

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
ACEC SUIT NO. E 020 OF 2022

ETHICS & ANTI CORRUPTION COMMISSION.....PLAINTIFF

=VERSUS=

FERDINAND NDUNG’U WAITITU.....1ST DEFENDANT

SUSAN WANGARI NDUNG’U.....2ND DEFENDANT

SAIKA TWO ESTATE DEVELOPERS LIMITED.....3RD DEFENDANT

BIENVEVUE DELTA HOTEL.....4TH DEFENDANT

BINS MANAGEMENT SERVICES LIMITED.....5TH DEFENDANT

AND

MAISAWA AND SPARES LIMITED.....1ST INTERESTED PARTY

LEXIS INTERNATIONAL LIMITED.....2ND INTERESTED PARTY

EILEEN WANJIKU MBUGUA.....3RD INTERESTED PARTY

AND

EQUITY BANK (K) LIMITED.....PROPOSED 4TH INTERESTED PARTY

RULING

1. This ruling is on the Notice of Motion Application dated 10th May 2023. The Application was made by the 4th and 5th Defendants who are limited liability companies, that are under the Companies Act and Company law principles corporate entities with their own legal personality, separate from their directors and shareholders.
2. The Application seeks a stay of execution of the injunctive orders that this Court issued on 4th May 2023 relating to the properties and

assets listed in the said orders. The orders were made on the Plaintiff Application dated 27th May 2022, and which was brought under the provisions of Order 40 (1) of the Civil Procedure Rules 2010. The Applicants have also urged the Court to grant any other relief or order it deems fit to meet the circumstances of the case.

3. The subject properties and assets which are domiciled in Kenya, are suspected by the Plaintiff, to have been acquired through corrupt conduct and are a subject of this suit. The Application is supported by the Supporting Affidavit of FERDINAND NDUNG'U WAITITU. The Respondents having opposed this Application, it was thereafter proceeded with by way of written submissions; with the parties filing their rival submissions thereon.
4. I have read the Application and its Supporting Affidavit, as well as the rival submissions filed by the Parties. There are two issues for determination. Namely, (a) Whether I should stay the execution of those orders, and (b) What orders should I issue to meet the dictates of equity and ends justice in this matter?

Analysis and Determination

5. Any suspected property or funds in respect of which preservation orders have been made under Section 56 of the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003), needs to remain preserved until it is determined that it is not a proceed of crime, intended for use in crime, it is not related to money laundering, or until the subject has explained how it was acquired, or proved that it was not acquired through corrupt conduct.

6. Similarly, where there are preservation orders subsisting, courts should as a general rule be in favour of allowing those orders to subsist until the suit is heard and determined and the subject finally vindicated after due process. Notably, however the interim order if an injunction is an equitable remedy that is not issued as of right and to which the principles of equity relate. Their subsistence will therefore depend on a number of facts, including the ends of justice, the dictates of equity, as well as the conduct and *bona fides* of the parties.
7. Failure to play by the rules of equity may lead to the discharge of such injunction, just as the conduct and *bona fides* of the parties may lead to variation and even their setting aside. In my view however, their variation, discharge, setting aside and even stay, should be only in the most exceptional, extra-ordinary and overly deserving circumstances only.
8. Such as where there is a glaringly manifest error of principle, error of law, miscarriage of justice, or absurdity in those orders, or in the court record. Such error being so manifest to the plain eye as not to require tooth combing, critical analysis, philosophical inquiry, or craft of interpretation. Also in the case of an arguable Appeal or intended Appeal.
9. When issued on the basis on suspicion only, before the suit has been heard and determined, the subsistence of such interlocutory injunctive orders should not be prolonged. As at that time the case against the Defendant has not yet been proved, and there is no finding yet of wrong-going on his part.

10. Therefore, quarantine orders that are prolonged or subsist indefinitely or unendingly, are punitive and may result in injustice or even miscarriage of justice. They need to subsist in exchange of an expeditious hearing and determination that is without undue delay.
11. This is because forfeiture proceedings are very delicate, punitive and *sui generis* proceedings that should be proceeded with, diligently, expeditiously and determined without undue delay. Ideally, they should not be clogged in the gridlock and become backlog. With the focus being on the end result, rather than preliminaries and technicalities, and other litigational niceties.
12. In the circumstances of this case, I hold that the interim injunctive orders hitherto subsisting, shall continue subsisting until this suit has been determined. In essence, the Application fails and is disallowed.
13. I direct that this suit be heard and determined in the next 60 days from the day of this ruling. It follows therefore that the said orders shall continue in force for the next 60 days the duration of the remainder of the duration of this suit. I further direct parties to take directions on how this suit shall be disposed.

DATED and DELIVERED at NAIROBI on this 24th day of July 2024.



**PROF (DR) NIXON SIFUNA
JUDGE**