

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: LAIBUTA, ALI-ARONI & MATIVO, JJ.A.)

CIVIL APPEAL NO. 464 OF 2019

BETWEEN

JIMMY MUTUKU KIAMBAA.....1ST APPELLANT

TRACY MBINYA MUSAU.....2ND APPELLANT

JIMBISE LIMITED3RD APPELLANT

MUTHAIGA GREEN ACRES LIMITED.....4TH APPELLANT

AND

**ETHICS AND ANTI-CORRUPTION
COMMISSION.....RESPONDENT**

AND

EQUITY BANK LIMITED.....INTERESTED PARTY

*(Being an appeal from the Judgement of the High Court of Kenya at
Nairobi (Hedwig I. Ong'udi, J.) dated 24th July, 2016*

In

ACECA CASE NO. 1 OF 2016

JUDGEMENT OF THE COURT

1. **Chapter Six** of the 2010 Constitution, was dedicated to the all-important subject of integrity and leadership. The chapter aims

at inculcating the culture of good governance, accountability, transparency and integrity, not just amongst leaders, but to the echelons of our country's civil service, state and public offices. Since coming into force of the 2010 Constitution, several Anti-corruption laws have been enacted with the aim of enforcing and implementing that chapter. Nonetheless, the imperious scourge of corruption remains a monster yet to be uprooted in our country.

2. At the time the respondent moved the court in **ACECA Case No.1 of 2016**, the 1st appellant was the treasurer at the Nairobi City County, having previously worked for several other County Governments. The second Appellant is the wife to the 1st appellant, and the 3rd and 4th appellants are companies owned by the 1st and 2nd appellants.
3. The respondent, the **Ethics and Anti-Corruption Commission**, is a public body established under **Section 3 of the Ethics and Anti-Corruption Commission (EACC) Act, No. 22 of 2011**, its functions inter alia include: developing and promoting standards and best practices in integrity and anti-corruption, receiving complaints on the breach of the code of ethics by public officers, investigating and recommending to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the **EACC Act, the Anti-Corruption and Economic Crimes Act** or any other law enacted pursuant

to Chapter Six of the Constitution; and recommending appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct.

4. The matter before us arose, as a result of investigations undertaken by the respondent, on receipt of information that the 1st appellant was suspected of receiving cash in excess of his known income through his bank accounts. It proceeded to obtain various orders from court that would enable it investigate the 1st appellant's activities to establish whether he was indeed engaged in corrupt dealings/or conduct.
5. The respondent investigated not only the 1st appellant, its fishing net was thrown ashore and cast on the 2nd appellant, and companies jointly owned by the two. For purposes of this appeal, we confine ourselves to Jimbise Limited, the 3rd appellant. The 4th appellant is not affected by the impugned judgement.
6. As a result of the investigations, the respondent reasonably suspected that the appellants had income in excess of their known source of income and were in possession of '*unexplained assets*'.
7. Having formed the opinion aforesaid, the respondent, in line with **Section 26 of ACECA**, sought for explanation on the said '*unexplained assets*' from the appellants. Not convinced with the explanations made by the appellants, the respondent instituted **Misc. Civil Application No.804 of 2014**, seeking to

preserve various assets belonging to the 1st appellant and thereafter, instituted ***Anti-corruption and Economic Crimes Case No 1 of 2016*** where it sought forfeiture of the appellants' *'unexplained assets'* allegedly valued at Kshs.872,094,147. The respondent placed before court for determination the following questions:

- a. Whether the appellants were in possession of 'unexplained assets' pursuant to the provisions of the Anti-corruption and Economics Act (ACECA) as itemized in Paragraph iii. Below.***
- b. Whether the said properties should be preserved pending the determination and or declaration on whether the said assets constitute 'unexplained assets' pursuant to section 55 of ACECA.***
- c. Whether a declaration should issue that the below listed properties and monies constitute unexplained assets namely:***

Land

- i. Maisonette No. 6 on L.R. No. 209/12736***
- ii. Maisonette No. 15 on L.R. No. 209/12742***
- iii. Mavoko Municipality Block 6/831***
- iv. Machakos/Kiandani/4260***
- v. Machakos Kiandani/3749***
- vi. L.R. No. 209/19522 (Original Number 209/12742/40) I.R. 129284***
- vii. L.R. No. 209/18417(original No. 209/18417 (Original No. 209/127336/17) I.R. 11152,***

Bandari Villas Phase 1 Estate

- viii. Apartment No. B1 Block B, Pritt Lane Court on L.R. No.2/699 Lease No. 127012/1***
- ix. L.R. No. 7785/605 (Original No. 7785/10/430) I.R. 56556***
- x. Apartment No. B5 Block B, Pritt lane, Court 3 on L.R. No. 330/1310, Lease No. I.R. 136088/1***
- xi. Apartment No. B8 Block A, Pritt Lane- Court 3 on L.R. No. 330/1310 Lease No. 136089/1***
- xii. Town House No. 2 on L.R. No. 209/19582 (I.R. 132743)***
- xiii. Skyrock Apartments, Block B, Unit 11 L.R. No. 330/317-***
- xiv. L.R. No. 7785/818 (Original 7785/10/55)***
- xv. L.R.No. 214 of Naivasha Avenue***

Vehicles

- i. KBT 454X***
- ii. KBP 255V***
- iii. KBS 454G***
- iv. KBD 978K***
- v. KBK 888S***
- vi. KBG 079F***
- vii. KBZ 298X***

Bank Accounts

- i. Account No. 0100002572677***
- ii. Account No. 01000005227003***

iii. Account No. MM1428009380

iv. Account No. 010002598633(US Dollar Account)

(all above at CFC Bank)

v. Account No. 0100001817517 CFC Stanbic Bank Ltd

vi. Account No. – 0100310598100 Standard Chartered Bank

vii. Account No. – 01109066255900 Co-operative Bank of Kenya

viii. Account No. – 0120757701 Gulf Africa Bank Limited

ix. Account No. 0810199948962 Equity Bank Limited

8. It was the respondent's case that the investigations revealed that the appellants were receiving huge amounts of money and made huge interbank transfers. In addition, the investigations revealed that between 2007 and 2013, the 1st appellant who was a public officer, and who had worked for various local authorities, the last being the City County of Nairobi, where he was a county treasurer, had acquired the above listed assets alongside his spouse the 2nd appellant, and the 3rd appellant. The value of the said assets was beyond the appellants known legitimate sources of income.

9. The appellants' case on the other hand, was that their sources of income were known, and that each one of them had given extensive explanation of the how they acquired the assets in

their explanation letters to the respondent. Further, that the respondent's analysis was pegged on several entries in the bank statements which were erroneous and, in turn, this led to an erroneous conclusion that their assets were unexplained.

10. Further, the appellants claimed that the cash inflow ought to constitute funds deposited into an account by third parties, and not personal interbank or inter account transfers, fixed deposits which on maturity is released into an account, or loans. It was contended that the respondent's failure to differentiate the same, led to the perception that the appellants' cash inflow was disproportionate to their known income and for this reason, the appellants sought for rectification of the anomaly and reconsideration of the alleged disproportional income.
11. On his part, the 1st appellant claimed to have engaged in large scale farming in wheat and livestock since 2006, had two hotels in Mombasa and Machakos, engaged in water and quarry business in Machakos, and had rental income from properties jointly owned with his wife. On her part, the 2nd appellant claimed that she received monthly rental income of Kshs.250,000 from Sky rock apartment, monthly income from her interior design company of Kshs.1,000,000, and from the beauty parlour an income of Kshs.200,000 a month. As for the 3rd appellant, the 1st appellant gave details of what it owns without further details.

12. The matter proceeded by way of *viva voce* evidence. In the course of the hearing, some concessions were made by the respondent on the ‘unexplained assets,’ reducing the value of the same to Kshs.575,121,611/-.
13. At the end of the trial, the court found that it had been established on a balance of probabilities that cash deposits said to have been from cattle business amounting to Kshs.21,971,810; wheat farming amounting to Kshs.17,094,610; maize farming amounting to Kshs.12,478,430; transport and quarry business amounting to Kshs.228,103,754; Kshs.3,000,000 from Kwangu advocates; and landed property worth Kshs.35,000,000, all amounting to Kshs.317,648,604 were ‘*unexplained assets.*’
14. Following the above findings, the trial court ordered forfeiture by the 1st appellant to the Government of Kenya of Kshs.282,648,604; and a further sum of Kshs.35,000,000 being the historical value of property L.R. No. 7785/605 (Original 7785/10/430 I.R.56556 and in default the property be forfeited.
15. The appellants were aggrieved by the judgement and filed a Memorandum of Appeal dated the 20th of September 2019 raising 18 grounds, which at the hearing counsel condensed into 7 issues as follows:

i. whether the judge failed to consider the appellants’ application dated 12th July, 2019 thereby failing to uphold the principle of stare decisis and, therefore, constructively

condemning the appellants unheard in violation of their fundamental constitutional rights;

- ii. whether the trial court failed to analyze the appellants' bank transactions;**
- iii. whether the trial court failed to consider the appellants' audited accounts;**
- iv. whether the trial court was biased, inconsistent and sitting on appeal in a matter already determined by a court of equal status;**
- v. whether the trial court made obvious errors thereby arriving at an unsound judgement;**
- vi. whether the court erred by considering sums deposited by Kwangu Mboya and co, advocates as unclaimed asset; and**
- vii. Whether the trial court erred by allegedly shifting the burden of proof.**

16. On its part, the respondent was aggrieved by part of the judgement and filed a Cross-Appeal dated 21st January 2020 on grounds that the trial court misdirected itself in finding that the purchases of the below mentioned properties were sufficiently Explained namely:

- i. Maisonette No. 15 on L.R. No. 209/12742, South C, in 2010**
- ii. Sky rock Apartment, Block B, Unit 11 on L.R. No. 330/317 in 2012**
- iii. Apartment No. B1, Block B on L.R. No. 2/699 Lease No. 127012/1**

- iv. Apartment No. A8, Block A on L.R. No. 330/1310
Lease No. 136089/1**
- v. Apartment No. B5, Block B on L.R. No. 330/1310
Lease No. 136088/1**
- vi. L.R. No. 7785/605 (Original No. 7785/10/430,
I.R. 56556**

17. The hearing of the matter before us proceeded on the go-meeting virtual platform, and was canvassed by way of written and oral submissions. In his submissions, learned counsel for the appellants took issue with the court's failure to hear and determine an application dated 12th July 2019 seeking to arrest the judgement, submitting that the trial court's failure to hear and determine the said application amounted to constructive denial of the appellants' right to be heard as provided by **Article 47 & 50 of the Constitution**.
18. Counsel submitted further that the court failed to consider that the respondent's failure to issue notices to the appellants before proceeding to apply for search warrants was against **Section 28 and 29 of ACECA**, which rendered the search and any action that flowed therefrom, including the recovery process, to have been illegal, null and void *ab initio*. In support of his argument, counsel relied on **Nairobi Civil Appeal No. 109 of 2016**, where this court made a finding that warrants obtained *ex parte* during investigations without notice to the person to be affected by the

said notice, violates the person's fundamental rights and freedoms, therefore null and void.

19. On the issue as to whether the trial court ignored the principle of *stare decisis*, counsel urged that the trial court failed to consider that this court had made a finding that warrants obtained *ex parte* by the plaintiff in the cause of investigations without notice to the person affected violates such person's fundamental rights and freedoms, and are hence illegal, null and void. **See Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai Estate & 4 Others [2013] eKLR & George Mike Wanjohi vs. Steven Kariuki & 2 Others [2014] eKLR.**
20. Counsel contended further, that the trial court, in arriving at its findings, considered deposits/gross revenue as '*unexplained assets*', without analyzing the withdrawals and/or transfers from the appellants' account; that the court further failed to independently establish the total deposits in the appellants' accounts; and that neither did it establish a base value of the deposits and/or income subject of the allegation that there was a disproportion between known and unknown income. In support of the submissions counsel relied on this Court's decision in **Stanley Mombo Amuti vs. Kenya Anti-Corruption Commission [2019] eKLR** where the court upheld the analysis and findings of the High Court in **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR**, where the

court stated that the 'unexplained assets' should be the difference between the deposits, the withdrawals and transfers.

21. Counsel further stated, that the court failed to appreciate the well explained earnings from various businesses, even though the schedule of those earnings were analyzed in the financial statements. He urged that, during the period of interest, the 1st appellant earned a total of Kshs.164,831,000 from rent, Kshs.45,998,300 from water business, and Kshs.26,161,710 from hotel businesses, giving a total of Kshs.236,981,010, which were all legitimate earnings.
22. On the part of the 2nd appellant, counsel submitted that during the said period, she earned from her beauty parlor, interior design business and rental income the sum of Kshs.63,158,100. As for the 3rd appellant, the earnings from rent during the said period was Kshs.2,350,000. Thus the appellants' total earnings were Kshs.302,489,110.
23. Further, counsel submitted that the court ignored in its entirety the audited financial books of accounts produced by the appellants, which the respondent had not challenged, and which reflected the true financial position of the appellants; and that the said books indicated that the 1st appellant had Kshs.121,316,469 in cash and Kshs.65,621,143 in terms of landed property based on historic value, making a total of Kshs.186,813,012 at the end of the period of interest, and yet the trial court ordered him to pay Kshs.282,648,604 to the

Government notwithstanding the fact that the amount was more than what he owned.

24. On the part of the 2nd appellant, counsel contended that she had Kshs.3,540,000 in cash and Kshs.36,182,140 being the value of landed property based on historical value, giving a total of Kshs.39,923,514 as at the end of the period of interest.
25. As for the 3rd appellant, counsel submitted that it had Kshs.37,274/- in cash and Kshs.81,338,192 worth of landed property based on historical value, totaling to Kshs.81,305,466 at the end of the period of interest.
26. Counsel further urged that, based on the above figures, the total value of the appellants' joint assets was, according to their audited books, Kshs.124,893,743 in cash, Kshs.183,142,049 in landed property, making a total of Kshs.308,522,035,792. Yet, the trial judge arrived at a figure of Kshs.522,206,651.
27. On the ground that the trial court was inconsistent, counsel contended that, in the judgement, the learned judge was satisfied with the acquisition of L.R. No. 7785/605 (Original No. 7785/10/430 (I. R No. 56556) Runda Water Estate. Yet, in the final analysis, the learned judge ordered payment of Kshs.35,000,000 or forfeiture of the said property to the Government.

28. Counsel further submitted that the trial court made several errors in that, though PW1 had testified that, before the period of interest, the 1st appellant had Kshs.18, 867,353 in his account, the learned judge surprisingly found that the 1st appellant had Kshs.8,867,353 at the time. That notwithstanding, the judge failed to release this sum despite it having been reflected in the accounts before the period of interest. Further, the learned judge failed to consider that L.R. No.209/18417 (original No. 209/127336/17) I.R 111252, Bandari Villas Phase was acquired before the period of interest, and the fact that, out of the sum of Kshs.575,121,611 initially demanded, PW2 in his evidence conceded to several transactions as having been erroneously reflected as deposits.
29. On the ground of bias, it was contended that the trial judge allowed all applications filed by the respondents, but disallowed the appellants' applications. Counsel submitted further that the judge assisted the respondent in its case, and was unnecessarily harsh, unkind and unfair to the appellants, which hatred was unexplained and obvious from the glaring errors on the face of the judgement.
30. Additionally, counsel submitted, that the claim that Kshs.3,000,000 from Kwanga Mboya advocate was a kick back in anticipation of a payment of Kshs.9,000,000 from the Nairobi City County Government was erroneous, as the 1st appellant who was the treasurer of the Nairobi City County did not

unilaterally make decisions on payments. Further, no similar allegations of bribery were levelled against the 1st appellant.

31. On whether the trial court shifted the burden of proof, counsel submitted that for the respondent to succeed under **Section 55 of ACECA**, it was necessary, on a balance of probabilities, to demonstrate that the appellants' assets were disproportionate to their legitimate income, and that the explanation as to how those assets were obtained was unsatisfactory, and that it had to prove further that the said assets were acquired through corrupt means. Counsel relied, *inter alia*, on **The Director of Asset Recovery and Others vs. Jeffrey David Green & Others [2005] EWHC 3168 (Admin) & National Director of Public Prosecutions vs. R.O. Cook Properties (PTY) Limited.** In both cases the courts noted that there was need to prove the kind of unlawful activities led to the acquisition of the said assets.
32. On his part, learned counsel for the respondent submitted that, save for the issues raised in the cross appeal, the respondent supported the judgement.
33. In response to the appellants' submissions, learned counsel submitted that the 1st appellant's affidavit was filed 3 years after notices were issued by the respondent, 2 years after institution of the suit which, in essence, denied the respondent the opportunity to investigate and interrogate the explanations given in the said affidavits. That notwithstanding, the explanations given fell below the required standard of proof.

34. It was urged further that the respondent satisfied the court that the assets in question were acquired during the period the 1st appellant was reasonably suspected of engaging in corrupt dealings. In this regard, counsel made reference to the case of **Stanley Mombo Amuti vs. Kenya Anti-Corruption Commission [2019] eKLR**, where this court set the four ingredients of establishing ‘unexplained assets’ to be: a set period for the person’s investigations; the person must reasonably be suspected of engaging in corruption or economic crime; he must have assets whose value is disproportionate to his known income around the set period and; the there is no satisfactory explanation.
35. On the contested principle of *stare decisis*, counsel submitted that the case of ***Director of Public Prosecution vs. Tom ojienda t/a Prof Ojienda & Associates Advocates & 3 Others*** (*supra*) relied upon by the appellants was overturned by the Supreme Court decision in **Ethics & Anti – Corruption Commission vs. Prof. Tom Ojienda & Others** ***Petition 30 of 2019*** as consolidated with ***Petition 31 of 2019*** a judgment delivered on 7th August 2022, where the supreme court held that the issuance of notices was dependent on the decision of the secretary to the respondent on whether it was necessary to issue the same or not. The law did not require the respondent to obtain warrants from court before issuing a notice to a suspected person.

36. In addition to the foregoing, counsel asserted that the matter proceeded by way of *viva voce* evidence by consent of the parties. and, therefore, the procedure laid down in section **55 (4-6)** of **ACECA** should be read in context. Counsel further contended that there was an admission by the 1st appellant in an affidavit dated 28th June 2018 that there were total inflows of Kshs.1,112,537,927 from August 2009 to February 2015 (a period of 66 months), and that, upon reconciliation of the accounts subsequent to the 1st appellants' affidavit, several items were excluded, leaving the '*unexplained assets*' at Kshs.575,121,611.
37. Counsel further contended that the legal burden of proof was not erroneously shifted to the appellants; that the respondent placed its evidence before Court, the court was satisfied and it is at which point the evidentiary burden of proof shifted to the appellants, who were to prove that they legitimately acquired the '*unexplained assets*'. Reference was made to the Supreme Court of Ireland decision in the case of **Gilligan vs. Ireland, Attorney General, Criminal Assets Bureau and Others [2001] 1ESC 82**, where it was held that the respondent is at liberty to challenge the evidence of the state by cross examining the deponent of an affidavit or by producing its own evidence which would challenge the facts set out by the state as being incorrect or inaccurate.

38. It was further submitted that **PW1** proved to the required standard that the 1st appellant received bribes as evidenced by the sum of Kshs.3 million received from Kwanga Mboya, Nairobi City County's lawyer, and the numerous sums deposited in the 1st appellant's account by himself, the 2nd appellant and other County Government employees.
39. With regard to the cross appeal, the respondent submitted that the trial court's decision ought to be varied or reversed to the extent that the court found some assets which were in possession of the appellants to have been sufficiently explained, and yet no evidence was adduced to prove that the same were acquired with legitimate income. Further, it was contended that the trial court failed to appreciate that the quantum of tax evaded by the appellants, which was independently assessed by the Kenya Revenue Authority, was indicative of the quantum of unexplained income.
40. Learned counsel for the respondent further argued that the trial court failed to question the increase of rental income during the period of interest. The rental income declared between 2007 and 2009 was Kshs.600,000. The sum escalated to Kshs.95 million in 2011-2013. Learned counsel contended that failure by the trial court to interrogate this increment may have informed the court's finding that the said assets were legitimately acquired from proceeds of rent. The said assets are:

- i. Apartment No. B1 Block B5, Pritt Lane Court 2 on L.R.No. 2/699 Lease No. 127012/1 acquired on 27th October 2010 for Kshs.14 million.**
- ii. Apartment No. B5 Block B6 Pritt Lane Court 3 on L.R. No. 2/699 Lease No. 136088/1 acquired on 10th May 2012 for Kshs.15 million.**
- iii. Apartment No. A8 Block A7, Pritt Lane Court 3 on L.R. No. 330/1310, Lease No. 136089/1 acquired on 10th May 2012 for Kshs.15.5 million.**

41. In addition to the foregoing, learned counsel asserted that no evidence was placed before court, that the 2nd appellant owned Tracey designs as alleged. No registration documents, business permits or tax returns were presented to court to demonstrate the existence of such a business and, therefore, the finding by the trial court that it was evident that the 2nd appellant made a tidy sum of money was a misdirection. Further, in the letter by the 1st appellant to the respondent, he asserted that the 2nd respondent incorporated an interior business in 2010, which was sold in order to raise capital to set up Jimbise Limited; the 3rd respondent. The certificate of incorporation indicates that the 3rd appellant was incorporated on 1st September 2010. Yet, the receipts in the 1st appellant's affidavit in respect of Tracy interior design are for 2013, 3 years after the business is said to have been sold. Thus, it was submitted that all properties said to have been acquired by the 2nd appellant purportedly with income from the said business remain '*unexplained assets.*' This includes: Maisonette No 15 on L.R. No. 209/12742, South C

acquired for Kshs. 10.5 million in 2010; & Sky rock Apartment, Block B, Unit 11 on L.R No. 330/317 acquired for Kshs.25 million on 17th August 2012.

42. Counsel submitted further that the judge erred by concluding that the proceeds of rent from properties acquired before the period of interest enabled the 3rd appellant purchase properties, without certainty of the amount of rent that was generated from the undisputed properties, the said properties purchased by the 3rd respondents are: apartment B1, Block B13, Pritt Lane Court L.R. No. 127012/1 acquired on 27th October 2010 for Kshs.14 million; apartment No. B5 Block B14, Pritt Lane Court 3 on L.R. No. 330/1310 Lease No. I.R. 136088/1 acquired on 10th May 2012 for Kshs.15 million; and apartment No. B8 Block 15, Pritt Lane Court 3 on L.R. No. 330/1310, Lease No. I.R 136089/10 acquired on 10th May 2012 for Kshs.16.5 million.
43. Counsel urged further that no evidence of sales, receipts, business permit, rent received or evidence of taxes paid for the water, hotel, beauty parlour, and interior design businesses or any at all, in support of the existence of the said businesses or income generated from the same were placed before court and, therefore, any assets claimed to have been purchased with income from the above-named businesses are '*unexplained assets.*'

44. Buttressing his argument, the respondent's learned counsel submitted that the appellants did not call any witnesses to corroborate the 1st appellant's testimony, not even the auditor who prepared the accounts.
45. Lastly, counsel contended that, all along, the appellants stated that they carried out legitimate business that earned them colossal sums of money, which enabled them to acquire the impugned assets, and yet no evidence was tendered to show that they met their tax obligations. When the issue was brought to the 1st appellants attention, his answer was that the issue before court was not about taxes. The court was asked to take note of the 1st appellants' reticence on tax matters, which is attributable to the underlying illegitimacy of their income.
46. This being a first appeal, our duty is to re-consider the evidence afresh, analyze and evaluate the same in order to arrive at an independent determination in line with the holding in *Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123*, these principles were enunciated thus:

"... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

In *Charles Mwirigi Miriti vs. Thananga Tea Growing SACCO & Another [2014] eKLR* this Court repeated the words in *Selle & Another* (*supra*) and went further to state:

“...in particular the court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of a particular circumstance or probabilities materially to estimate the evidence or if the impression based on the demeanor of witnesses is inconsistent with the evidence in the case generally.”

47. Having considered the record, the submissions both oral and written by each side, the case law as cited, we form the view that the issues of concern for determination by this court are as follows:

- i. whether there was failure on the part of the court to observe the principle of stare decisis, leading to violation of the appellants’ fundamental rights;***
- ii. whether the appellants had any ‘unexplained assets’ and, if the answer is in the affirmative, whether they gave sufficient explanation as to how they were acquired;***
- iii. whether the court erred in ordering forfeiture of the ‘unexplained assets’;***
- iv. whether the court misdirected itself by finding that the appellants had given sufficient explanation on some of the ‘unexplained assets’;***
- v. whether the court erred by shifting the burden of***

proof to the appellants;

vi. whether the trial court was biased or inconsistent, thereby arriving at an erroneous judgement; and

vii. who pays the costs of the appeal?

48. The application dated 12th July, 2019 is said to have been seeking to arrest the judgement of the trial court, for the reason that no notice was issued to the appellants prior to the respondent obtaining warrants. Clearly from the trial court proceedings, the issue of notices being issued before orders were obtained from court, was never raised before the trial judge. It appears from the submissions that learned counsel for the appellants attempted to raise the issue at the tail end of the proceedings in the trial court. For starters, the said application was not part of the record as put to us. Secondly, we agree with the respondent that the argument that the judge ignored the doctrine of *stare decisis* in the circumstances of this case, and in as much as this may be true, may not stand on the face of the decision of the Supreme Court in **Ethics & Anti – Corruption Commission vs Prof. Tom Ojienda & Others** ***Petition 30 of 2019*** as consolidated with ***Petition 31 of 2019***, a judgment delivered on 7th August, 2022.

49. In line with **Section 26** of the *EACC Act*, the Supreme Court laid the matter to rest in the following words:

“Under Section 26, the 1st appellant is required to issue a Notice in writing where the Secretary is satisfied that it could assist or expedite an investigation. The language in this Section is permissive rather than mandatory. It all depends on whether the Secretary is satisfied that the furnishing of information regarding specified property could assist or expedite an investigation. This explains why the person reasonably suspected of corruption is the one required through a Notice in writing to furnish the requisite information relating to the property or properties specified in the Notice. Obviously, if the Secretary is not satisfied that such Notice will assist or expedite an investigation, then he/she does not have to issue it. The Secretary may very well be of the opinion that such Notice, instead of assisting or expediting an investigation, could actually jeopardize or delay it. It is also clear to us that such Notice, if necessary, would be issued during an ongoing, and not prior to an investigation. Otherwise, how would the Secretary form an opinion that an investigation requires to be assisted or expedited, if it was not ongoing? Before the conclusion that certain information is required, preliminary investigative processes must have been undertaken.”

50. **Section 26 of ACECA** provides as follows:

26(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the

Secretary and with regard to such specified property:

(a) enumerating the suspected person's property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

(2) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

(3) The powers of the Commission under this section may be exercised only by the Secretary.” (emphasis added)

51. Flowing from the investigations and explanation given by the appellants, and not being satisfied by the said explanation received on the ‘*unexplained assets*’, the respondent filed suit subject of this appeal. In turn, the appellants responded by way of affidavits and the matter proceeded by way of *viva voce* evidence. The appellants were accorded an opportunity to respond to the notices and, thereafter, they got another opportunity at the hearing to explain the ‘*unexplained assets*.’

52. From the reading of **section 26** of ACECA and the Supreme court decision of **Ethics & Anti – Corruption Commission vs Prof. Tom Ojienda & Others Petition 30 of 2019** as consolidated with **Petition 31 of 2019**, it is clear there was no need to obtain any order or warrants from the court before issuance of the notices and that the notices secretary to the respondent had the power to issue notices where he deemed necessary without recourse to court , and therefore, no violation occurred. Accordingly, this ground of appeal fails.
53. In the pleadings before the trial court, the respondent had initially listed 15 landed properties, 7 vehicles, and 8 bank accounts as ‘*unexplained assets*’ and placed their value at Kshs.872,094,147.

Section 2 of ACECA defines ‘unexplained assets’ to mean:

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.***

54. In his affidavit filed on 28th June 2018, the 1st appellant acknowledged that the total inflow in his accounts was Kshs.1,112,537,927. However, he complained that the value attributed by the respondent as value of the inflow was

erroneous, as it had considered double entries, interbank transfers, inflows from fixed deposits and a loan from the interested party, in the cause of hearing, the respondent made concessions and, in the end, the respondent settled at the sum of Kshs.575,121,811 as the value of the *'unexplained assets.'*

55. The undisputed net salary of the 1st appellant for the period of interest was a total sum of Kshs.5,821,309. His declared income & assets for January 2007 to 31st December, 2007 were assigned a value of Kshs.1,000,000, and liabilities place at Kshs.75,000 (being salary advance). For the period ending 31st October 2009, the assets were valued at Kshs.3,900,000, and no liabilities were declared. As for the period ending October 2013, the assets were valued at Kshs.423,050,000, and no liabilities were declared.
56. The 1st appellant attempted to explain the huge disparity of income between 2009 and 2013 as accumulated rental income, which he had inadvertently left out of the declared assets. We must say that this explanation coming from one who has an accounting background appears casual and unacceptable to say the least. In any event, the question is how the 1st appellant's rental income increased from Kshs.1 million a year to Kshs.423,000,000 within a span of 6 years? There was no reasonable or any explanation given on the substantial rise on the rental income. The only loan that the 1st appellant alluded to was advance by the interested party; Equity Bank in 2014, and said to have financed a property on Naivasha road, which was removed from the list of *'unexplained assets.'*

57. Evidently, most of the landed properties were acquired before the said loan was obtained from Equity Bank. Several questions arise on how the appellants acquired so much wealth in 6 years that enabled them buy 15 properties? How were they able to acquire some of the said properties worth millions of shillings within a month? What was the source of income? All these questions were not sufficiently explained by the appellants and, where there was attempt so to do, the same was not supported by any concrete evidence.

58. The 1st appellant equally failed to explain the huge deposits made to his account during the period of interest by himself, his wife or persons he worked with at the Nairobi City County. For example, **Ambrose Mwanja Musani**, a clerk at the City County of Nairobi, deposited Kshs.3.4 million; the head of budget at the same County, Kshs.1.5 million; **Joseph Mwanja**, a driver, Kshs.1.3 million; and **Barnabus Oigo**, the 1st appellant's bodyguard Kshs.66,886,000. Notably, all these persons worked as juniors of the 1st appellant at the Nairobi City County. The claim that the 1st appellant had wheat, maize, cattle farming, water, transport, quarry, hotel & bar businesses was not supported by cash sales, receipts, invoices, deposits of the sales or tax returns. Neither were details of rental income from 2007 all through to 2015 provided.

59. From the financial report presented in evidence by the appellants, the 1st appellant's rental income generated from his

landed properties was said to have been Kshs.164,831,000, income from the water business was said to have been Kshs.45,988,300, from the hotel business Kshs.26,161,710. All were said to be legitimate income but none had any supporting documents. As for the 2nd appellant, similarly, her income was said to be Kshs.63,158,100 and the 3rd respondents said to have had rent of Kshs.2,350,000/- however none of them had supporting documents.

60. The financial report the appellants complain to have been disregarded by the trial court was not supported by evidence. Secondly, the maker was not called to testify on the veracity thereof. We do not fault the trial court for disregarding the said financial report. On our part we view the said report as a worthless piece of paper unworthy of consideration by a court of law.

61. As for the assets, it is clear from the record that the parties agreed to exclude properties acquired before the period of interest and had been listed as unexplained assets, namely:

- i. *Maisonette No.6 on L.R. No. 209/12736, South C, Nairobi;***
- ii. *Mavoko/Municipality Block 6/831;***
- iii. *Machakos/Kiandani/4260;***
- iv. *Machakos/Kiandani/3749; and***
- v. *all Motor vehicles.***

According to the respondent, all other properties remained ‘*unexplained assets*’ for purposes of the suit, and required explanation as to how they were acquired.

62. In their submissions, the appellants sought to have the court apply the figure of Kshs.172,890,052 relied upon by the Tax Tribunal (to arrive at the excess tax payable) as opposed to the sum arrived at by the learned judge in her analysis. It is not clear to us what method was used by the Tax Tribunal to arrive at the sum preferred by the appellants. Secondly, the two agencies have different mandates and may not necessary arrive at similar outcomes. While the respondent seeks to recover ‘*unexplained asset*’, the Kenya Revenue Authority, is mandated to recover taxes that become due and payable. Their responsibilities and duties are different.

63. In its judgment, the trial court was required to carry out an analysis to establish the value of assets acquired by the appellants, viewed against their known income, and to consider the explanation given by the appellants as to how the ‘*unexplained assets*’ were acquired. If not satisfied, the court was to consider the value of assets considered legitimate, and those that remained as ‘*unexplained assets.*’ In this regard, the trial court had power to order and direct that the value of such ‘*unexplained assets*’ be paid to the Government, or that the assets be forfeited. In addition to the movable and immovable

assets, the trial court had to consider cash, bank deposits, and other properties owned by the appellants.

64. From the testimony of **PW2**, it became clear that the sum initially given as cash inflow included inter transfers, proceeds of sale of motor vehicles and erroneous double entries, which led to erroneous summation. The admission by the respondent of the wrong entries reduced the claim from Kshs.872,094,147 to Kshs.575,121,611.
65. In her decision, the learned trial Judge correctly found that the appellants did not dispute the computation by the 1st respondent and that, although the 1st appellant had claimed that their net deposit was Kshs.448,721,802, he did not explain or expound on how he had arrived at the said figure. The learned trial Judge also found that the appellants did not dispute that the landed properties had an approximate value of Kshs.167,100,000. The only bone of contention was the allegation that the assets were not legitimately acquired.
66. **Section 55(5) and (6) of ACECA** states as follows:

(5) *If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of*

corrupt conduct.

(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

67. The afore-cited sections clearly set out the position in law that, he who asserts has to prove the fact in issue. The respondent had the obligation to prove beyond a balance of probabilities that the appellants were in possession of ‘unexplained assets’ and, if the court was so satisfied, only then would the evidentiary burden shift to the appellants to explain how those assets were acquired.

68. In *Ethics and Anti-Corruption Commission vs. Stanley Mombo Amuti [2015] eKLR* this court stated as follows:

“[33] The Act provides that the burden of proof remained with EACC and it was the court to determine that it was discharged on a balance of probability. It is at that stage the burden would shift to the respondent if the court so ordered. In our view, this is not an alien process in civil litigation. It also happens in defamation cases where there is a defence of justification.”

69. In the case of *Stanley Mombo Amuti vs. Kenya Anti-Corruption Commission [2019] eKLR*, this Court reiterated the holding in the afore-cited case thus:

“78. The concept of “unexplained assets” and its forfeiture under Sections 26 and 55 (2) of ACECA is neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. Sections 26 and 55 of ACECA are non-conviction based civil forfeiture provisions. The Sections are activated as an action in rem against the property itself. The Sections require the Anti-Corruption Commission to prove on balance of probability that an individual has assets disproportionate to his/her legitimately known sources of income. Section 55 (2) of the Act make provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it. Section 55 (2) of ACECA is in sync with Section 112 of the Evidence Act, Cap 80 of the Laws of Kenya. Section 112 of the Evidence Act, (Cap 80 of the Laws of Kenya) provides:

“In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him.”

79. Under Section 55 (2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets

disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired.”

70. On the allegation that the learned trial Judge wrongly shifted the burden of proof, we find otherwise and do not fault the judge. We are of the view that the judge gave an opportunity to the respondent to prove on a balance of probabilities, that there were indeed ‘unexplained assets’, which it did. The respondent listed the properties acquired by the appellants as against the known income to the satisfaction of the court, it is then, that the court required the appellants to explain the source of the ‘*unexplained assets.*’ The appellants failed to give satisfactory explanation in that regard.

71. We note that, in 2009 the declared Salary and rent received by the 1st appellant was Kshs.1,690,000, he had a liability; a loan of Kshs.750,000. The big questioned is how the appellants acquire several high end properties between 2009 and 2013? Even if one was to assume that the undisputed properties generated income, there was no evidence placed before court in

support of huge sums of rent that would have enabled the appellants to acquire the properties they did in upmarket Nairobi. In this regard, we agree with the respondent's submission that the trial judge erred by failing to interrogate the difference of income between 2009 and 2013, which had skyrocketed from Kshs.600,000 to Kshs.95,000,000 within a span of 6 years.

72. We therefore fault the learned trial judge for finding, in the absence of sufficient explanation and supporting evidence, that the appellants known income could support the purchase of the following assets:

- i. apartment No. B1 Block B, Pritt Lane Court 2 on L.R. No. 2/699 Lease No. 127012/1 acquired on 27th October 2010 for Kshs.14 million;z***
- ii. apartment No. B5 Block B 14 Pritt Lane Court 3 on L.R. No. 330/1310 Lease No. 136088/1 acquired on 10th May 2012 for Kshs.15 million;***
- iii. apartment No. A8 Block A7, Pritt Lane Court 3 on L.R. No. 330/1310, Lease No. 136089/1 acquired on 10th May 2012 for Kshs.15.5 million;***
- iv. maisonette No 15 on L.R. No. 209/12742, South C, acquired for Kshs. 10.5 million in 2010; and***
- v. Skyrock Apartment, Block B, Unit 11 on L.R No. 330/317 acquired for Kshs.25 million on 17th August 2012.***

73. In addition to the properties listed in the preceding paragraph, all properties, except those removed from the list by the parties, and all cash deposits save for the 1st appellant's salary and sums

borrowed from Equity Bank, remain ‘unexplained assets’. The appellants did not sufficiently explain how they were acquired. The other landed properties which remains insufficiently explained were:

- i. apartment B1, Block B13, Pritt Lane Court L.R. No. 127012/1 acquired on 27th October 2010 for Kshs.14 million;***
- ii. apartment No. B8 Block 15, Pritt Lane Court 3 on L.R. No. 330/1310, Lease No. I.R 136089/10 acquired on 10th May 2012 for Kshs.16.5 million; and***
- iii. Land reference No. 7785/605 (original number 7785/10/430) Runda Waters.***

74. The cash in the appellants’ bank accounts as stated by the 1st appellant and not disputed by the respondent was Kshs.121,316,469 for the 1st appellant, Kshs.3,540,000 for the 2nd appellant and Kshs.37,274 for the 3rd appellant. In his testimony, the 1st appellant stated that he had been allowed to withdraw 11 million from his account which was not challenged. Therefore, cumulatively, the appellants were holding the sum of Kshs.124,893,743, deducting the 11 million drawn it leaves the sum of Kshs.113,893,743. We therefore agree with the appellants, only to the extent that, the judge erroneously arrived at the sum of Kshs.282,648,604 as cash in the bank.

75. Based on our findings as aforesaid:

- a. The appeal succeeds only to the extent that we hereby set aside the trial court's order requiring the 1st appellant to pay to the Government the sum of KShs. 282,648,604 and, in its place, we hereby order and direct that the appellants do jointly and severally pay or forfeit to the Government of Kenya the sum of Kshs. 113,893,743, being the unexplained cash in their bank accounts.*
- b. The respondents' cross appeal succeeds to the extent that the Judgement of the High Court of Kenya at Nairobi (Hedwig I. Ong'udi, J.), is hereby varied to include the following assets in the list of 'unexplained assets' liable to forfeiture, namely:*
- i. Maisonette No. 15 on L.R. NO. 209/12742;*
 - ii. Skyrock Apartments, Block B, Unit 11 L.R. No.330/317;*
 - iii. apartment No. B1 Block B, Pritt Lane Court 2 on L.R. No. 2/699. Lease No.127012/1;*
 - iv. Apartment No. B5 Block B, Pritt lane, Court 3 on L.R. No. 330/1310, Lease No. I.R.136088/1*
 - v. Apartment No. B8 Block A, Pritt Lane - Court 3 on L.R. No. 330/1310 Lease No. 136089/1;*
 - vi. L.R. No. 7785/605 (original No. 7785/10/430) I.R. 56556; and*
 - vii. L.R. No. 7785/818 (Original 7785/10/55)*
- c. We further order and direct the payment by the appellants of the current market value of the assets listed in Paragraph b above or forfeiture in lieu of payment to the Government of Kenya of the current value of the said assets forthwith.*

d. The costs of the appeal be borne by the appellants jointly and severally.

Those are our orders.

Dated and delivered at Nairobi this 9th day of February, 2024.

DR. K. I. LAIBUTA

.....
JUDGE OF APPEAL

ALI-ARONI

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

