REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION-MILIMANI

ACEC NO. 21 OF 2018 (O.S)

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

VERSUS

THOMAS GITAU NJOGU.....1ST DEFENDANT

TERESIA NJERI GITAU.....2ND DEFENDANT

NJEGIT INVESTMENTS LIMITED.....3RD DEFENDANT

TERESIA NJERI GITAU

T/A WANGMUG ENTERPRISES.....4TH DEFENDANT

TERESIA NJERI GITAU

T/A NJETASH ENTERPRISES.....5TH DEFENDANT

JUDGMENT

1. The Ethics and Anti-Corruption Commission is a body established pursuant to Article 248 of the Constitution and Section 3(1) of the Ethics and Anti-Corruption Act No. 22 of 2011. Its sole mandate is to undertake investigations into allegations of corruption or economic crimes and where necessary, institute civil proceedings against any person under section 55 of the Anti- Corruption and Economic Crimes Act(ACECA) for the recovery of assets whose value is disproportionate to his or her known legitimate sources of income. The 1st defendant is a public officer working with the Ministry of Interior while the 2nd defendant is his wife. The two are also the joint Directors of the 3rd defendant while the 2nd defendant is the proprietor of the 4th and 5th defendants.

Plaintiff's case

2. It is the plaintiff's case that pursuant to reliable sources of information that the 1st defendant had engaged in corrupt conduct leading to acquisition of assets beyond his known legitimate sources of income, they commenced investigations. In particular, it was alleged that the 1st defendant was engaged in embezzlement and/or misappropriation of public funds through accessing unauthorized petty cash *("buffer cash")* by virtue of his position as a Senior Assistant Accountant General.

3. It was further alleged that the 1st defendant had between 1st January 2016 and 31st August 2017, made cash deposits into various

bank accounts held by the 2nd, 3rd, 4th and 5th respondents totalling to Kshs 111,681,931.98 an amount that exceeded his salary or legitimate sources of income.

5. That the plaintiff also established that during the same period, the 1st defendant acquired in his name or through proxies or agents various landed properties, motor vehicles and money all of which amounts to unexplained assets.

6. Vide an originating summons dated 20th April 2018 and filed on 22nd August 2018, the plaintiff sought determination of the following issues:

(1) Whether the respondents are in possession of unexplained assets pursuant to the provisions of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 as itemised hereunder in paragraph 3.

(2) Whether the properties listed in paragraph 3 herein below should be preserved pending the determination and or declaration on whether the said assets constitute unexplained assets pursuant to the provisions of Section 55 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

(3) Whether a declaration should issue that the under listed properties/money constitute unexplained assets pursuant to the provisions of Section 55 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

(a) Nairobi Block 110/317 Thome Estate in the name of Njegit Investments Limited.

(b) Kajiado/Kaputiei North/93107, Kitengela in the name of Njegit Investments Limited.

(c) Kabete/Kibichiko/2497, Kabete in the name of Thomas Gitau Njogu.

(d) Kabete/Kibichiko/2506, Kabete in the name of Njegit Investments Limited.

(e) Monies held in a/c no. 0240272120429 held in Equity Bank, OTC Branch.

(f) Monies held in a/c no.1180165861994 Equity Bank, Kasarani Branch.

(g) Monies held in a/c no. 0910197000407 Equity Bank, Ngara branch

(h) Monies held in a/c no. 0240101444652 Equity Bank, Harambee branch.

(i) Monies held in a/c no.0120100282619 Equity Bank, Tom Mboya branch.

(j) Monies held in a/c no. 01100092133600 Co-operative bank, Co-operative House branch.

(k) Monies held in a/c no. 01100003014200 Co-operative Bank, Zimmerman branch.

(l) Monies held in a/c no. 014000020914 Family Bank, Kariobangi branch.

(m) Monies held in a/c no. 041000014991 Family bank, Cargen House branch.

(n) Monies held in a/c no. 0758314197 Barclays Bank, Moi Avenue branch.

(o) KCL 350Z – Toyota Hilux;

(p) US Dollars, 3,500; and

(q) Kenya Shillings 8,223,050/=.

7. The application is premised on grounds that between the period 1st January 2016 and 31st August 2017, the 1st defendant deposited in various accounts a total sum of Ksh 111,681,931.98 inclusive of his salary amounting to Khs 1,893,414ry 2017.

8. That the plaintiff further established that during the same period, the 1st defendant acquired in the name of the 3rd defendant some landed properties namely; Kajiado/KaputieiNorth/93107, Nairobi Block 110/317 and Kabete/Kibichiko/2506. Further, that the 1st defendant started development on Kabete/Kibichiko/2497 held in his name. That all these properties valued at Kshs 89,600,000 amounted to unexplained assets. It was also alleged that the 3rd defendant proceeded to acquire motor vehicle KCL 350Z Toyota Hilux using funds that could not be accounted for.

9. Upon completion of investigations, the plaintiff issued a statutory notice to the 1st, 2nd and 3rd defendants, requesting them pursuant to the provisions of Section 26 and 55 of the ACECA to furnish the plaintiff with written statements enumerating their properties. They further sought documentation supporting how and when they were acquired. That in response, the 1st, 2nd and 3rd defendants through their letters dated 16th April 2018 declined to explain the said disproportion.

11. In support of the application, Catherine Ngari a forensic investigator working with the Commission, gave a detailed account of the assets that amounted to un explained wealth. She deponed that, the 1st defendant was a public officer who had worked in various financial departments since 1990 and through the influence of his office, he managed to acquire massive unexplained properties.

12. She gave a salary breakdown during the period between 7th January 2016 and 31st July 2017 when the 1st defendant was working as a Senior Accountant General earning a cumulative net salary amounting to Kshs 1,893,414 payable through his Family Bank Account No. 04100014991 at Cargen House.

13. She further averred that upon obtaining warrants to investigate bank accounts No. 0110092133600 and 01100003014200 at Co-operative Bank, 0758314197 at Barclays Bank, accounts No. 014000020914 and 041000014991 Family Bank, account No. 001029278834 Equity Bank and KCB Account No. 11344334812 held in the name of Kabatia and Co. Advocates, they discovered that the said accounts were conduits for acquisition and concealment of illicit wealth by the 1st defendant.

14. She further stated that on 23rd August 2017, she obtained a warrant to search the 1st defendant's residence at Marurui and his office at Harambee house from which she collected various documents and cash amounting to; USD 3,500 and Ksh 6,983,000 from his office and, Ksh 1,240,000 from his house. The amount of deposits made in each account for that period was summarised as below:

(1) Barclays Bank moi Avenue Account No.0758314197 in the 1st defendant's name Kshs 100,000.

(2) Co-operative Bank Co-operative house branch Acc. No. 01100092133600 in the 1st defendant's name Ksh 2,989,430.

(3) Equity Bank Account No. 1240101444652 in the 1st defendant's name Kshs 1,936,484.20.

(4) Family Bank account no.01400020914 Cargen house in the name of the 1st defendant Kshs 2,501,183.60 out of which 500,000 was unexplained.

(5) Equity bank Kasarani branch in Account no. 11801657861994 in the name of Teresia Njeri Gitau Kshs 4,412,931.

(6) Equity Bank Kasarani bank account no. 0910197000407 in the name of Teresia Njeri Gitau t/a Njetash enterprises Kshs 9,197,607.

(7) Equity Bank, Kasarani Branch account no.0120100282619 in the name of Teresia Njeri Gitau Kshs 1,239,000.

(8) Family Bank, Kariobangi Branch Account No. 41000014991 in the name of Teresia Njeri Gitau Ksh 388,209.73.

(9) Co-operative Bank Zimmerman branch Account No. 01100003014200 in the name of Teresia Njeri Gitau Ksh 59,500/=.

(10) Equity Bank Kasarani branch A/c No. 0240272120429 in the name of Njegit Investments Ltd Kshs78,150,000.

(11) Equity Bank corporate branch client account number 0010292 788 384 in the name of Kibatia and Company Advocates being deposits made by either the 3rd defendant through the 1st and 2nd defendants amounting to Ksh 25,000,000 less a transaction of Kshs 500,000/= made on 16/12/2016 which was not related to the defendants.

(12) Co-operative Bank Nairobi business centre branch account No. 01143232460900 in the name of Kibatia and Company Advocates credited with a sum of Kshs 9,600,000/=.

(13) KCB Bank Account KICC Branch Account No. 1134434812 in the name of Kibatia & Company Advocates credited with asum of Kshs 900,000/=.

(14) Co-operative Bank Kitengela Branch Account No. 01109198861600 in the name of Sompet Kanchori deposits made by the 3rd defendant amounting to Kshs 500,000/=.

16. That further investigations revealed that the 3rd defendant acquired Nairobi Block 110/317 valued at 40 million, Kajiado/Kaputiei North/93107 worth 26, million and Kabete/ Kibichiko/2506 worth 5 million between January 2016 and August 2017 all valued at Khs 71,600/=.

17. It was further deponed that during the same period, the 1st defendant started development of a property known as Kabete/Kibichiko/2497 worth 18,000,000/=. That upon analysing wealth declaration forms for 2018, the 1st defendant had indicated that he had sold Title No. Kajiado/Kaputiei/93107 for Kshs 55,000,000/= yet included it in his wealth declaration forms.

18. That in the wealth declaration forms, the Applicant had declared 40 million as loans from friends. In conclusion, it was stated that the total amount amassed by the defendants was during the period the 1st defendant took the position of Assistant Accountant General which was not commensurate with his well-known legitimate sources of income.

19. Contemporaneously filed with the summons is a notice of motion dated 22nd August 2018 seeking to restrain any transfer, disposal, sale or any dealings in respect of the subject properties pending hearing and determination of the suit. The application further sought to restrain any withdrawal or transfer of sums of money in the subject accounts pending hearing and determination of the suit. By consent, the notice of motion dated 22nd August 2018 was allowed pending hearing and determination of the suit.

Respondents' case

20. In response to the Originating Summons (O.S), the 1st defendant with authority from the 3rd defendant filed a replying affidavit sworn on 15th October 2018 denying the plaintiff's allegations of having unexplained assets arising out of corrupt conduct. He stated that he was a certified public accountant by profession who has risen through the ranks from the position of a junior accountant to his current position. That he has worked in various ministries and departments since 1990 when he joined civil service without facing any disciplinary issues.

21. He averred that sometime the year 2017, while working at the Ministry of Interior, Officers from EACC confronted him over embezzlement of public funds.That despite giving justifiable explanations on how he legitimately acquired his wealth, the officers did not stop there and instead they proceeded to freeze his accounts and those of his wife.

22. He further stated that the recovery of 3500 US Dollars from his Harambee office comprised of 2000USD given as a gift by a friend while on a trip to korea and 1500 USD was an imprest received from his employer while on the said trip. He averred that the 2000USD can be surrendered to the government and the balance of 1500 US Dollars being part of his imprest which he had been given while on the said trip but was unable to spend be returned to him.

23. Regarding Kshs6,893,000 found in the safe in his office at Harambee house, he explained that the same was official money held by the PS for confidential expenditure. He asserted that as the overall in-charge of cash liquidity in their Ministry, he had powers to request for buffer cash from time to time as need arose e.g emergency.

24. Turning onto Kshs 1,240,000 found in his residence at Marurui estate, he broke down the same as follows: Kshs 500,000/= was borrowed from a friend and received on 23rd August 2017 for purposes of paying his fundis at a construction site at Kibichiko ; Kshs 715,060 was said to be part of a loan advanced to him and his wife by Anne Ngururi their long time friend for purposes of boosting their retail business and, Kshs 24,940 was accumulated balances and fines from their welfare society known as Blessed Fourteen Investments.

25. He disputed the allegation that a total of Kshs 111,681,931.98 was deposited in their various accounts. According to him, between 1st January 2016 and 31st August 2017, only Ksh 91,206,254 was deposited in their said accounts.

26. In answer to the various deposits in their various accounts, the 1st defendant gave the breakdown as hereunder:

(1) Barclays Bank Moi Avenue in his name Account No. 0758314197: Kshs 100,000 deposit reflected was out of the cash realised from the sale of land L.R. No. Kajiado/Kaputiei North/93107.

(2) Co-operative Bank Co-operative house branch Account No. 01100092133600 held in his name, a total sum of Kshs 6,505,815 deposited therein was from rental income for Roysambu house. That out of that money, Ksks 300,000 was a loan received from Francis Mureithi for purposes of purchasing motor vehicle KCL 350Z and, a sum of Kshs 624,000 deposited on 22nd February 2017 was from his wife's retail business.

(3) Equity Bank harambee branch Account no. 0240101444652 held in his name, a total amount of Kshs 1,936,484 was deposited comprising of; monies from official /approved payment/allowances at Ksh 1,177, 557 and, Kshs 477,321 being net dividends from companies in which he has invested in shares like Equity and Kshs 200,000 being a loan acquired from a friend one Ann Ngururi.

(4) Family bank, Cargen house branch Account No. 01400002091 held in his name, asum totalling to Ksh 2,501,183 was deposited and broken down into; Ksh 2,001,183 as his aggregate salary; Ksh 500,000/= deposit made on 30th November 2016 was a drawing from Teresia's family businesses.

(5) Equity bank Kasarani branch in the name of Teresia Gitau t/a Wangmug Enterprises A/C No. 1180657861914 a total sum amounting to Kshs 4,412.931 was deposited and explained as follows; Ksh 312,931 being payment received for supply of goods to the Ministry of Industrialization on supply of procurement materials and, Kshs 4,000,100 deposited on various dates between 10th July to 2nd August 2017 being monies obtained as a friendly loan from Ann Ngururi.

(6) Equity Bank Kasarani branch Teresia Njeri Gitau t/a Njetash Enterprises A/C No. 0910197000407 funds amounting to Kshs 9,197,607 was broken into: Kshs 515,780 deposits made between 3rd June 2010 and 8th November 2016 being rent from individual tenants and, Kshs 835,434, was rent deposits through agents; Kshs5,150,000 deposited on various periods was friendly loan from Anne Ngururi and, Kshs 540,517 was deposit from supply of procurement materials under access to Government procurement opportunities.

(7) Equity bank Kasarani branch Teresia Njeri Gitau A/C No. 0120100282619 amounts totalling to Kshs 1,229,000 was explained as ; deposits from Teresiah's family retail business, loans from self help groups and a sum of Kshs 650,000 made on 29th March 2017 as money received from Mwangi Kiarie on sale of motor vehicle.

(8) Family bank Kariobangi branch Teresia Njeri Gitau Account No. 4100001991 funds amounting to Kshs 388,209 was also classified as deposits from Teresiah's Family retail business and interest credited from banks.

(9) Co-operative bank, Zimmerman branch in the name of Teresia Njeri Gitau Account No. 01100003014200 a sum of money amounting to Ksh 59,500/= was financing from Teresia's family retail business.

(10) Equity Bank, Kasarani branch Njegit Investment Limited Account No. 0240272120429 a total sum of Kshs 28,150,000 was allegedly transacted as follows: Kshs 5,100,000 deposited on various dates by Francis Mureithi as a friendly loan; Kshs 19,400,000/= received from Francis Mureithi upon sale of land and, Kshs 3,650,000 as soft loan received on various dates from Ann Ngururi.

(11) Equity Bank, Corporate branch (client account) held by Kibatia & Company Advocates A/c No. 0010292788384 had funds broken into; Kshs 6,200,000 as soft loan received from Francis Mureithi; Kshs 200,000/= a deposit made on 6th March 2016 from Teresia's family retail business; Ksh 13,400,000 proceeds from the sale of land to Francis Mureithi and; Kshs 6,100,000 being part of a soft loan received from Ann Ngururi.

(12) Co-operative Bank, Nairobi Business Centre branch Kibatia and Co. advocates A/C No. 01143232460900 an amount of Kshs 8,400,000 was made and the same explained as: Kshs 7,500,000 loan received from Francis Mureithi and Kshs 900,000/= deposited on 3rd March 2017 as drawing from Teresiah's family business.

(13) KCB, KICC Branch Kibatia and Company Advocates A/C No 11314434812 a sum amounting to Kshs 900,000/= was financing as friendly loan from Francis Mureithi.

(14) Co-operative Bank Kitengela branch in the name of Sompet Kanchori A/C No 01109198861600 funds totalling to Ksh 500,000 deposited on 8th February 2017 was described as money from Teresiah's Family business. That the total deposits for all the enumerated accounts was Kshs 91,206,254 and not Kshs 111 million plus claimed by the plaintiff.

27. Regarding LR Nairobi Block 110/317 Thome Estate, it was allegedly acquired on 30th May 2017 at a cost of Kshs 27 million and not Kshs 40 million as claimed by the commission. That Njegit investments Ltd acquired land reference Kajiado/Kaputei North/93107 on 29th November 2016 at a cost of Kshs 26,600,000. Concerning LR. Kabete/Kibichiko/2506, he stated that it was acquired on 7th May 2009 and not 22nd August 2017. That the total cost of the above landed property was Kshs 53,600,000 and not Kshs 71,000,000 as claimed by the plaintiff.

28. Regarding development on the L.R. Kabete/Kibichiko/2494, the 1st defendant stated that, the development started the year 2009 immediately it was acquired and that it was developed through loans, loans from friends and building materials from other sites.

29. He contended that, most of those loans acquired have not been repaid as the accounts have been frozen. He further stated that between 1st January 2015 to 31st October 2017, he received two friendly loans totalling to Kshs 40,000,000/= received in two tranches. That the 1st 20 million loan was repaid using proceeds from the sale of Kajiado/Kaputiei/North/93107. To support this claim, he attached sale agreements marked as annexture JGN8.

30. To serve as proof that he had rental income, he attached tenancy agreements and management forms marked JGN9. He acknowledged that in March 2018 he received a notice seeking an explanation on how he had acquired the property.

31. On her part, the 2nd defendant denied the plaintiff's claim through a replying affidavit sworn on 15th October 2018. She acknowledged proprietorship of the 4th and 5th defendants and that she was a wife to the 1st defendant. She stated that she is a business lady operating a retail shop (stall) within Uhuru market where she sells raw materials for making bags and clothes.

32. She averred that sometime the year 2000 she also started rearing chicken, pigs and dairy farming with 5 grade cows. She further claimed to have also registered a business name (Njetash) but the business did not pick. That out of her layers and broilers chicken, she started supplying eggs and chicken meat to various hotels and open markets among them Wangige and Thika .

33. That out of her sales, she could make Kshs15,000/= per day. She averred that she stopped farming sometime 2009 when they moved to Marurui estate after the neighbours complained of noise from livestock and chicken.

34. Consequently, she started a beauty shop along Thika road. That the year 2011, they decided to construct self contained single rooms at Kasarani from which tenants started depositing rent straight into account No. 0910197000407 Equity Bank in her name trading as Njetash Enterprises.

35. She further averred that in the year 2015, she registered Wangmug abusiness name for purposes of procurement and supplies. That as a consequence, she won a tender in the year 2016 to supply 15 tonners to the Ministry of Industrialization from which she received an invoice of Kshs 330,000 (JNG 7)

Hearing

36. This matter commenced for hearing before Justice Ongudi who heard the plaintiff's case before she got transferred. Parties agreed to proceed with the case before me from where it had reached.

37. In his testimony, George Wainaina Mungai(pw1) Chief cashier who was at the material time attached to the Ministry of Interior adopted the content of his affidavit sworn on 18th September 2018. He told the court that during that period, he worked with the 1st defendant who was his boss. He further stated that, he used to keep cash in the office. That these cash in other words known as the 'buffer cash' was for operations and emergencies. He produced an acknowledgment note marked PEXB1 and PEXB2 for a sum of Kshs 6,000,000 and Kshs 9,017,000 respectively showing that on 17th August 2017 and 2nd August 2017, the 1st defendant received the said amount for the foresaid purposes.

38. On cross-examination, he stated that the buffer cash was an informal arrangement between him and the 1st defendant his boss. He further told the court on cross-examination that the money was meant to make confidential payments authorized by the PS.

39. PW2 Catherine Ngari a Forensic Investigator with EACC adopted the averments contained in her affidavit and supplementary affidavit in support of the application. The witness took the court through various deposits and withdrawals as analysed herein above.

40. She stated that during her investigations, she found a sale agreement for the property known as L.R. NRB/Block 110/317 which was bought at Kshs 27 million but with no transfer done. That she curiously found a sale agreement for the sale of L.R. Kajiado/Kaputiei North/93107 registered in the name of Njegit Investment.That Njegit bought it at 26 million and purported to have sold it to Francis Wambugu Mureithi at 55 million after 6 months. That they also discovered LR Ewaso Nyiro Block 4/127 which was bought on 6th May 2016 at Kshs 770,000 but the title was still with the seller.

42. That from the flow of money in various accounts with minimal withdraws and the inflated sale of property, it was clear that the defendants were involved in money laundering. She deponed that in the wealth declaration forms for the year 2016, the 1st defendant did not declare the property.

42. In order to verify whether the respondents ever paid any tax, she found that the 2nd and 3rd respondents had no tax returns. As to the amount deposited with Kibatia and Co. Advocates amounting to Kshs 35,400,000, he was able to explain to their satisfaction.

43. On his part, the 1st defendant (DW2) literally adopted the averments contained in his replying affidavit and the annextures thereto. He stated that the money recovered from his office i.e 2000 US Dollars and Kshs 6,893,000 was office money to which he had no claim. He however claimed 1500 USA Dollars on account of being his official imprest given to himwhen he travelled to Korea.

44. He admitted that in the year 2016-2017, he bought land in Kitengela and Thome at 26 million and 27 million respectively. He further stated that the source of the money (Kshs 20million) which he used to buy Thome property was borrowed from a friend one Francis Mureithi which he recovered from the sale of Kitengela plot to him.

45. He also stated that his wife *(2nd defendant)* depended entirely on business and rent from Roysambu and Kasarani houses. It was his evidence that he also depended on loans and income from business. Touching on Kshs 1,240,000/= recovered from his house, he claimed that the same was personal money. He denied ever stealing from his employer or ever engaging in any corrupt activities.

46. DW3 Teresia Njeri Gitau to some extent corroborated her husband's testimony. As part of her evidence, she adopted her affidavit sworn on 15th October 2018 challenging the suit. She also claimed to have borrowed 20 million from her friend Ann Wathatu Ngururi (DW1) for purposes of acquiring Thome house.

47. DW1 Anne Wathatu Ngururi, a family friend to the 1st and 2nd defendants adopted her affidavit sworn on 3rd December 2018 as her testimony. She stated that she lent the Gitau's 20 million in three instalments of 5 million, 5 million and 10 million. That the loan was to be refundable after one year with 2 million interest.

48. On being asked the source of the money, she claimed that it was out of rent from which she gets over 10 million per year and about 2 to 3 million from her supermarket business.

49. DW4 Francis Mureithi, a contractor and businessman dealing with sale of sugar, adopted the averments contained in his affidavit sworn on 3rd December 2018 in which he confirmed lending 20 million to the 1st defendant and later, bought Kitengela plot from him at 55 million. He claimed that he has not been refunded his money to date.

Submissions

Plaintiff's submissions

50. The plaintiff filed its submissions on 7th June 2019. M/s Maina appearing for the plaintiff basically restated the plaintiff's case and alluded to the legal principles governing asset recovery. She submitted on three issues namely:

(i) Whether the defendants are in possession of un explained assets.

(ii) Whether a declaration should issue to the effect that the subject properties/money constitute unexplained assets pursuant to Section 55 of ACECA.

(iii) Whether the defendants should be ordered to forfeit 111,681,931 to the government being the cumulative unexplained deposits to various accounts.

51. M/s Maina submitted that the breakdown of deposits in the defendant's 14 accounts revealed that deposits were made in round figures at multiple times within a single day as illustrated in paragraph 8 of Catherine Ngari's supplementary affidavit sworn on 31st October 2018. Learned counsel further submitted that the 1st defendant did not render any explanation to justify possession of 1500 USD found in his office and Ksh 1,240,050 in his house. That the 3rd defendant was conveniently incorporated to assist in money laundering.

52. Counsel further submitted that, from the 1st defendant's wealth declaration forms made on 29th January 2018, he had indicated that his gross salary for two years was Kshs 3,772,639, gross rent Kshs 3,000,000/=, dividends Khs 300,000, sale of motor vehicle KBJ 080M and KBZ 584J at Kshs 1,600,000 coming to a total of Kshs 8,672,639 which is way below the accumulated wealth of over 111 million. It was further submitted that the 1st defendant only declared tax returns for his salary thus leaving the rest of the properties out.

53. That rental income tax returns were never declared at all. That the high successive deposits in her bank accounts do not have sufficient evidence as to their source. Learned counsel questioned the genuineness of over 40 million friendly cash loans without collateral nor evidence to prove the source of this money by the lenders.

53. It was further submitted that a property known as Kajiado/Kitengela/Kaputiei North/93107 allegedly bought by the 1st defendant vide sale agreement of 29th November 2016 and purportedly sold to DW4 at 55 million vide sale agreement dated 17th April 2017 (5 months later) could not have made such huge profit.

54. Ms Maina argued that the plaintiff's role is to prove on a balance of probability that the assets acquired constitutes unexplained property through corrupt conduct and the burden will shift to the respondent to justify possession. That proof of any element of criminal conduct was not mandatory. To support this position, counsel made reference to the decision in the case of the **Director of Assets Recovery Agency and Ors, R (on the application of) V Green and Ors (2005) EWHC 3168, UK Queen's Bench** where the court stated that the Director need not allege commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct in return for how much the property was obtained.

55. Counsel further made reference to a South African case in **National Director Public Prosecutions (NDPP) v. R. O. Cook (Properties) Ltd Cases no 260/03,666/02 and111/03** where the Supreme Court of South Africa found that Chapter 6 provides for forfeiture where it is established on a balance of probabilities that a property has been used to commit an offence or is proceeds of unlawful activities even when no criminal proceedings are pending.

56. Further reference was made to the holding in the case of **ACEC Miscellaneous 5 of 2016 KACC v Stanley Mombo Amuti** where the H.Court found that suits of asset recovery are non-conviction based. She also quoted the decision in the case of **Kenya Anti-Corruption Commission v James Mwathethe Mulewa & Another [2017] eKLR** wherein the court explained what constitutes unexplained property as otherwise assets acquired through corrupt conduct.

Defendants' Submissions

57. The firm of Kibatia appearing for the defendants filed his submissions on 10th July 2019 reiterating the defendants' response to the plaintiff's claim vide their various affidavits filed in court. Learned counsel broke down issues for determination into 4:

(1) whether the plaintiff have reasonable suspicion that the 1st defendant had committed any corruption or economic crime.

(2) whether the plaintiff did investigate all known sources of income/funds held by the defendants"

(3) Whether the explanations given by the defendants are valid/reasonable.

(4) whether the originating summons is incompetent for lack of merit.

58. It was Mr. Kibatia's submission that, the allegations preceding the filing of the O.S. claiming that the 1st defendant had engaged in embezzlement of public funds at the Interior Ministry and that he had awarded or influenced award of tenders to friends and his kins was not proved. Learned counsel contended that there was no evidence adduced to prove that any money was lost from the Ministry where the 1st defendant was working nor was there proof that he had exerted any influence in the award of tenders.

59. Counsel further submitted that after serving notice upon the respondents under Section 26 of ACECA, the plaintiff did not bother to further verify on the authenticity of the sources of income as explained. Regarding failure to prove the source of 1500 US Dollars, the learned counsel submitted that it was not possible to prove given that all necessary supporting documents were confiscated from the 1st defendant's house and were never returned.

60. Regarding the incompetent O.Summons, counsel submitted that it was filed without any reasonable suspicion that indeed the assets in question constituted unexplained assets. Learned counsel referred the court to **Amuti Mombo** case quoted herein above describing what constitutes unexplained property. That property known as Kabete/Kibichiko/2506 was acquired the year 2009 which is outside the period under investigation. Counsel submitted that the plaintiff did not address itself on LR Kabete/Kibichiko/2497

61. Regarding the issue of friendly loans, Kibatia submitted that the same was recognized by the Court of Appeal in **Amuti Mombo** case above quoted**.** Counsel urged that the plaintiff had not proved its case on a balance of probability as required under the law and the holding in **Petition No. 7 of 2017 Jimmy Mutuku Kiamba and 3 others vs Ethics and Anti-Corruption Commission and 2 others.**

Analysis and determination

62. I have considered the pleadings herein, testimonies by both the plaintiff and defendants. I have equally considered written and oral submissions by both counsel. Issues that crystallize for determination are:

(i) Whether the plaintiff has proved to the required degree that the subject assets/funds constitute or amount to unexplained properties/assets in accordance with section of 55 of ACECA.

(ii) If the answer to (i) above is yes, whether the court should forfeit them to the State.

Legal principles governing forfeiture of unexplained assets

63. The salient legal provisions governing aspects of asset recovery can basically be traced into the Constitution and Statutes among them; Anti-corruption and Economic Crimes Act (ACECA), Ethics and Anti-Corruption Commission Act (EACCA) and judicial precedents from both within and outside jurisdiction.

64. Constitutionally, the Ethics and Anti-Corruption Commission (EACC) is a creature of **Article 79 and 248** and its mandate as a commission prescribed under Article 252 of the Constitution. Article 252 provides general functions and powers of commissions as hereunder–

“(1) Each commission, and each holder of an independent office—

(a) may conduct investigations on its own initiative or on a complaint made by a member of the public;

(b) has the powers necessary for conciliation, mediation and negotiation;

(c) shall recruit its own staff; and

(d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.”

65. Besides the powers conferred by Article 252 of the Constitution, the Anti-Corruption Commission has additional investigative powers as outlined under Section 11 (1)(j) of the EACCA which includes;

“to institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.”

66. The instant suit herein has been filed pursuant to Section 55 of the ACECA seeking forfeiture of several properties allegedly acquired through corrupt conduct or simply unexplained wealth which exceeds the known legitimate sources of income of the 1st defendant.

67. What constitutes unexplained assets" Section 2 of the ACECA defines unexplained assets as follows:

“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.”

68. Section 55 of the ACECA does provide for forfeiture of unexplained assets. This provision which is the bedrock of forfeiture proceedings of unexplained wealth or property/assets suspected reasonably to have been acquired through corrupt conduct thus provide as follows:

Sub-section 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.**

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

Sub-section (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."

69. It is therefore incumbent upon the plaintiff to prove its allegations or case on a balance of probability. To that extent, it follows that Institution of a suit is not a matter of course. The commission is duty bound to discharge this burden before it can shift to the defendant. See **Kenya Anti-Corruption Commission v Stanley Mombo Amuti, Anti-Corruption and Economic Crimes Court Miscellaneous Application no. 5/2016 High Court Nairobi (2017) eKLR** where the court held that:

"The burden of proof lies with the plaintiff herein to prove the allegations that the defendant has unexplained assets and proof is above a balance of probability."

70. It is apparent from Section 55 of ACECA that the court is clothed with wide discretionary powers to determine on whether the Commission has tendered sufficient evidence to prove its case on a balance of probability so as to enable the court make a just conclusion or determination that the defendant indeed has unexplained assets. This proposition was espoused by the Court of Appeal in **Stanley Mombo Amuti vs Kenya Anti-Corruption Commission Civil Appeal No. 184/2018** which judgment was delivered on 19th May 2019 where the court stated at paragraph [58] that:

"In the instant matter, under *Section 55 (5)* and *(6)* of the ACECA, the trial court has discretion to decide if the Commission has tendered evidence on a balance of probability establishing the appellant had unexplained assets. In addition, the court had discretion to let the appellant satisfactorily explain the source of his assets."

71. According to the plaintiff, the Commission got some information that the defendant who was at the material time to this suit working as a Senior Assistant Accountant General had engaged in embezzling and or mismanaging public funds by virtue of his position. That the said investigations revealed that his salary was about Kshs1,893,414.35 for the period in issue (1st January 2016 to 31st July 2017). That after obtaining search warrants and inspection of accounts orders from the magistrates' court, it proceeded to obtain preservation orders which later culminated to issuance of notices to explain sources of his income.

72. Is the defendant's wealth disproportionate to his legitimate sources of income" To bring into perspective the alleged excess wealth, I will address each item separately as hereunder:

(i) US Dollars 3,500 found in the defendant's office at Harambee house.

(ii) Kshs 6,983,000 found in the defendant's office at Harambee house.

(iii) Kshs 1,240,050 found in the defendant's residence at Marurui.

73. Pursuant to a search warrant order of the court dated 23rd August 2017, the defendant's residence and office were searched by the investigating officer (See annexture GN8). From his office, a sum of 3500 US Dollars was seized. According to the plaintiff, this money could not be accounted for. On the other hand, the defendant said, 2000 USD was a gift given to him when on official trip to Korea. That the balance of 1500 USD was part of his official imprest which he did not spend while in Korea.

74. The defendant admitted that he should have declared the gift and that the government is at liberty to take the same. As to the alleged imprest, he admitted that he had no proof to support his claim as the EACC officers had carried away all his documents. However, an imprest is an official document a copy of which is ordinarily retained in the surrender office. He should have obtained copies to show that he went on a trip to Korea and that he was given an imprest.

75. In the absence of any evidence to support his claim, it will only be logical to conclude that he is unable to convince the court that he had the money from a legitimate source of income in this case the imprest. In the **Stanley Mombo Amuti case v KACC(supra)** the Court of Appeal at paragraph [79] clearly stated that;

"... 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 ....".

76. The defendant having not rendered any convincing explanation with proof that the 1500 US Dollars was an official imprest, I am inclined to order that, the entire USD 3500 be forfeited to State as unexplained property.

77. Regarding Kshs 6,983,000/=, the respondent readily admitted that the amount was government money which he officially had and he had no claim over the same. Accordingly, the whole amount is forfeited to the state.

78. As to Kshs 1,240,050 recovered from the house, the defendant claimed the whole amount as personal property. At paragraph 21 of his replying affidavit, he gave a breakdown of the money as follows; Kshs 500,000/= as money borrowed from a friend and received on 23rd August 2017 for payment of fundi's then constructing a house for him at Kibichiko site; Ksh 715,060 as part of a loan given to his wife by one Ann Ngururi and, Ksh 24,940 as accumulated balances and fines from defaulters of their welfare. He attached a list of members to the group with balances of their contribution and fines *(annexture.JGN 7 in support of the replying affidavit).*

79. However, from the affidavit of Ann Wathatu Ngururi sworn on 3rd December 2018, she did not talk of any money lent to the 1st defendant's wife around the time the money was received on 23rd August 2017. Equally, Teresia his wife swore a replying affidavit on 15th October 2018. She did not mention anything about the Kshs1,240,050 and that part of that money, Ksh 715,060 was a loan given to her by her friend Ann Ngururi

80. It therefore implies that the 1st defendant was merely creating a story that Kshs 715,060 was from his wife being a loan from Ann Ngururi. As to Kshs 500,000 being a loan from a friend, he did not mention the name of the friend nor was the friend called as witness.

80. Regarding Kshs 24,940 being money from their self help group, he attempted to explain the source of that money by way of documentary evidence which was not at all rebutted by the plaintiff. To that extent, I find that explanation convincing and plausible. Accordingly, out of Kshs 1,240,000/=, only 24,940 has been satisfactorily explained. The balance of Ksh 1,215,060 has not been justified hence qualifies to be unexplained property and therefore forfeited to the State. Accordingly, Kshs 24,940 shall be refunded to the defendant after recovering the forfeited amount.

(iv) Motor vehicle KCL 350Z Toyota Hilux

81. Concerning this motor vehicle, the defendant averred at paragraph 23 page 6 of his replying affidavit that the source of the money to purchase it was out of a deposit of Kshs 624,000 made up of Khs324,000 drawn out of his wife's retail business and, Kshs 300,000/= being money from a friend known as Francis Mureithi. Francis Mureithi did not corroborate this allegation in his affidavit nor testimony. Equally, his wife did not state as such in her sworn replying affidavit. With that gap, the 1st defendant is not able to justify the source of the money he claimed was deposited in account No. 01100092133600 Co-operative Bank, Co-operative House by Papera traders on 22nd February 2017. Contrary to this explanation, in his response to the notice dated 16th April 2019 by the

commission, he stated that the full amount was a friendly loan. This is a contradiction to the explanation given in the replying affidavit.

82. In the absence of any convincing explanation as to the source of the deposits of Kshs 624,000/=, I am left with no option but to declare it an unexplained asset which I hereby forfeit to the State.

(v) Nairobi Block 110/317 Thome Estate in the name of Njegit Investments Ltd.

83. This property estimated to be valued at 40 million according to the commission, was allegedly acquired during the material time out of illegitimate sources of income. The 1st and 2nd defendant do not deny that the property is theirs acquired on 30th May 2017. They only claimed that the property is worth 27 million and not 40 million.

84. According to the 2nd defendant, part of the money used to buy this property was a friendly loan of 20 million given sometime 2017 by Ann Ngururi. She stated at paragraph 23 of her replying affidavit that she deposited the same amount with Kibatia Advocates. In her testimony and affidavit filed on 3rd December 2018, Ann stated that she gave Teresia a friendly loan of 20 million in April 2017 in three instalments of 5 million, 5 million and 10 million.

85. Contrary to the 2nd defendant's claim that she deposited the 20 million with Kibatia Advocate, there is not a single entry in Kibatia's client's account reflecting on any deposit to the tune of 20 million. All deposits in Kibatia's account are variously made in figures below 1 million probably to avoid detection from Central Bank for further questioning.

86. According to the 2nd defendant's testimony on cross-examination by M/s Maina, she claimed that all the monies Miss Nguriri gave, was kept in cash in her house. This is contrary to her averment at para 23 of her replying affidavit that she deposited the money with Kibatia Advocate and also in some family account. She did not even specify how much was deposited in their family accounts and in which account.

87. M/s Maina submitted that there was no proof that Ann Ngururi had such kind of money to give without collateral. Ann claimed that she got money from her rental income and supermarket business which earns over 10 million per year and 2 to 3 million per month respectively.

88. How then could she raise over 10 million in one month to be able to lend out to a friend. She did not show any congent proof that she has the capacity to lend such kind of money. Although not a litigant, there has to be a basis upon which one can indeed be convinced that the person claiming to be lending money generously in the manner Ann did was indeed not a pauper.

89. Besides, the 1st defendant said in his evidence in chief that the Thome plot was bought on 30th May 2017 at 27 million. However, Ann said that she gave the 2nd defendant the first instalment on 2nd April 2017. Why was the money given in advance"

90. Be that as it may, there is no explanation given as to the source of the 7 million which together with 20 million bought the house at 27 million.

90. From the above cited contradictions, it is apparent that the defendants are unable to justify the source of the money used to acquire the property at Thome estate. The borrowing element in my opinion is a fertile imagination which cannot believed even remotely.

(vi) Kajiado/Kaputiei North/93107

91. This property is estimated by the plaintiff as valued at 26 million and that it was acquired on 30th May 2017 by Njegit Co. The defendant claimed that he bought the property in Njegit's name at 26 million on 29th November 2016. However, in his replying affidavit at paragraph 32, he stated that the property was acquired between 1st November 2015 and 31st August 2017 using a friendly loan of 20 million from Francis Mureithi and the balance from his retail business.

92. It was allegedly sold to Mureithi again at 55 million five months after it was bought. That Mureithi paid 55 million less his 20

million loan he had given to the 1st respondent. As proof of the loan advanced, the 1st defendant attached an agreement for advance of the money from Mureithi dated 24th November 2016.

93. It is not enough to merely claim that a friend did lend him a friendly loan of that magnitude without any condition attached. There must be proof that the lending friend had the capacity to loan. Mureithi who appears in several bank accounts operated by the defendants as their perennial lender did not even attempt to show that he is a person of means and that he was capable and did raise the 20 million loan. Although he claimed to be a contractor and businessman operating a godown, there was no evidence say bank statements to show that he was capable of lending such huge sums of money at close intervals. The casual claim that a friend lent one money without establishing or proving the friend's ability is untenable and no forfeiture of unexplained assets will ever be realized if such explanations are to be entertained casually.

94. That is not to say that friends cannot lend money. One must go an extra mile and establish the ability of that friend in lending the amount of money in question. According to the sale agreement attached by the plaintiff to the affidavit in support, Njegit sold the Kajiado land on the 17th April 2017 after buying it on 16th November 2016 translating to a period of 5months earlier.

95. It is a contradiction that the 1st defendant borrowed 20 million from Mureithi on 24th November 2016 to buy Kajiado plot which he bought on 29th November 2016 at 26 million and later resold it to Mureithi on 17th April 2107 at 55 million. This explanation is rather ridiculous to any ordinary person. Although I am not a market expert and land valuer, it is unbelievable and the only logical conclusion is that the defendants were engaged in money laundering.

96. The explanation given sounds more of fantasy than fiction considering that his salary for the two years was hardly 2million which money was not even spent on this project. It is my holding that the defendants have not satisfactorily explained how they acquired the property and the same is hereby declared as unexplained asset only to the extent of the money alleged to have been used to acquire it and therefore forfeited to the state.

(vii) Kabete/Kibichiko/2497 in the name of the 1st defendant

97. This property valued at K18,000 is not one of the assets sought to be investigated as per the plaintiff's notice of 19th March 2018. However, it is one of the assets listed in the wealth declaration forms of the 1st defendant. The defendant stated that he bought this property the year 2009 and that he has been developing it over time using loans from friends, credit facilities and remains of construction materials from other sites.

98. From the search attached to the O.Summons, the above property was registered in the 1st defendant's name on 17th April 2009. This is totally outside the period under investigation. Regarding development which was done in bits since 2009, it is possible that one can manage bit by bit without necessarily engaging in corrupt conduct. In my view, the explanation given by the defendant is logical and in the circumstances, I hold that the plaintiff has not proved its case on a balance of probability in respect to this property.

Viii Kibichiko/Kabete/2506

99. According to the plaintiff, it was acquired during the period under investigation. However, the defendant claimed it was bought on 7th May 2009. From the title deed attached by the plaintiff, it was registered in the name of the 1st defendant on 23rd July 2009. This is also outside the period under investigation. In the **Stanley Mombo Amuti v KACC** Court of Appeal case at paragraph 46, the court had this to say –

"We have considered the appellant's submissions that the sum of Ksh 15,500 was neither enumerated nor indicated in the notice filed 9th July 2008. In our view, the appellant was required to explain the source of the cash deposit in his various bank accounts for the period under investigation."

100. Guided by this authority, I do not find any tangible claim over this property and the same does not constitute unexplained property.

ix– Account No. 0758314197 Barclays Bank Moi Avenue in the name of Njogu Thomas

101. A deposit of Kshs 100,000 was made on 13th July 2017 and its source questioned. In response, the defendant claimed the money was part of the proceeds received after selling Kajiado/Kaputiei North/93107 to Francis Muureithi . That the aim was to maintain the account active. As stated in his testimony, the said property was sold on 17th April 2017 to Mureithi. It is possible this money may have been from that source. There is nothing to show that he could not have raised that money from the said source.

X – Account No. 01100092133600 Co-operative Bank and Co-operative house in the name of Njogu Thomas

102. This account has deposits totalling to Kshs 2,989,430 for the period 12th January 2016 to 14th August 2018. From the bank statement and financial breakdown, there are regular deposits ranging between Kshs 250,000 to Kshs 395,000 save for one deposit at Kshs 32,52 0. In his response, the defendant explained that all the money was from rental income. He attached a property management agreement between him and metropolis estate managers dated 1st April, 2011 (see Annexture TGNG9). He also attached samples of tenancy agreements as proof that he had tenants. The plaintiff did not challenge this aspect. Although the defendant did not attach any tax returns for rental income, he disclosed that he had rental houses at Roysambu and Kasarani which properties have not been the subject of investigation. The Plaintiff did not go beyond generation and production of bank statements in terms of deposits to disapprove the defendant's claim that the said money was out of rent.

103. I take judicial notice that not every landlord is paying rental tax and failure to pay tax does not mean that there are no rental houses. For those reasons, the plaintiff has failed to prove that the money in that account was not from rental income which in any event is duly declared in the November 2018 wealth declaration form. That should be left to rest and the amount therein cannot be forfeited.

X – Equity Bank Harambee Branch: Thomas Gitau Njogu Account No. 1240101444652

104. The total amount in this account for the relevant period is Kshs1,936,484.20. Most of the transactions in this account are funds from various government departments through RTGS/RRTS. Majority of these deposits are from the Ministry of Industrialization and dividends paid by cheque by various companies where the 1st defendant is a shareholder. The 1st defendant defended these deposits stating that they were allowances and official payments duly approved by his employer. I do not find any good reason why the plaintiff was questioning deposits that are clear on the face of it. Consequently, I do not find anything unexplained in this account.

XI-Family Bank Cargen House Branch: Thomas Gitau Njogu A/c 014000020914

104. The amount totalling to Kshs 2,501,183.60 is clearly reflected by both the plaintiff and defendant as a salary account. There is nothing unexplained in this account.

XII – Equity Bank Kasarani Branch A/c No. 11801657861994 in the name of Teresia Njeri trading as Wangmug enterprises.

105. In this account, deposits of Kshs 4,412,931 were made in large quantities ranging between Kshs 250,000 and Kshs 300,000 all at Ngara Equity branch. Alook at the 1st defendant's replying affidavit at page 12, reveals that almost all these deposits were monies financed from friendly borrowing particularly from Ann Ngururi. According to the breakdown given by the 1st defendant, the deposits claimed to be received as friendly loans from Ann Ngururi were in a block figure of Kshs 300,000 for each of the following days; 10th July 2017, 11th July 2017, 12th July 2017, 13th July 2017, 14th July 2017, 18th July 2017, 19th July 2017, 20th July 2017, 21st July 2017, 24th July 2017, 31st July 2017.

106. That she also received Kshs 250,000 each on 29th July 2017 and 31st July 2017. Save for the sum of Kshs 312,932 paid by the Ministry of Industrialization for the supply of goods by Teresia which is not disputed, the rest of the money is alleged to have been borrowed from one person in this case Ann Ngururi.

106. However, Ann Ngururi in her aforesaid affidavit and testimony did not make any reference to these deposits or as having lent the money as claimed. Equally, Teresia did not make reference to this money in her response.

107. It sounds funny that an individual in this case Ann Ngururi had ready money to lend one person sometimes 13 times a month without any conditions attached. It is not lost in my mind that, she is the same person who claimed to have lent 20 million to the defendants in April, May and June 2017 to the 2nd defendant yet her monthly income from the supermarket is 2 million per month and rent 10 million per annum translating to almost Kshs 120, 000 per month.

108. In the ordinary course of doing business, an individual may lend a friend money but not in the exaggerated manner being displayed here. I do not buy this camouflaged kind of imaginary borrowing with the obvious intention of trying to clean some illicit money. Accordingly, it is only Ksh 312,931 that has been explained to my satisfaction and the balance of Ksh 4,100,000 is liable to forfeiture to the State.

XIII – Equity Bank Kasarani Teresia Njeri Gitau t/a Njetash Enterprises A/c No. 0910197000407

109. The total amount in this account is Kshs 9,197,607. In response, he associated the money in question to rental income and borrowing from a friend Ann Ngururi and a sum of Kshs 318,620 and Kshs 540,517 being money paid through RTS by the Ministry of Industrialization for supply of goods. The rental income is reflected in small amounts. As stated above in respect to the rent account, the plaintiff did not investigate the rental houses to ascertain whether the houses in Roysambu and Kasarani were capable of generating the kind of rent alleged. The plaintiff having given an explanation which is not rebutted, I will hold that some of the money indicated as rental income is correct.

110. However, in the same account, there are huge deposits indicated as friendly loans from Ann Ngururi brokendown as follows:

12th July 2017 -Ksh350,000, 13th July 2017 - Kshs 300,000, 14th July 2017 – Kshs 300,000, 18th July 2017 – Kshs 300,000, 19th July 2017 – Kshs 350,000, Kshs 20th July 2017 – Kshs 400,000, 21st July 2017 – Kshs 350,000, 24th July 2017 – Kshs 400,000, 25th July 2017 – Kshs 500,000, 29th July 201– Kshs 450,000, 31st July 2017 – Kshs 400,000, 2nd August 2017 – Kshs 350,000

111. As stated earlier, Ann Ngururi seems to be a permanent character in lending money for every monetary activity undertaken by the defendants. Where was she getting this huge sums of money from to freely lend to a friend almost ten times per month" It is not logical in the current economy that an individual could be keeping money waiting to be lent to a friend or friends for that matter. This is a statement which is purely cooked to sanctify the impossible. Again, Ann Ngururi in her affidavit and testimony, did not make any reference to this kind of lending. Equally, Teresia in her replying affidavit and testimony did not make reference to alleged loans.

112. Accordingly, the money claimed to be loans from Ann Ngururi is unexplained and the same amounting to Kshs 4,300,000 shall be forfeited to the State.

XV – Equity Bank, Kasarani Branch Account No. 0120100282619 Teresia Njeri Gitau

113. The total amount in this account is Kshs1,239,000. According to the 1st defendant, the money is from the family business managed by Teresia and self help group loan. The amount is in small sums evenly spread thus justified from various businesses which Teresia was engaged in and which is not disputed. However, there is a deposit of 650,000/= which is said to be from Peter Mwangi Kiarie for sale of motor vehicle. Unfortunately, Peter Mwangi did not swear any affidavit nor testify. There is no sale agreement attached. That amount is left hanging with no justification. Accordingly, that money is forfeited to the State.

XVI – Family Bank, Kariobangi branch Bank Account No. 4100014991 in the name of Teresia Njeri

114. The amount in this account is totalling to Kshs388,209. The 1st defendant explained that the money was from Teresia’s retail business. The amount reflected is in small amounts spread evenly indicative of retail business which has not been challenged. I am satisfied with the explanation given hence the same does not amount to unexplained assets.

XVII – Co-operative Bank Zimmerman Branch: Teresia Njeri Gitau A/C N0. 01100003014200

115. The amount in this account totalling to Khs 59,500 is associated with family business by Teresia which is not in dispute. I am

convinced the money could have been generated from her several small scale businesses.

XVIII – Equity Bank, Kasarani branch, Njegit Investment Ltd Account No. 0240272120429

116. The total amount in this account is Kshs28,000,000/=. According to the respondent, this amount of money was saved from proceeds out of ; a friendly loan from Francis Mureithi; sale of L.R Kaputiei North/93107 and, friendly borrowing from Ann Ngururi. The said lenders Francis and Ann Ngururi did not at all make reference to having lent the amount in question either in their testimony nor affidavit. In any event, Mureithi only advanced 20 million to the 1st defendant on 24th November 2016 as per annexture TGN8 attached in his replying affidavit.

117. How come it is only Mureithi Francis and Ann Ngururi who have ready money to be lent to their friends. Admittedly, as a general principle, there is nothing wrong in a friend lending money to a friend. However, each case must be dealt with on its own merit. In this case the explanation given do not add up and therefore not satisfactory. Accordingly, the amount in the said account must and is hereby forfeited to the State.

XX – Equity Bank Corporate branch Kibatia and Co. Advocates A/c No. 0010792788384

118. The money amounting to 25 million was allegedly deposited in the Advocate's various accounts for the purchase of property. The plaintiff was satisfied with the explanation given by Kibatia Advocates.The respondent claimed that money was borrowed as friendly loan from Francis Mureithi and Ann Ngururi as well as proceeds from the sale of L.R. Kajiado/Kaputiei North/93107.Why would proceeds of sale of land be split into Khs 900,000/= for each separate deposit yet as per the sale agreement payment is not in instalments.

119. Since the money has been spent from Kibatia's accounts allegedly for the purchase of land by the 1st defendant, there is nothing remaining to forfeit. The same fate shall befall Kibatia's account No. 01143223460900 Co-operative Bank, Nairobi Centre and KCB Bank KICC branch A/c No. 1134434812.

XXI – Co-operative Bank Kitengela A/c No. 01109198861600 in the name of Sompet Kanchori Keeja.

120. The amount in this account totalling to Ksh 500,000 was deposited on 8th February 2017 at Kshs 300,000 and 8th February 2017 at Ksh 200,000/=. In his explanation, the applicant claimed that the money was from his wife's business. It has not been challenged that Teresia's business could not be in a position to raise that kind of money hence I will find that it is not unexplained property.

121. Having arrived at the above finding, it is clear that, it does not matter whether the money in question had a direct link to a criminal conduct. It does not matter that there was no complaint from the defendant's office. It is also immaterial that there was no allegation of any misconduct capable of disciplinary action or otherwise. One can be clean on the face of it like a pope but behind the scenes there are invisible and untold negative stories. 122. The key objective in legislating ACECA was informed from the view point that some actors in the criminal world are smart in the manner in which they carry out their criminal activities leaving no trail of evidence to secure a conviction in a criminal case whose threshold on a burden of proof is higher than in a civil case. Under ACECA, you cannot escape criminal prosecution and continue enjoying the fruits of your criminal activities. Once the commission establishes reasonable grounds to suspect that the property in one's possession cannot be explained, the burden easily shifts to the possessor of the property to justify the means by which he or she acquired the targeted assets.

123. The absence of criminal proceedings or allegation is immaterial as stated at paragraph 78 of **Mombo Amuti** case before the Court of Appeal (supra) where it was stated;

"The concept of "unexplained assets" and its forfeiture under Section 26 and 55(2) of ACECA is neither founded on criminal proceedings nor convictions or criminal offence or economic crime."

124. See also **Murphy v .M (G) (201) 1 ESC. 82) and Director of Assets Recovery Agency and others v Green and others (2005) EWHL 3168** where the court held that:

"In civil proceedings, for recovery under part 5 of the Act, the Director need not allege the commission of specific offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained."

125**.** The key objective of forfeiture proceedings principally is to cripple or inhibit criminal activity and therefore has an effective remedial effect. It is also intended to counter the rapid growth of crime both nationally and internationally, organised crime, money laundering, criminal gang activities and racketeering which present a danger to public order and safety and therefore, threaten economic stability and the rights of all. In this case the law is not strictly looking at direct punishment of the property owner but rather, it is looking at the guilty property and not the property owner's guilt or innocence in the strict criminal sense**.** To further fortify this position, I am guided by the decision in the case of **NDPP VS Rebuzzi quoted in the case of Schabir Shaik $ others vs State CCT 86/06(20080) ZACC7** where the court stated that;

"... the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill gotten gains. From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminal wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order.

126 Similar position was held in the **Assets Recovery Agency vs Quorandum Limited & 2 Others (2018) eKLR** and in the case of **Teckla Nandjila Lameck vs President of Namibia 2012 (1) NR 255 (HC)** where the court stated that;

".... Asset forfeiture is, as is stated in 50 POCA, a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused. Chapter 6 proceedings are furthermore not necessarily related to a prosecution of an accused. Those proceedings are open to the state to invoke whether or not there is a criminal prosecution."

127. What struck me most in this case is the ease at which the purported lenders in this case Ann Ngururi and Francis Mureithi lent credit readily without any struggle and the inexhaustible fountain and or the unlimited source of money they had or have. Further, there was no evidence or any proof that the huge sums of borrowed money from the generous lenders was ever refunded at any time and from which source. The fact that the defendant was not caught directly engaging in crime or corrupt conduct is not a shield to insulate him against being call upon to account for, answer or justify the illegitimate possessions.

128. In a nutshell, it is my finding that the plaintiff has proved its case on a balance of probability in relation to unexplained properties held by the defendants which I will declare forfeited to the state as hereunder:

(i) 3500 USD found in the 1st defendant's office be and is hereby forfeited to the State.

(ii) A sum of Ksh 6,983,000 found in the 1st defendant's office is hereby forfeited to the State.

(iii) Out of a sum of Kshs1,240,000 found in the 1st respondent's residence, a sum of Kshs1,215,000 be and is hereby forfeited to the State.

(iv) Motor vehicle Regn.No. KCL 350Z be and is hereby forfeited to the State.

(v) The property known as L.R. Block No.110/317 Thome Estate be and is hereby forfeited to the State.

(vi) That a sum of Kshs 26 million used to purchase L.R.No. Kajiado/Kaputei North/93107 be recovered and forfeited to the state after the sale of the said property and the excess money if any after the sale be given to the current registered owner.

(vii) Monies held in Equity Bank Kasarani branch A/c No. 11801657861994 in the name of Teresia Njeri trading as Wangmug Enterprises but not exceeding Kshs 4,100,000 be and is hereby forfeited to the State.

(viii) Monies held in Equity Bank Kasarani Branch in the name of Teresia Njeri trading as Njetash Enterprises A/c No.

0910197000407 but not exceeding Cash Kshs 4,300,000 be and is hereby forfeited to the State.

(ix) Monies held in Equity Bank Kasarani branch account No. 0120100282619 in the name of Teresia Njeri but not exceeding Kshs 650,000 be and is hereby forfeited to the State.

(xi) Monies held in Account No. Equity Bank, Kasarani branch in the name of Njegit Investment in Account No. 0240272120429 but not exceeding Kshs 28,000,000 be and is hereby forfeited to the State.

Right of appeal 30 days

Dated, Delivered And Signed At Nairobi This 3rd Day Of December 2019.

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J. N. ONYIEGO

JUDGE

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