

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI CORRUPTION & ECONOMIC CRIMES DIVISION
ANTI-CORRUPTION CASE NO. E024 OF 2022 (O.S)

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF

=VERSUS=

NICHOLAS OWINO OCHIEL.....1ST DEFENDANT
TERRY VIOLET MUTHONI.....2ND DEFENDANT
TERIC VALUERS LTD.....3RD DEFENDANT
TERNIC ENTERPRISES LTD.....4TH DEFENDANT
RICHARD OMONDI OCHIEL.....5TH DEFENDANT

AND

WATERFRONT OUTLETS LTD.....1ST INTERESTED PARTY
NATIONAL BANK OF KENYA.....2ND INTERESTED PARTY

RULING

1. The Plaintiff the ETHICS AND ANTI-CORRUPTION COMMISSION (EACC) is a government entity having the responsibility of combating corruption and recovering for the government, funds and properties acquired through corrupt activities or conduct. It filed this suit against the Defendants, seeking to recover from the Defendants, properties that it asserts, were acquired through corruption.
2. Thereafter, it obtained from this Court, conservatory orders to conserve those properties until the suit has been heard and determined. Later, WATERFRONT OUTLETS LTD then a non-party, applied to be joined in the suit as an Interested Party. After

being so joined as the 1st Interested Party, it filed in this suit, a motion dated 7th November 2023.

3. Which motion is the subject of this ruling, which was principally brought under the provisions of Order 40 Rule 7 of the Civil Procedure Rules. It was supported by the Supporting of Affidavit of CHRISTOPHER ONWONG'A OANDA, and seeks orders to set aside this Court's said conservatory injunctive orders of 24th October 2022 and discharge from this suit and from those orders, the property known as L.R. No. 209/16717 (I.R No. 116277).
4. The property was one of the properties the subjects of those orders, and to which the Applicant is the current registered owner. The Applicant's main ground is that the said property is currently owned by it.
5. The Application proceeded by way of written submissions. With the Applicant and the Plaintiff filing their respective submissions, and later highlighting the same.

Analysis and Determination

6. Having distilled the respective pleadings of the principal parties, as well as this Application together the response to it and the respective submissions on it, I have found that I have to determine whether the Applicant (the 1st Interested Party, and currently the sole Interested Party after the 2nd Interested Party was struck out from this suit) has put forth legally sufficient enough grounds to persuade this Court to set aside its said orders and discharge the said property from this suit.

7. In my considered view, the orders the Applicant is seeking in this Application, are of final character, hence which can only be issued finally after the suit has been heard and a final determination made on the status of the ownership of the said property. Therefore, coming at this preliminary stage of the suit, the orders would be pre-mature.
8. All that is required of the Plaintiff at this preliminary stage of the suit, was merely to, with some preliminary prima facie evidence, credibly establish some to link, between any of the defendants and the impugned property; and later during trial provide credible evidence that demonstrate that any of them, is currently or has previously owned, co-owned the property.
9. The Plaintiff has pleaded in its pleadings and deponed in the affidavits it has filed in this suit, that some of the defendants have previously co-owned the property.
10. Non-conviction civil forfeiture proceedings such as these, being proceedings that are not preceded by a conviction in a criminal court, are proceedings that are initiated on the basis of reasonable suspicion rather than a court judgment, decree or conclusive proof. For that reason, suspicion is sufficient to sustain the proceedings pending proof at the hearing; provided such suspicion is neither unreasonable nor absurd, and is such as is within bounds of reasonableness.
11. For properties suspected to have been acquired corruptly, the main element of the suit is reasonable suspicion, and neither the subject, his proxies, his associates, his cronies, nor surrogates such as those he has leased, sold or charged the questionable

property to, may be allowed to cleverly sneak into the suit with the intention of scuttling it, or protesting it.

12. Where they have been joined or allowed into the suit (those that have claimed ownership of the property), they shall not be allowed to hijack and derail it. They shall instead be expected to keep their cool, and have a nominal participation in the proceedings. Limited only to vindicating the property, and not descending in the main dispute and defending the case against the defendant. They may for that purpose, be allowed to file affidavits and file submissions to protect their interest. Provided there is no evidence of connivance between them and the defendants.
13. It need be emphasized that in forfeiture proceedings such as these, the duel is and remains, primarily between the Anti-Corruption Authority and the persons or entities suspected to have acquired the property corruptly. Guests such the Applicant will not be allowed to support the defendant's case. That will not only be diversionary, but will also be akin to "mourning more than the bereaved".
14. The point in time of reference of such forfeiture proceedings, is the point of acquisition of the property, rather than the present time i.e when, how and by whom the property was acquired, rather than the question of who its current owner is or the property's current status.
15. After all, if later the property is proved to have been acquired through corruption, it will escheat to the status ante, the current status of title holding notwithstanding; with all metamorphosis in title being null and void *ab initio*.

16. Even where the ownership and title of an impugned property is or asserted to be presently in the name of another, the court will that notwithstanding, still proceed to examine the entire land register and interrogate the entire history of ownership. This it will do, to particularly ascertain whether there has been in the register, any entry in the name of the subject who is suspected to have corruptly acquired the property. To achieve that, it will have to go behind the Certificate of Title and unmask any antecedent improprieties.
17. I am of the persuasion, that a Certificate of Title is the end product of a process, and that the process includes the exercise of due diligence. In such proceedings where the acquisition of the property is impugned, it is not enough to wave a title deed or a certificate of title. Where it is eventually established through evidence that the property was acquired through corruption, its title document will contrary to the norm, be mere paper, unresponsive of ownership.
18. In this suit, while the 1st Interested Party has in this Application stated that it is the current owner or co-owner of the property, the Plaintiff has in the Replying Affidavit of SHADRACK MWENDA its investigator provided documents tracing the title of the property, to TERNIC ENTERPRISES LTD the 4th Defendant. The Plaintiff has further attempted to link that company to the 1st and 2nd Defendants, who were persons of interest in the investigations it conducted.
19. It now remains to be seen whether the Plaintiff shall eventually at the trial of this suit, tender sufficient and credible enough

evidence to link the 1st and 2nd Defendant to the other defendants and also to the acquisition of this property.

20. The upshot of the foregoing, is that this Application lacks merit, hence it is hereby dismissed with costs.

21. Therefore, pending the final determination of this suit, the said property remains and shall continue remaining the subject of the proceedings and the said court orders. It cannot at this time be discharged or released from these proceedings and suit until the suit has been heard and concluded; and the said property not found to have been acquired corruptly as alleged by the Plaintiff.

22. I further order that while the Applicant shall remain in this suit as Interested Party, its participation in the proceedings shall be limited only to filing an affidavit(s) and thereafter to filing closing submissions at the tail end of the proceedings. As it is a nominal other than a principal party in the proceedings, its participation shall also be nominal.

23. It shall not file any pleading(s) of its own, present any witnesses of its own, or cross-examine any witnesses as have sworn Affidavits or as may be called by the principal parties. Any evidence it wishes to produce in this suit may only be affidavit evidence; and any document (s) it wishes to produce may only be annexed to such affidavit(s) as it shall file.

DATED and DELIVERED at NAIROBI on this 2nd day of October 2024.



PROF (DR) NIXON SIFUNA

JUDGE