

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**  
**ANTI-CORRUPTION SUIT NO. E022 OF 2023**

ETHICS & ANTI CORRUPTION COMMISSION.....PLAINTIFF

**=VERSUS=**

NASHON WILSON KANANI ... .....1<sup>ST</sup> RESPONDENT

WILLY WALLA INTERNATIONAL LIMITED.....2<sup>ND</sup> RESPONDENT

WILCOREG LIMITED.....3<sup>RD</sup> RESPONDENT

BRIDGE SIDE FARM.....4<sup>TH</sup> RESPONDENT

REGINA MUNYIVA MUTINDA.....5<sup>TH</sup> RESPONDENT

REGINEEZ ENTERPRISES LIMITED.....6<sup>TH</sup> RESPONDENT

**RULING**

1. This ruling is on the Application, the Notice of Motion dated 12<sup>th</sup> September 2023. By which the Applicant sought interlocutory injunctions, against motor vehicles, parcels of land and funds (on various bank accounts) that it suspects to have been acquired through corrupt conduct. The Application was filed after the expiry of preservation orders that this Court had earlier issued under Section 56 (1) & (3) of the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003, popularly referred to by the acronym ACECA).
2. The Application, and which is supported by the Supporting Affidavit of ANDERSON WERU the Commission's Investigator, was principally brought under the provisions of Order 40 (1) of the Civil Procedure Rules 2010. The Respondents opposed the Application, on the

grounds stated in the 1<sup>st</sup> Respondent's Replying Affidavit sworn on 11<sup>th</sup> October 2023.

3. Thereafter the Application was canvassed by way of written submissions. With the Applicant maintaining that those funds and properties were obtained through corrupt conduct, and that the Respondents had failed to explain the manner in which those funds and properties were acquired. The Respondents for their part argued that they had in their response to the Application, satisfactorily explained how the same were acquired, hence that they wholly discounted the suspicion that they were acquired through corrupt conduct.
4. The Applicant further argued that the 1<sup>st</sup> Respondent has even previously been charged in court and convicted of bribery and corruption offences. An accusation to which the 1<sup>st</sup> Respondent responded, that he appealed the decision and succeeded on Appeal; with the decision being overturned by the Court of Appeal.
5. The Respondent further argued that by the time the Applicant filed this Application, the preservation orders earlier issued by this Court in respect of the subject funds and properties had already lapsed. Further that the Civil Procedure Rules do not apply to proceedings commenced under the ACECA.

### ***Analysis and Determination***

6. On whether the Civil Procedure Rules apply to proceedings commenced under the ACECA, I hold that Civil forfeiture proceedings under ACECA and POCAMLA (Proceeds of Crime and

Anti-Money Laundering Act, Act No. 9 of 2009) are essentially civil proceedings.

7. Hence the provisions of the Civil Procedure Rules apply, including Order 40 as to temporary injunctions and orders. Particularly where the subject matter of the suit is immovable property, movable property, chattels, choses in action, funds, or prevention of injury or loss of whatever kind. Except again in my considered view, for applications for variation, setting aside or discharge of orders obtained under the ACECA and the POCAMLA.
8. In civil forfeiture proceedings in **NAIROBI HIGH COURT ANTI-CORRUPTION MISC CIVIL APPLICATION NO. E024 OF 2023 ETHICS AND ANTI-CORRUPTION COMMISSION v. DANIEL MUNYWOKI WAMBUA**, I held that an Application to civil discharge, vary or set aside, any interim and preservation orders obtained under the ACECA, must be made under the provisions of the ACECA itself, and not the Civil Procedure Rules. I still hold that an Application to civil discharge, vary or set aside, any interim and preservation orders obtained under these two specialized Acts (the ACECA and the POCAMLA), must be brought under the provisions of these Acts themselves. Section 89 in the case of the POCAMLA, and Section 56 (5) in the case of the ACECA.
9. In the same vein, an Application for the discharge, variation, or setting aside of an injunction issued under Order 40 of the Civil Procedure Rules, must Rule 7 of the Order, and not the ACECA or the POCAMLA provisions.
10. As I ruled on an earlier a discharge variation and setting aside Application by the Respondent in this same matter, dated 25<sup>th</sup>

September 2023), when it comes to whether or not to issue preservation orders in ACECA and POCAMLA proceedings, courts should adopt a precautionary approach and apply the precautionary principle which is an emerging legal principle in Anti-Corruption law, and specifically in civil forfeiture suits.

11. Which principle is that any suspected property or funds need to be quarantined and 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; and until the subject has explained how it was acquired, and proved that it was not acquired through corrupt conduct. Similarly, where there are preservation orders subsisting, courts should as a general rule and as good practice, be in favour of allowing those orders to subsist until the suit is heard and determined and the subject finally vindicated after due process.
12. Pursuant to this precautionary principle therefore, the discharge, variation and setting aside of preservation orders should be only in the most exceptional, extra-ordinary and overly deserving circumstances only. Such as where there is a glaringly manifest error of principle, a grave error of law, a fundamental glaring injustice, a miscarriage of justice, or an absurd absurdity in those orders or in the court's record. Such error being so grave as cannot await the final conclusion of the suit itself; and so very manifest to the plain eye as not to require a tooth-comb, critical analysis, philosophical inquiry, or craft of interpretation.
13. As I already ruled in my ruling of 7<sup>th</sup> February 2024 in this same suit, no such circumstances exist, and neither has any plain error(s) or obvious slip(s) been demonstrated in the case of the interim

conservatory injunctive orders hitherto in force, earlier issued on this Application. In that ruling, I found on record and in the pleadings, no material upon which to interfere with the said orders.

14. What I need to determine in the instant Application therefore, is whether to allow the Applicant's motion itself; this one dated 12<sup>th</sup> September 2023. I have to determine two things. First, whether the Application has met the legal threshold for grant of interlocutory injunction. Secondly, whether the relief should therefore issue or not.
15. Notably, except for whether there exists a *prima facie* case or not, this being an interlocutory stage, this Court has with abundant caution refrained from delving into a final determination of the suit itself and has preserved that for later when it finally determines the suit itself on its merits, and on the evidence exhibited in the filed Affidavits of the parties.
16. This is for the reason that at this interlocutory stage, the main issue for determination is merely whether this Application has met the legal threshold for the grant of the interlocutory injunctive conservatory orders the Applicant has sought in this Application, before it is later called upon in totality the rival evidence and arguments proffered by the parties, render its final judgment in the suit itself, one way or the other. At this stage on an Application of this nature, there are principally only three issues for determination, namely:
  - (a) *Whether on the basis of the pleadings on record, the Applicant has met the legal threshold for grant of interlocutory injunction;*

- (b) Whether as the suit pends hearing and determination on merit, the Court should at this stage grant the injunction; and
- (c) An injunction being an equitable relief, whether there exist any factors that militate against the grant of the injunction.

17. The legal threshold that Kenyan courts apply in this regard, is the *Giella* test, i.e the test that was affirmed by the defunct East Africa Court of Appeal in *Giella v. Casman Brown [1973] EA 358*, where the court stated as follows:

**“First, an applicant must show a prima facie case with probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which will not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

18. These three conditions (or pillars) of the *Giella* test, have for long been the “litmus test” or legal threshold applied by Kenyan courts in applications for interlocutory injunctions.

19. In the present case, the Applicant has through its pleadings and Affidavit presented an arguable case. The same has however, been extensively and vigorously replied to by the Respondents. Thereby raising weighty issues that have to be determined. As to whether there are high chances of success, that is not obvious at this preliminary stage on the basis of pleadings only. It is actually the Applicant's word against the Respondents'.

20. As to whether there will be damage not compensable in damages should the sought injunctive reliefs not be issued, the Applicant has passionately demonstrated that the public interest will suffer in that event. Kuloba J in *Siteiya v Gitome & 3 Others [2015] eKLR* while outlining the factors that a court should consider in deciding whether to grant or deny an application for an interlocutory injunction (temporary injunction). He said that courts should when dealing with applications for this injunction ask themselves the question, '*Where does the public interest lie?*'.
21. I further note that in forfeiture suits, the balance of convenience is logically in favour of preservation or quarantining of the suspected or tainted asset until the proceedings are concluded. This is not only because of the public interest, but also because of the grave and delicate nature of allegations of corrupt conduct generally. Especially where the subject is accused of or suspected of the theft, plunder or misappropriation of public funds or public resources. Such public considerations when weighed against the private interest of the subject, they must prevail.
22. Forfeiture proceedings are 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. They are therefore such as should not be encumbered or beset with incessant, numerous or unnecessary intervening applications.
23. So that the focus is on the end result, rather than preliminaries and technicalities, or procedural niceties. Such are not only less needed interruptions and disruptions of the primary proceedings, but may be

exploited by the parties and their legal counsel, to scuttle, frustrate and delay the proceedings. They are sometimes also a diversionary technique for procrastination's sake.

24. The pragmatic and appropriate approach, is to deal with the goose itself rather than the gooselings. To prefer hearing the case itself, rather than dwelling on interlocutory motions. Except those that are a must, or that are very necessary or of most urgency. Courts should therefore always screen such preliminary and interlocutory interventions, and see which ones should give way to the case itself.
25. In the totality of the circumstances of this case, I allow the Applicant's Application dated 12<sup>th</sup> September 2023, and thereby grant the injunctive orders sought. The same shall last for a period of 60 days only. This is for purposes only of preserving the funds and properties, until the final determination of this suit. In consequence of which, I direct that this suit be prosecuted and determined within 60 days from the date of this ruling.

**DATED and DELIVERED at NAIROBI on this 11<sup>th</sup> day of July 2024.**



**PROF (DR) NIXON SIFUNA**

**JUDGE**