REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION)

ACEC NO. 9 OF 2016

(FORMERLY HCCC NO. 300 OF 2006)

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

PETER MWAI NDEGWA T/A

BON MARCHIE CONTRACTS;

SPIRAL POWERS TOOLS & EQUIPMENT; and

EMEDIA PROMOTIONS.....1ST DEFENDANT

DAVID MUROKI NDEGWA T/A

KAMBITI GENERAL MERCHANTS.....2ND DEFENDANT

DAVID KABAKA GACHURU.....3RD DEFENDANT

GEORGE WAHOME NJOROGE.....4TH DEFENDANT

JOSEPH NDUNG'U KIARIE T/A

PLOVER PACKAGING.....5TH DEFENDANT

TOM ODHIAMBO MWONYA.....6TH DEFENDANT

ANGELINE MARY MUGUONGO.....7TH DEFENDANT

ERASTUS MAINA GIKUNU.....8TH DEFENDANT

CHARLES KINYUA KAGIO T/A

KINCH ENTERPRISES; and

SEKIL CONTRACTORS.....9TH DEFENDANT

DANIEL MWAURA KIMANI.....10TH DEFENDANT

JUDGMENT

1. The Plaintiff vide its amended plaint dated **9th April, 2009** seeks the following orders against the Defendants severally and jointly.

a) Recovery of Kshs.28,655,709/=.

b) In the alternative and without prejudice to prayer **(a)** above, judgment against each of the Defendants for the respective sums received by them as per paragraphs 10 and 11 of the amended plaint.

c) A declaratory order that the 7th Defendant is not a bona fide owner/purchaser of motor vehicle registration No. KAP 700C RAV 4 and the court do order the attachment and sale of the said motor vehicle in partial recovery of the sum of Kshs.28,655,709/=

d) Judgment against the 7th Defendant for Kshs.800,000/= less the amount realized from the attachment and sale of the motor vehicle registration No. KAP 700C Rav 4.

e) A declaration that the 3rd Defendant is not a bonafide purchaser of motor vehicle registration No. KZV 927, Isuzu pick up and the court do order the attachment and sale of the said motor vehicle in partial recovery of the sum of Kshs.28,655,709/=.

f) A declaration that the 1st and 2nd Defendants are not the bonafide signatories to the **Account No.257,931,350,** Kenya Commercial Bank Limited Thika Branch, and that the court do issue an order attaching the sum of Kshs.6,502,683.75/= therein and also order that the same plus accrued interest be paid to the LATF Account No. 01-010-E341 at Central Bank of Kenya.

g) Costs.

h) Interest on (a), (b) and (f) at commercial rates.

2. The 1st, 2nd, 3rd, 4th and 5th Defendants filed their respective statements of defence denying all the claims. This was through the firm of Kinyanjui and Njau and Co. advocates. The 6th and 7th Defendants filed their statements through Kanyangi and Co advocates. The 7th Defendant raised a counter claim for release of motor vehicle registration No. KAP 700C Rav 4 which she claims to lawfully belong to her. She also claimed for payment of general damages to her with costs of the counterclaim.

3. Defence statements for the 8th, 9th and 10th Defendants were filed by their counsel being Ndungu Mwaura, Kabiro Ndaiga and Muturi Njoroge companies of advocates. The Plaintiff in its reply to the 10th Defendant's defence stated that it joined issue with the averments in the said defence and which did not constitute an admission (s) of facts in its plaint. Further that the particulars were established by virtue of investigations carried out.

4. Before the hearing took off, the court was notified of the death of the 2nd and 4th Defendants. At the same time, Mr. Kinyanjui for the 1st, 3rd and 5th Defendants was allowed by the court to cease acting for them. They were served by registered mail but they did not turn up in court for the hearing. Those who participated in the hearing were therefore the 6th, 7th, 8th, 9th and 10th Defendants.

The Plaintiff's Case

5. The Plaintiff called a total of nine (9) witnesses.

Pw1 – Josephine W. Kanyi now a chief economist with the national treasury was a principal economist in charge of the physical

and monitoring affairs department during the period of interest. She said she was in the thought process of the Local Unit of the Funds Transfer (LATF). She explained the process of allocation of LATF funds to local authorities then. She referred to Gazette Notice **No. 3040 for 30th April, 2004 (PEXB1)** which showed the allocation for Makuyu town council as:

i. Kshs.3,596,846 1st batch.

ii. Kshs.2,397,897 2nd batch.

6. She explained the procedure for the release of the funds which was kicked off by communication by the Permanent Secretary (P/S). The payments were usually done on 30th September, 30th January and 30th April. When she received her directors' copy of letter of 19th October, 2004 for payment(PEXB2) she smelt a rat. She also noticed a payment of Kshs.18,426,412/= from the LATF account for Makuyu account out of which Kshs.8,900,410/= was paid to Kenya commercial bank. This was irregular because for LATF Makuyu had a Barclays Bank Account No. MTC-LATF 3739570 Thika and not KCB.

7. She called the Central Bank and also notified her P/S of the anomalies vide a memorandum dated 22nd November 2004 (PEXB 3). There was communication between the Director and P/S dated 22nd November, 2004 (PEXB5) showing that the latter did not authorize payment into the Kenya Commercial Bank (KCB) account. The matter was then reported to the EACC for investigations. (PEXB6).

8. In cross examination, she stated that the suspect payment was *"authorized"* by the signatories at the Central Bank namely: -

i. G. K Muthemba

ii. H. W Pamba Ouma

The payment was however disowned by the P/S and local government.

9. **Pw2 Herbert W. Pamba** a retired assistant accountant at treasury stated that he was a signatory to the LATF account. He explained the process of initiating the LATF payments right from the P/S local government. He produced a letter dated 23rd February 2004 (PEXB8) from the Treasury to the chief bank manager Central Bank with instructions for Makuyu town council. His name appears on the letter and he categorily denied ever signing the letter.

10. He also referred to another letter dated 6th April 2004 (PEXB 9) from the Treasury to the chief bank manager Central Bank in respect of LATF funds to local authorities. Attached to it is a schedule showing payment to Makuyu town council account No. MTC – LATF 257-971,350 for Kshs.11,840,551/=. He denied ever authorizing the said payment.

11. He again referred to a letter dated 19th October 2004, (PEXB10) from Treasury to the chief bank manager Central Bank for release of Kshs.18,420,412/=. Makuyu was to receive Kshs.8,900,410/= through – KCB Thika MTC – LATF 257-971-350. He again denied ever authorizing this payment. He explained that he submitted his specimen signatures during investigations and he was cleared of any wrong doing.

12. In cross examination he said he did not know who had forged his signature on the said letters. He insisted that though interdicted, he was reinstated after being cleared. He then retired at the normal age of 55 years.

13. **Pw3 George Kennedy Muthemba** a deputy director of budget at the Treasury testified that at the time of incident, he was a principal accountant at the accountant general's office, ministry of finance. He explained his duties and the process of authorization of LATF. Referring to PEXB 8, 9 and 10 he denied being the author of the signature under his name. He stated that his signature was forged and he had given out his specimen signatures for investigation. He however confirmed having been interdicted and reinstated later.

14. He maintained lack of knowledge of the person or persons who forged his signature. He stated that he only remembered signing for payment of Kshs.1,147,205,586/= in respect to several local authorities. That the letter dated 25th November 2004 (PEXB 5) confirmed that.

15. In cross examination, he denied conspiring with Pw2 over this matter. He also denied knowing the 3rd Defendant. He was not able to confirm to the court whether his signature had been counter checked or not.

16. **Pw4 Antipas Nyachwa** is a deputy director investigations and forensic services with national land commission (NLC). He formerly worked for the directorate of criminal investigations (DCI) as a forensic document examiner. He stated that on 22nd February 2005, he received a document from chief inspector Kahiga accompanied by a police memo form dated 22nd February 2005. He also received from him 7 disputed documents (A1 – A7) several specimen signatures for Mr. Pamba (B1 – B8), Mr. Muthemba (D1 – D8), Mr. Gakuru (E1 – E8); Mr. Tom (F1- F7), Mr. Mwoki (G1-G8), Mr. Mwai (H1-H8) Mr. Kabaka (I1 – I8). He also received seven sets of known and undisputed signatures for the same persons.

17. He was to examine and compare whether the signatures on the documents (A1 to A7) could have anything to do with the known signatures C1 – C7. It was his evidence that on 23rd February, 2005 he examined and compared the questioned signatures with the document EXB1. He found no agreement in them with Mr. Pamba's or Mr. Muthemba's writing and signature. He did the same for Mr. Gakuru and found the writing to be the same but the signature was disguised, and therefore not comparable. The same went for the writing and signature on A3 and C4 for Tom Mwonya.

18. He further examined and compared the signatures on the documents A4 to A6 and H1 to H8 and the known signatures on C6. He found the signatures to have been by one hand. This is in respect to Mwai. He examined and compared the signatures on A4, A6 and A7 with the specimens on D1 to D8 and the signature on C2 (Muthemba) and found them to be by one hand. Lastly, he compared those in A5, I1 – I8) and those in C7 (Kabaka) and found them to be by one hand. He produced his report dated 23rd February 2005 as EXB11 (page 4-85) of the bundle of documents. The witness explained that a disguise signature cannot be compared.

19. In cross examination, he stated the writings for Tom (6th Defendant) were by the same hand but the signatures were disguised. The figures were in the same hand. He added that signatures may differ with time but that does not mean they are different. He was not given the signatures for the 7th and 8th, 9th and 10th Defendants.

20. **Pw5 Josephine Nyambura Mwangi** was a nominated councilor at Makuyu town council where she was the finance chair person. Her committee dealt with staff issues and finance matters. By a letter dated 9th September, 2003 she was invited to a meeting on 16th September 2003. She confirmed that the meeting took place and she chaired it. She produced the invitation letter and the minutes, (PEXB 12 and 13). She denied the existence of **min 34** in the minutes of that day nor any discussion about opening of a KCB account.

21. She was categorical that the council never operated a KCB account and that one David K. Gachuru chaired the meeting of 16th September 2003 though he was in attendance. In cross examination she mentioned that no meeting on finance would take place without her knowledge, and that a seven-day notice was given for any meeting. She denied knowing a Daniel Mwaura Kimani.

22. **Pw6 Kamau Wachira** is a finance officer at Embu county assembly formerly an audit clerk at Makuyu town council, where he used to peruse financial documents (payment vouchers) and prepare cheques. He listed the accounts he dealt with to be as follows: -

- ***LATF Account No. 3739570***

- ***BBK Thika (Savings)***

- ***BBK Thika Account No. 1096346 (current)***

- ***Cooperative Bank Thika Account No. 0110073035200 (current)***

- ***Co-operative Bank Thika Account No. 0120073035200 (savings)***

He annexed a list of the council's suppliers (pexb15). It was his further evidence that Makuyu did not have an account at KCB.

23. In cross examination, he said the town clerk and treasurer were responsible for opening of the bank accounts. He stated that he

did not know the people who signed the letter EXB 8. As per the ministry directions, only one LATF account had to be opened. Their suppliers were not more than 20 and had to be prequalified for 1-2 years under the regulations. He did not know the 10th Defendant. He said there was no policy barring them from dealing at a personal level with contractors who were dealing with the council.

24. In re-examination, he said if there were other accounts he would have come across them in the course of duty. A new account could only be opened after a resolution had been passed, he said.

25. **Pw7 Benjamin I.S Kudosi** is the branch manager KCB Kereini- Muranga. Formerly he was the manager *(personal business banking)* Thika branch. He explained that while at Thika his duties included opening accounts and sourcing for clients. He explained the procedure for opening an account for an organization/council. Required were:

- **Minutes**

- **Resolution**

- **Signatories/ their identity cards and specimen signatures.**

He identified an application by Makuyu town council dated 12th November 2003 and received on 20th November 2013. The Applicants were: -

- **Peter M. Ndegwa – town clerk**

- **Daniel M. Ndegwa – treasurer**

26. Attached to the application (PEXB16) were

- **Copies of the identity cards**

- **Specimen signatures**

- **Extract of a minute authorizing the opening of the account by a meeting held on 16th September 2003.**

- **Account opened was No. 257 971 350 which was a current account.**

- **A deposit of Kshs.10,000/= made by Ndegwa Peter (PEXB17).**

- **The activities were credits and deposits.**

27. On 24th November, 2003 a cheque for Kshs.386,220/= was deposited by Ndegwa Peter (PEXB18) and statement (PEXB19), confirms the same. On 27th February 2004 a payment of Kshs.6,202,688/= (TT by order of CBK LATF less a commission of Kshs.1,500/= was made, (statement plus transfer notePEXB20). On 17th April 2004 Kshs.11,840,551/= was credited by treasury (statement and corresponding entry) PEXB21. Payment of Kshs.8,900,410/= to the town council account (PEXB 22).

28. Withdrawals were done by cheque on instructions of the signatories (Bundle of cheques (PEXB23).

- **Cheques to Daniel Mwaura Kimani cheque No. 002216/002883 (bankers cheque).**

- **A cheque to Shineland No. 002632 (bankers cheque) Both PEXB 23), were produced.**

29. The bank received several instructions from Makuyu town council to pay various persons. These were produced as PEXB26. They included the following: -

DATE	PAYEE	AMOUNT (KSHS.)
08-03-2004	Erastus Gikuru	640,000/=
08-03-2004	Charles K. Kagio	1 Million
08-03-2004	David Kabaka Gakuru	200,000/=
22-10-2004	Bon Machine Contracts cheque 0063	406,000/=
22-10-2004	Erastus Gikuru cheque No. 0064	450,000/=
22-10-2004	Kambiti Merchants cheque No. 0065	449,064/=
2-11-2004	Kindu Enterprises cheque no. 0062	800,000/=
22-11-2004	Sekil Contractors cheque no. 0068	375,041/=
22-11-2004	KCB Thika cheque no. 0067	996,380/=

30. He explained that cheque no. 0067 was for issuance of a bankers cheque to Daniel Mwaura Kimani. He produced the cheques and instructions (PEXB27). The last balance as at **25/11/2004** was **Kshs.6,502,683/75** (Bank statement PEXB 22).

31. In cross examination, he said he knew David M. Ndegwa one of the signatories prior to the opening of the account. He knew him as working for Makuyu town council. He did not know under what circumstances the money landed in that account. He confirmed that Erastus Gikunu had been paid money severally but he did not know what the payments were for. Money was banked and paid out so fast.

32. He denied knowing the 10th Defendant. He confirmed that there were bankers cheques paid from this account. He did not have occasion to call Makuyu town council over any irregularity over its account.

33. **PW8 Dorothy Waithera Allan** testified that on 16th September 2003, she attended a Makuyu town council meeting and she was the one recording the minutes. She identified the minutes as EXB13, and in particular minute **No. 34/13**. She denied there being any discussion on opening of a bank account. There had been no further meeting for signing of minutes.

34. In cross examination, she denied attending any finance committee meeting on 16/09/2003. She denied there being such a meeting. She knew the 10th Defendant as an assistant chief in Kambiti but he never attended any council meeting.

35. **Pw9 Antony Kahiga** is an investigator with EACC. He investigated this case after the commission received a complaint over LATF money being deposited in wrong accounts. For this case the proper account was Barclays Bank (BBK) code 381 (EXB 28 and 29). The information he confirmed in respect to the Defendants is as follows: -

Name **Position**

1st Defendant clerk to Makuyu town council

2nd Defendant treasurer Makuyu town council

3rd Defendant chairperson Makuyu town council

4th Defendant staff at Ministry of Local Government

5th Defendant staff at Treasury

6th Defendant staff at Treasury

7th Defendant staff at Treasury (ICT)

8th Defendant police officer (OCS Makuyu police station

9th Defendant businessman

10th Defendant assistant chief of Kambiti area of Makuyu

36. Investigations revealed that the minutes used to open the account (PEXB 14) signed by the 1st and 3rd Defendants was not genuine as no such meeting took place. The genuine minutes were (PEXB 28) and had no mention of opening a bank account. Save for 6th and 7th Defendants, all the Defendants were paid money via cheques in their names (PEXB 23).

37. He produced bank statements, vouchers (PEXB 30 and 31) to show how the 1st Defendant received a total of Kshs.4,122,302/10 for himself and for Bon Marchie Contracts all from Makuyu town council. He also produced vouchers and bank statement EXB 32 showing how the 1st Defendant received from Makuyu town council Kshs.1,043,863/= through Spiral Powers Tools and Equipment. He also received money from the said town council through Emedia Promotions. PEXB 33,34, and 35 show he was involved.

38. He testified that the 2nd Defendant received Kshs.2,964,609 through Family finance bank on account of Kiambati general merchants which he later changed to Kambiti general merchants on his own request to the bank (PEXB 36). The bank statement (PEXB 37) shows credits as: -

- **Kshs.978,000/=**

- **Kshs.449,064/=**

Cheque deposits were for Kshs.153,500/=, Kshs.480,000/=, Kshs.410,000/= and Kshs.480,000/= all by Makuyu town council (PEXB 39)

39. The 3rd Defendant received Kshs.1,087,500/= from Makuyu town council. He paid Kshs.320,000/= for a motor vehicle and tyres; received Kshs.412,058/55 (PEXB 41 and 42). The account was at Equity bank Thika. He produced the bank statement from Equity bank for the 4th Defendant (PEXB 43). The 5th Defendant trading as Plover packaging sent an invoice (PEXB 44) for Kshs.500,000/= and was paid by cheque (PEXB 23) yet he was not a supplier/contractor with Makuyu town council. He also received money in his name.

40. Pw9 stated that the 6th Defendant received his money through the 9th Defendant who got it as an individual and through the business names. The 9th Defendant had an account with Co-operative bank (PEXB 45). He referred to the Cooperative bank statement (PEXB 46) where there is a requisition form for Kshs.625,000/= for a bankers cheque in favour of Tom O. Monya (6th Defendant PEXB 46); Another such requisition for Kshs.625,000/= by the 9th Defendant is (PEXB 47).

41. The statement also showed a credit transfer to Fina bank in favour of the 6th Defendant from Cooperative bank. The witness explained that the 9th Defendant had in a statement explained how he had been getting this money. The 1st Defendant had also given a statement to that effect. Both statements were produced as (PEXB 48 and 49).

42. PEXB 450 is a credit transfer for Kshs.575,000/= by the 1st Defendant to 6th Defendant (PEXB 50) and cheque deposit voucher from Fina bank to the 6th Defendant for Kshs.255,000/= from Kinch enterprises (9th Defendant PEBXB 51). All these are reflected in the 9th Defendant's statement from Co-operative bank (PEXB 52). The 9th Defendant traded as Sekil Contractors and had an account at K-Rep bank (PEXB 53) and did receive money from Makuyu town council.

43. He further produced account opening documents at Fina Bank by the 6th Defendant. They included copy of his identity card

(PEXB 54) cheque deposit voucher for Kshs.625,000/= drawn by Co-operative bank (PEXB 55) and cheque deposit for Kshs.255,000/= (PEXB 56). His bank statement was produced as PEXB 57.

44. The 7th Defendant benefitted through a car bought in her name through a cheque from the 9th Defendant. He produced a power of attorney to Barnados Mwoya by Elijah Wainaina for purposes of transacting, the issue of the motor vehicle registration no. KAP 700C Toyota Rav 4. He produced the receipt for Kshs.800,000/= vide cheque no. 005732 Cooperative bank Nasiko branch, sales agreement witnessed by the 6th Defendant (Documents PEXB 58). The amount of Kshs.800,000/= is reflected in the 9th Defendants bank statement. (PEXB 57).

45. The 7th Defendant's statement at BBK showed her average salary as Kshs.4,671/= (PEXB59). She never said she received any loan. The 8th Defendant received Kshs1,526,300/=. He was paid by Makuyu town council vide cheque no 000064 (PEXB 23), Kshs.450,000/= and cheque for Kshs.640,000/= (PEXB 23). The payment was through National bank of Kenya which is his account (PEXB 60) and his bank statement PEXB 61 confirms that.

46. He further testified that the 10th Defendant received Kshs.1,550,000/= from Makuyu town council. A letter from the said council (1st and 2nd Defendants) lists payments and payees with instructions for a cheque to be paid to the 10th Defendant for Kshs.996,380/=. He received the cash (PEXB 23). He confirmed receiving the cheques in favour of Makuyu town council. These were:

1st Cheque for Kshs.386,220/= dated 16/09/2003.

2nd Cheque for Kshs.1,324,340/=

47. Both cheques were deposited in the "LATF" account KCB instead of the LATF account BBK. The payments were for land rates (PEXB 62). The cheque deposit vouchers are (PEXB 18). He stated that he confirmed that none of the Defendants were suppliers to the Makuyu town council. The payments were therefore for no work done.

48. In cross examination he indicated that the statements recorded by the 6th and 7th Defendants were available and he denied torturing anyone to obtain a statement from him/her. He confirmed having arrested the 6th Defendant and recommending charges against him. This he did to his supervisor Henry Mwithia but he was not charged. He also stated that prior to the deposits to the 6th Defendant's account, there was money in his account.

49. That the 6th Defendant denied knowledge of the alleged deposits into his account. He confirmed that the 6th Defendant never told him anything about money owed to him by the 9th Defendant. The motor vehicle bought in the 7th Defendant's name was repossessed as the money in issue was traced to it. He said he never found out whether the 1st, 2nd and 9th Defendants were in personal business deals.

50. The 6th Defendant **Tom Odhiambo** testified as Dw1 and stated that in 2004/2005 he was working at Treasury, ministry of finance. He denied involvement in any fraud while he worked there. He also denied the Plaintiff's claim of Kshs.28 millionfrom him. He explained that he worked in the paymaster generals section and they used to take documents to the Central Bank, and those dropping the letters were not necessarily the authors. He denied sending any money to Makuyu town council and stated that the letter authorizing payment was signed by Mr. Pamba and Mr. Muthemba who denied signing them. That among the Defendants, he only knew the 7th and 9th Defendants.

51. He testified that Pw9 came to his office and informed him that he was investigating a case of theft though he did not give him the details and he denied being involved. He said he knew the 9th Defendant as a car dealer who also owned a garage. He received Kshs.575,000/= *(credit)* in his account for a motor vehicle KYL 256 which he had sold to the 9th Defendant. On 25/5/2004, he sold him another motor vehicle KZM 861 *(Matatu)* for Kshs.625,000/=, for which he was also paid. He also received Kshs.255,000/= in form of cheque as payment of money the 9th Defendant owed him.

52. At this point in time he was an accountant II and had no powers to transfer LATF money as he was not among the signatories. He denied benefitting from that money. He also denied the contents in the two statements by the 1st and 9th Defendants, (PEXB 48 and 49). He asked the court to dismiss the claim, against him.

53. In cross examination he admitted not having mentioned anything about selling motor vehicles in his defence or statement. He did not have the sale agreement, transfer documents or logbook. He said he had a motor vehicle he has worked with but it's not in his name. He admitted that the payment of Kshs.575,000/= was by bankers cheque and the writing at the bottom shows it's from Makuyu town council.

54. He denied instructing the 9th Defendant to send money to Gachewa motors nor accompanying the 7th Defendant to buy the motor vehicle. He only witnessed the agreement at Gachewa motors. He stated that he had lent the 9th Defendant Kshs.255,000/= though he could not recall what his monthly earnings were at the time. He was in the matatu business and was filing his returns with KRA. He said he had only met the 8th Defendant in court.

55. In re-examination, he said had he known the circumstances under which the 1st and 9th Defendants recorded their statements, he could have carried his documents to court. He added that one could be in possession of a motor vehicle without documents. There was nothing wrong with a public servant being in the matatu business or witnessing another person's documents, he said.

56. The **7th Defendant Angeline Mary Muguongo** testified as Dw2. She denied the claim of Kshs.28,655,000/=. She testified that she explained to the EACC how she got the motor vehicle KAP 700C. Her name is not in the list of those who received the money. She denied that the money she used to buy the motorvehicle was from Makuyu town council. She wants her motor vehicle returned and she be paid damages.

57. In cross examination she said the motor vehicle in issue had been bought by Kagio from Gachewa motors. She was to refund the money to him. He did not sell the car to her though the receipt bears her name. It was paid for by cheque from Co-operative bank, though she had no account with Co-operative bank. She denied knowing Kagio *(9th Defendant)* and said she called the 6th Defendant because she knew him. She explained that the logbook is not in her name as it was not transferred to her. She said she had none of the documents with her as she had given them to EACC.

58. She further stated that she gave the Kshs.800,000/= in cash to Kagio and the money was from the many things she does. Her salary as a machine operator was Kshs.4,600/=. She had a joint bank account with her husband who used to send her money. She denied knowing or doing any business with the 8th Defendant.

59. In re-examination she said besides being in employment she was a hustler and her husband used to send her a lot of money. That she gave her documents to Pw9 Antony Kahiga as he was the one investigating the case.

60. The 8th Defendant testified as Dw3. He is a former police officer. He denied defrauding the treasury as alleged. When he was an officer commanding station *(OCS)* in Makuyu in 1999 he introduced his nephew Charles Kinyua *(9th Defendant)* to Kabaka *(3rd Defendant).* In the year 2003 he was transferred to Kerugoya then Nyahururu, and in the same year he met the 3rd Defendant who told him of a person who had been unable to do the road works given to him. He requested him to take up the work.

61. He went to the site and saw three roads in Makuyu and took up the work after negotiations. He agreed with them to be banking the payments in his account at National bank after he had completed the work. He did not know the source of the money but it was Makuyu town council which was paying for the work. It is the second Defendant who told him that. He denied taking any cheques to Nairobi nor knowing the people there.

62. In cross examination he stated that it was the 2nd and 3rd Defendants who told him about the undone contract and he was not aware of procurement procedures. He did not enter into any contract with the Makuyu town council for this work. The 2nd Defendant had given him a letter which was not with him in court.

63. He confirmed receiving about Kshs.1.5 million of which Kshs.450,000/= was by cheque. All he did was pour murram and hardcore on the road. That the person who received the materials was Dorothy who testified as Pw8. He however, confirmed that he never asked her anything on this. He had no delivery notes from Makuyu but he sent them invoices.

64. **M/s Merichi** for the 9th Defendant informed the court that she had a conversation with her client but he was unwilling to appear in court for cross examination. She however said they would rely on the statement of defence filed on 12th May, 2006.

65. The 10th Defendant **Daniel Mwaura Kimani** testified as Dw4. He is a former assistant chief Kamiti. He owns a shop and

matatus and only knows the 3rd Defendant herein. He denied having any dealings with the Makuyu town council. He testified that he had sold his Toyota Hiace matatu registration No. KAP 301F to the 3rd Defendant who paid him Kshs.600,00/= by a bankers cheque. He produced the sale agreement (DEXB1), logbook (DEXB 2), bankers cheque (DEXB 3). The logbook is in his name.

66. It was his evidence that they again entered into an oral then formal agreement on 14th May, 2004 in respect to motor vehicle registration no. KAR 437G (DEXB 4). The 3rd Defendant paid him Kshs.950,000/= by a bankers cheque, (DEXB 6). The logbook is DEXB5. He produced DEXB 7 to confirm importation of the vehicles. He said he banked the cheques, given to him by the 3rd Defendant.

67. He testified that he had explained to Pw9 how he had acquired the money frozen in his account to the tune of Kshs.1,550,000/=. He wants the money released to him. He had given the 3rd Defendant the logbooks and transfer forms and he had even insured the vehicles in his names. (DEXB 8).

68. In cross-examination he confirmed that the cheques are from KCB Thika where the bankers cheques were bought from. He had no copies of the documents which he said he had given to the 3rd Defendant. He denied knowing the 6th, 7th and 8th Defendants.

69. **Dw5 Stephen Kinene** was the 10th Defendant's witness. He testified that the 10th Defendant is his cousin and he witnessed the sale of the two vehicles already mentioned by the 10th Defendant. He signed the sale agreement and witnessed the payment by bankers cheques.

70. In cross examination, he denied knowledge of the source of money paid to the 10th Defendant. He denied knowing the 6th and 7th Defendants.

71. Parties agreed to file written submissions which they did. I will only highlight the submissions.

72. **Mrs. Shamalla** for the Plaintiff submitted that the Plaintiff had established through oral and documentary evidence how the 1st, 2nd, 3rd, 6th, 8th and 9th Defendants came up with a plan to defraud Makuyu town council of funds through the LATF programme.

73. That the scheme led to the loss of **Kshs.26,945,147/=.** Further that the said funds were illegally paid as they were not the gazetted payments and they were paid using forged letters of instructions.

74. It was her submission that the 6th Defendant did not deny receiving the money from the 9th Defendant. He however gave an explanation which was not plausible as there were no documents to corroborate his evidence. Further the 7th Defendant had no explanation for the payment of this motor vehicle by the 9th Defendant who did not even know her. That the 8th Defendant did not deny receipt of the money from the Makuyu town council yet he was not a supplier to the said council (PEXB15). He produced no documents to support his evidence.

75. She pointed out that the 9th Defendant elected not to defend himself. She asked the court to take note of his confession in the statement produced herein. As for the 10th Defendant, counsel submitted that he had said he sold two vehicles to the 3rd Defendant and was paid using two cheques whose origin he did not know. The origin was confirmed and he cannot be allowed to benefit from illegally obtained funds.

76. She referred the court to the case of **Makula International Limited –vs- His Eminence Cardinal Nserbuga & Anor (1982) HCB II** where the Uganda Court of Appeal held that: -

" …….. a court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleadings including admissions made thereon".

77. She further referred to the Court of Appeal for Eastern Africa in **Mistry Amar Singh –vs- Serwano Wofunira Kulubya (1963) EA 408** which adopted the well-established legal principle of law that was quoted **in Scott –vs- Brown, Doering Mcnab and Co. (3) (1892)2 QB724,** as follows: -

"Ex turpi cause non oritur action. This old and well known legal maxim is founded in good sense and expresses a clear and well-

recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to make the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the notice of the court ….. If the evidence adduced by the Plaintiff proves the illegality the court ought not to assist him".

78. Based on the two cited cases, she submitted that the Plaintiff had proved its case beyond any shadow of doubt, through documents showing how the Defendants conspired to defraud Makuyu town council through the LATF programme and how each one of them benefited from the conspiracy. She prayed for judgment to be entered as prayed, in the amended plaint filed on 9th April 2009.

79. **Mr. Kanyangi** for the 6th and 7th Defendants submitted that the Plaintiff had failed to prove its claims against the two Defendants. That the claim did not state that the two Defendants engaged in any manner of fraud leading to the loss of LATF money. That they did not divert any money to their accounts.

80. He argued that no conspiracy between the 6th, 7th and 9th Defendants was proved. There was no evidence from Gachewa motors to confirm that the motor vehicle was bought using money stolen from LATF. That instead it has been shown that the 7th Defendant's vehicle KAP 700C was impounded and has been kept at the Plaintiff's premises for over 10 (ten) years.

81. On the statements made by the 1st and 9th Defendants he submitted that they would be inadmissible even if this was a criminal trial. The 1st and 9th Defendants never attended the trial, and having been sued alongside the 6th and 7th Defendants then they are accomplices. He referred to the ruling by this court on this plus the case of **Central Bank of Kenya –vs- Giro Commercial Bank and others (2014) eKLR**. He prayed for dismissal of the Plaintiff's claim and prayed for judgment be entered on the 7th Defendant's counter claim including release of her vehicle.

82. The 8th Defendant submitted citing paragraphs 4 and 10 of the plaint and stated that he was not an employee of Makuyu town council and neither was he a signatory to any of the institutions or any account at the town council. He contended that the Plaintiff made unsubstantiated allegations of fraud against him.

He prayed for dismissal of the suit plus an order for release of his money held in his account at National Bank of Kenya Harambee Avenue, Nairobi.

83. **M/s Koceyo** for the 9th Defendant in their submissions state that the 9th Defendant was not in control of the LATF account No.257 971 350. It is further submitted that it is not clear under what circumstances the statements by 1st and 9th Defendants were recorded. That the 6th Defendant well explained why he received money from the 9th Defendant. She argued that the evidence confirmed that the 9th Defendant and his businesses were not suppliers to the town council.

84. Finally, it is submitted that the 9th Defendant being a businessman is not expected to inquire into the sources of the money by his customers. He had been paid Kshs.9,414,436/= by the 1st and 2nd Defendants after various business engagements. Counsel relied on the case of **Telcom Kenya Ltd –vs- Kenya Railways Corporation (2018) eKLR** to buttress her submissions. It was counsel's submission that the money received by the 9th Defendant was neither public property or proceeds from corruption.

85. In his submissions, **Mr. Munyororo** for the 10th Defendant submitted that the 10th Defendant received as of right payment for the sale of his two vehicles. There was no way he could have known the source of the money for the purchases. It was his argument that Section 57(1) ACECA is inapplicable since the origin of the assets is known and can be accounted for by the 10th Defendant. That the 10th Defendant was an innocent 3rd party.

86. He asked this court to apply the principles highlighted in the **Turquand's case that is Morris –vs- Kanssen (1946) AC 459** which was stated in the case of **Telcom Kenya Ltd –vs- Kenya Railways Corporation (2018) eKLR** where it was stated: -

"Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and not bound to inquire whether acts of internal management have been regular."

Analysis and Determination

87. I have considered the pleadings herein, evidence on record and the submissions. It is the Plaintiff's case that the acts complained of were committed through fraud and conspiracy leading to the loss complained of.

88. I find the following to be the issues falling for determination

i. Whether the KCB account No. 257 971 350 Thika was the LATF account for Makuyu town council.

ii. Whether the letters dated 23rd February 2004 (PEXB 8), 6th April 2004 (PEXB 9, (19th October 2004 (PEXB10) were genuine authorization from Treasury.

iii. Whether any money was credited into KCB Thika account No. 257 971 350, on the basis of PEXB 8,9 and 10. If so how much"

iv. Was the money in KCB Thika account No. 257971350 spent on the Makuyu town council projects" If not who are the beneficiaries"

v. Are the beneficiaries liable for the loss of the amount of Kshs.28,655,709/="

vi. Who should pay cost"

Issue No. (i) ***Whether the KCB account No. 257 971 350 Thika was the LATF account for Makuyu council.***

89. LATF was a fund established by the Ministry of Local Government for purposes of facilitating the disbursement of funds to local authorities under the repealed Local Government Act. The said local authorities were to open bank accounts for purposes of receiving these funds. Pw1 was a key person at National treasury on the LATF project. She said the payments were specifically disbursed on **30th September, 30th June and 30th April** to the local authorities LATF accounts.

90. Pw6 a former finance officer Makuyu town council gave the court BBK Thika account no. 3739570 as the only LATF account for the said town council. Other accounts for the council and which were not LATF were: -

i. BBK Thika account No. 1096346 ***(current)***

ii. Co-operative Bank Thika account no. 0120073035200 savings.

91. It was Pw1's evidence that when she received copy of a letter dated 19th October 2004 (PEXB 2) for release of funds she was uncomfortable as this fell outside the known disbursement dates. Further the money for Makuyu was going to a KCB account yet its known LATF account was BBK account no. 3739570 Thika. Action had to be taken promptly.

92. Investigations revealed that "LATF" KCB account no. 257,971,350 Thika was opened by 1st and 2nd Defendants *(officials of the town council)* using falsified minutes (PEXB14) signed by the 1st and 3rd Defendants. It was confirmed that a meeting had indeed taken place on 16th September 2003 (PEXB12) but there had been no resolution for opening an account.

93. She produced the genuine minutes (PEXB13). The application for opening the account bearing the copies of identity cards of Applicants, specimen signatures, extract of the minutes were produced as (PEXB 16). It was therefore proved beyond doubt that KCB account no. 257971350 Thika was not the official LATF account for Makuyu town council.

Issue no. (ii) ***Whether the letters dated 23rd February 2004 (PEXB 8), 6th April 2004 (PEXB 9, (19th October 2004 (PEXB10) were genuine authorization from Treasury.***

94. It was Pw1's evidence that a Gazette Notice (PEXB 1) of 30/4/2004 clearly indicated what the allocation for Makuyu town council was.

- **1st batch – Kshs.3,596,846/=**

- **2nd batch – Ksh.2,397,897/=**

Whatever came in the form of release of funds vide letters (PEXB 8, 9 and 10) signed by Mr. Pamba and Mr. Muthemba were investigated. The former forensic document examiner (PW4) subjected the writings and signatures of various persons including the Defendants to test them against the signatories in (PEXB 8,9 and 10). The amounts in PEXB2 were way above the total amount allocated to Makuyu town council.

95. His finding was that the letters PEXB 8, 9 and 10 had not been signed as alleged by Mr. Pamba and Mr. Muthemba. They were therefore forgeries. There was therefore no authorization from Treasury for release of the said funds.

Issue no. (iii) ***Whether any money was credited into KCB Thika account No. 257 971 350, on the basis of PEXB8,9 and 10. If so how much"***

96. The answer is YES. Pw7 produced statements, transfer notes, entries vide (PEXB 20, 21 and 22) which confirmed that there were credits into this account from Treasury as follows: -

i. 27/2/2004 – Kshs.6,202,688/=

ii. 17/4/2004 – Kshs.11,840,551/=

iii. Direct payment –Kshs.8,900,410/= for computers.

iv. 16/9/2003 (PEXB22) - Kshs.28,655,709/=

Issue No. (iv) ***Was the money in KCB Thika account no. 257971350 spent on the Makuyu town council projects" If not who are the beneficiaries"***

97. The 1st Defendant received a total of Kshs.4,122,302/10 as per EXB 32,33,34 and 35 for himself and Bon Marchie contracts. He did not turn up in court to defend the claim against him.

- The 2nd Defendant passed on in the cause of the proceedings and there was no substitution, he was shown to have received Kshs.2,964,609/= through PEXB 36, 37 and 39.

- The 3rd Defendant who elected not to defend the claim against him was through PEXB 41 and 42 shown to have received Kshs.1,087,500/=.

98. The 4th Defendant who also passed away in the course of the proceedings was not substituted. His bank statement (PEXB 43) showed receipt of a total of Kshs.412,058/55. The 5th Defendant has through PEXB 23 and 44 been shown to have received Kshs.500,000/=.

99. The 6th Defendant received Kshs.625,000/= (PEXB 47 and 55) and Kshs.575,000/= (PEXB 50) and Kshs.255,000/= (PEXB 51 and 56). His bank statement (PEXB 57) confirmed these and other receipts totaling Kshs.2,050,000/=. In his defence the 6th Defendant explained that he received Kshs.575,000/= for sale of his motor vehicle KYL 256 and Kshs.625,000/= for sale of another motor vehicle KZM.

100. Both sales were to the 9th Defendant. Finally, he received Kshs.255,000/= (cheque) from him as part of money the 9th Defendant owed him. It has been submitted by Mr. Kinyanjui that there was no way the 9th Defendant would have known the source of the money. He did not produce any single document to support the sales and lending he talks about.

101. The 7th Defendant confirmed that the motor vehicle KAP 700C was paid for (Kshs.800,000/=) by Kagio *(9th Defendant)* whom

she did not know. That she was to refund him the money and at another point she says she gave the 9th Defendant the Kshs.800,000/= in cash. There is no single document, e.g. receipt, sale agreement, logbook, transfer form produced to support the claims. There was no evidence from her husband to confirm that he is the one who was giving her so much money as she claimed.

102. The 8th Defendant received a total of Kshs.1,526,300/= as shown through PEXB 23 and 60. His explanation is that it was money for buying materials, *(murram and hardcore)* for repairs of three roads in Makuyu. He claimed not to have known of any procurement procedures to be followed. He did not produce any single document to show how he had been assigned to carry out the road repairs. He was not a supplier to the said town council.

103. The 9th Defendant elected not to defend his case against him as he failed to appear in court for cross examination.

Payments received from Makuyu town council by 9th Defendant

Date	**Amount in (Kshs.)**
19/4/2004	250,000/=
19/04/2004	460,000/=
24/04/2004	1,750,000/=
4/5/2004	2,100,250/=
10/6/2004	750,000/=
24/11/2004	375,041/=
02/11/2004	800,000/=
TOTAL	**6,485,291/=**

All these were payments made from KCB Account No. **257971350/= Thika**.

104. In his counsel's submissions which are not backed by any evidence, it was submitted that the 9th Defendant received Kshs.9,414,436/= from1st and 2nd Defendants for their own transactions. What are these transactions"

105. The 10th Defendant has indeed admitted selling to the 3rd Defendant two vehicles for which he received a payment of Kshs.1,550,000/=. His defence is that he could not have known the source of the money that was paid to him.

106. It has clearly been shown that the 1st, 2nd and 3rd Defendants unlawfully opened a LATF account with KCB Thika. This account was used to receive a total of **Kshs. 28,655,709/=** in the name of LATF money which was used to pay persons for services not rendered to the Makuyu town council.

107. The 1st and 3rd Defendants did not defend the claims against them and they were the brains behind the opening of the fictitious account. The 9th Defendant has been shown to have received money for no services rendered to the town council. He even admitted to not being a supplier or contractor to the said council.

108. From the said money, he deposited a total sum of Kshs.2,050,000/= into the account. The 6th Defendant has completely failed to explain why that huge sum of money was deposited into his account by the 9th Defendant. The claims of sale of vehicles and payment of debts are not supported by any evidence. It was not even pleaded in his defence.

109. The 8th Defendant did not also adduce any evidence to support his claim of rendering service to the town council. Section 107

of the Evidence Act provides that: -

(1) ***"(1) Whoever, desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

(2) ***When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".***

It was the duty of the Defendants to satisfactorily explain the reason for these huge payments, into their accounts.

110. The 10th Defendant produced documents to show that he sold vehicles to the 3rd Defendant. The 3rd Defendant has been shown to have orchestrated this fraudulent scheme to steal LATF money. Whatever he paid to the 10th Defendant was part of this stolen money. The 10th Defendant may have genuinely sold the vehicle but that in itself cannot turn the stolen money into clean money. The same must be recovered.

111. The 10th Defendant is at liberty to follow the 3rd Defendant for the sale price of his vehicles. In this, I am persuaded wholly by the holding in the case of **Makula International –vs- His Eminence Cardinal Nsubuga & Anor (supra**).

112. The 7th Defendant did not pay anything for the Rav 4 vehicle and the amount paid for it has been traced to illegally acquired money. She will lose the car and will not receive any damages she has claimed. If indeed she gave the 9th Defendant any money, she will have to follow it up with him

Issue no. (v) ***Are the beneficiaries liable for the loss of the amount of Kshs.28,655,709"***

113. Yes, they are liable to the extent of the benefit received. The KCB account was unauthorized and all deposits into it in the name of LATF was stolen money.

Issue (vi) ***Who should pay costs"***

114. The Defendants were the cause of all this mess. They allowed themselves to be paid money for no services rendered to Makuyu town council.

115. In conclusion, I find that the Plaintiff has proved its case against the Defendants and I enter judgment for the Plaintiff against each one of the Defendants for the following sums:

- **1st Defendant** Kshs.4,122,302/30 plus costs.

- **2nd Defendant** Ksh.2,964,609/50 plus costs (to be paid from his estate).

- **3rd Defendant** Kshs.1,087,500/00 plus costs, less the proceeds of sale of the impounded vehicle KZV 927 Isuzu pickup.

- **4th Defendant** Kshs.412,058/55 plus costs (to be paid from his estate).

- **5th Defendant** Kshs.867,067/15 plus costs

- **6th Defendant** Kshs.2,050,000/= plus costs.

- **7th Defendant** Kshs.800,000/- plus costs less the proceeds of sale of the motor vehicle KAP 700C Rav 4.

- **8th Defendant** Kshs.1,526,300/= plus costs.

- **9th Defendant** Kshs.6,485,291/= plus costs.

- **10th Defendant** Kshs.1,550,000/= plus costs.

116. The frozen money in any accounts of the Defendants shall be unfrozen for purposes of forfeiture to the State in respect to the judgment entered against each Defendant.

117. It is hereby declared that 1st and 2nd Defendants are not bonafide signatories to KCB Account No. 257 931 350 Thika. This account shall be closed and the sum of **Kshs.6,502,683.75/=** plus accrued interest held in the said account shall be forfeited to the State.

118. It is further declared that: -

i. The 3rd Defendant is not a bonafide purchaser of motor vehicle registration no. KZV, Isuzu pickup which is forfeited to the State.

ii. The 7th Defendant is not the bonafide owner/purchaser of motor vehicle registration No. KAP 700C Rav 4, which is forfeited to the State.

DATED THIS 22ND DAY OF JULY, 2019 AT MAKUENI HIGH COURT.

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H. I. ONG'UDI

JUDGE

DELIVERED ON 24TH DAY OF JULY 2019 AT NAIROBI HIGH COURT BY

.....

JUDGE

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