hence the corrupt conduct associated with money whose source or legitimacy cannot be explained.

99. Mr. Okubasu urged the court to find that the lawful period within which an individual can be put to task as regards explanation in proceedings by the State for recovery of assets is only up to the time when the assets in question were seized, and therefore, contended that the court should disregard any issues arising after 4th May 2017 when the subject matter of this suit was seized. In this case the relevant period is from the time the commission (plaintiff) received information of corrupt conduct against the 1st defendant and 4th May 2017 when the money in question was recovered.

100. Therefore, the 2nd and 3rd defendants are being asked to justify acquisition of the said amount before 4th May 2017. Although further investigations went beyond 4th May 2017, this was necessitated by the peculiar nature of the case in which parties not targeted originally came into the picture by claiming proceeds reasonably suspected to be proceeds of crime or generally money that could not lawfully be accounted for.

101. I do not find any tangible evidence or reasonable explanation given by the 2nd and 3rd defendants to disassociate the money in question from possible corrupt conduct including but not limited to money laundering.

102. It is my holding that the 2nd and 3rd defendants have failed to discharge the burden of proof in explaining possession of huge sum of money being kept in the house under normal circumstances. Although there is no law prohibiting people from keeping money in their houses, it is questionable when such huge amounts of money cannot be connected to a lawful source of income.

103. Accordingly, I am satisfied that the plaintiff has proved its case on a balance of probability against the 2nd and 3rd defendants and judgement is thus entered against them jointly and severally with a determination and finding that the amount of money listed in paragraph 3 of the amended Originating Summons U.S Dollars 168,900 and Kshs. 1 million recovered from the 1st and 2nd defendant's house amounts to unexplained assets hence I do hereby direct the same to be forfeited to the government. Regarding costs, I will direct that the 2nd and 3rd defendants do bear the costs equally.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 8th DAY OF April 2020.

J. N. ONYIEGO

JUDGE



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