

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 were acquired by the Defendants, through corruption.
2. The Plaintiff thereafter, obtained conservatory orders to conserve those properties until the suit has been heard and determined. Following those orders, NATIONAL BANK OF KENYA the 2nd Interested Party, then a non-party, applied to be joined in the suit as an Interested Party. After being so joined, it filed in

this suit, a motion dated 29th January 2024. The motion sought a mandatory Injunction to remove from this suit, and from the said orders, the following land parcels:

- (1) LR No. 9363/142.
- (2) LR No. 9363/143.
- (3) LR No. 12778/263.
- (4) LR No. 1333/601 (Thome Estate),
- (5) LR No. 7978/27 (PLOT No. 25, MIREMA).

3. The Applicant Bank's primary ground of the Application is that these properties were charged to it, for loans it advanced. This is a case by a chargee to protect its charges, where the properties are a subject of conservatory injunctive orders in civil forfeiture proceedings where they are suspected to have been acquired corruptly.
4. Ideally, as held by this Court in its ruling in **NAIROBI HC ANTI-CORRUPTION SUIT NO. E022 OF 2023 ETHICS & ANTI-CORRUPTION COMMISSION v. NASHON WILSON KANANI**, once any property is tainted or alleged to be tainted or is the subject matter of that anti-corruption suit, the same shall not be released from the suit or proceedings until the court has made a final determination on its status. Except of course, for exceptionally compelling reasons that cannot wait for the final outcome of the suit, or in terms of the grounds provided for in the relevant anti-corruption statutes such as the ACECA (The Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003) and the POCAMLA (The Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009).
5. This is because ant-corruption proceedings whether criminal or civil, are, in my opinion, proceedings *sui generis*. Being

proceedings *sui generis*, anti-corruption courts because of their higher call, need to in exceptional circumstances sometimes proceed away from the ordinary traditional and conventional approaches. They need to examine facts and circumstances from a special prism, contextualised and adapted to the fight against corruption.

6. In the instant case, for instance, the Bank is neither claiming ownership of the property, nor defending the manner in which the subjects acquired the property. It is only urging the fact that the property is currently charged for loans it advanced, on the security of the impugned properties.
7. I observe that while a subjects' ownership of a property is primary, a Bank's charge over it, is indeed secondary and parasitic upon the subject chargor's ownership. A charge neither amounts to ownership. Neither does it transfer nor confer ownership on the chargee. Neither does it divest ownership from the chargor. Hence the chargor remains the owner of the charged property.
8. For that reason, a chargee of a property cannot have as against the property a better title than the chargor himself. I find therefore, that the 2nd Interested Party as a mere chargee of the property, and who is not claiming or asserting ownership in those properties, lacks the *locus* to defend the subject's ownership of the said property, or contest a suit questioning the subject chargor's ownership of them, or the right of the chargor's to retain that ownership.
9. While not claiming title, not contesting the Plaintiff's suspicion or allegation that those properties were acquired corruptly, the

Bank is insisting that the properties be discharged from the said injunctive orders and released from this suit, for the mere reasons that they are currently charged to it for loans. This is an absurdity that the law will not suffer, and which an anti-corruption court should not entertain.

10. I therefore find that the 2nd Interested Party Bank's Application in defence of the impugned properties, not only lacks merit, but the Bank wholly lacks the *locus standi* to defend any Defendant's ownership of the property or the legitimacy of the property, or contest the EACC's suit or suspicion against the Defendants. Lacking in merit, the Application is hereby dismissed, with costs.

11. I hold that such a chargor should follow the money it lent to the subject, instead of the suspect property. It could for instance call for payment of the sums advanced to the subject, or ask for an alternative property as a substitute security for that loan.

12. The Bank should during the pendency of those proceedings keep off the proceedings and the suspect property, until the suit has been determined. The diversionary and sabotage acts of such banks jumping into forfeiture suits and attempting to divert and derail them from their natural course, is most desirable. Such players should exercise a vulture's patience and wait for the final whistle at the end of the proceedings.

13. I hold that even in such situations, there ought to be no duel between such Banks and the Anti-Corruption Authority. The duel remains between the Authority and the subject. Therefore, any mischief-makers as well as the associates and friends of the subject need to be kept at bay until a determination is finally

made and the Court has decided whether the property was corruptly acquired and is for forfeiture, or was properly acquired and is for release to the subject.

14. Consequently, the 2nd Interested Party is henceforth discharged from this suit, and shall no longer participate in it.

DATED and DELIVERED at NAIROBI this 25th day of September 2024.



**PROF (DR) NIXON SIFUNA
JUDGE**