

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI CORRUPTION & ECONOMIC CRIMES DIVISION
ANTI-CORRUPTION SUIT NO. E027OF 2023

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

=VERSUS=

MZALENDU KIBUNJA.....1ST DEFENDANT
STANVAS ONGALO.....2ND DEFENDANT
OLIVER RABOUR.....3RD DEFENDANT

RULING

1. The **ETHICS AND ANTI-CORRUPTION COMMISSION** (EACC) the Plaintiff and which is Kenya's Anti-Corruption Authority filed this suit against the Defendants. The suit seeks from the Defendants the restitution of the sum of Ksh 468,390,241= that they are alleged to have misappropriated to recover from the National Museum of Kenya when they were its officials.
2. Which sum comprises salaries that were over a period of time paid to 105 employees that the Commission has in its Plaint herein stated were ghost workers. As to the exact definition of the term "ghost worker", we shall deal with that if and when the suit gets to trial.
3. The Defendants filed a Preliminary Objection this suit. The objection which is dated 2nd May 2024, was on the following grounds:
 - (1) *That this Court lacks jurisdiction to hear and determine the suit.*

- (2) That the cause of action, herein is based on the Ethics and Anti-Corruption Act, Section 11 (1) (j) which clothes the Plaintiff herein with the Authority on behalf of the State to file suit for recovery and protection of public property related to corruption.
- (3) That the law therefore envisages filing such a suit only after a conviction/a finding of a culpability of a corruption charge by a Criminal Court through the criminal justice system.
- (4) That the suit herein is therefore premature and is an abuse of the court process as the 3rd Defendant/Applicant has not been convicted of any corruption charge(s) or any finding whatsoever that he has handled proceeds of corruption and any criminal suit to be prosecuted has just been filed and is yet to proceed to hearing as investigations are still proceeding.
- (5) That these proceedings therefore directly offend the rights of the 3rd Defendant/Applicant as provided under Articles 48, 49 and 50 of the Constitution and more so if founded on a platform of infringement of the doctrine of presumption of innocence.

- (6) *That this suit as filed seeks to convert this court into a Criminal Court where the 3rd Defendant/Applicant is therefore being called to prove his innocence in a civil suit, is a criminal case; which is outside the jurisdiction of this Honourable Court, and is seeking to have the 3rd Defendant/Applicant herein prove their innocence in a civil suit.*
- (7) *That this case seeks to achieve a conviction of a finding of guilt using the wrong standard of proof being a balance of probabilities as this Court can not apply the standard of proof beyond reasonable doubt as this court is not sitting as a Criminal Court under the Criminal Justice System.*
- (8) *That the proceedings pending herein are incompetent, null, void and of no legal consequence.*
- (9) *That the application is an abuse of the court process and should thus be dismissed with costs.*

4. The EACC is Statutory and mandated to deal with matters relating to Corruption and Ethics. In executing this mandate, it has the latitude to elect to proceed by way of criminal prosecution or civil proceedings.

5. When it comes to civil proceedings, it can elect to base them on a conviction, or even still file civil recovery proceedings without there having been a prior conviction. In criminal

prosecution, the proceedings are criminal proceedings where liability is based on successful prosecution and eventual conviction; and so are conviction-based civil recovery suits.

6. Notably, civil recovery proceedings for their part are not necessary to be predicated on prior conviction. They may as already stated above, be non-conviction based or be based on prior conviction.
7. In Anti-Corruption litigation by EACC, the criminal process and the civil process are parallel processes that can be undertaken simultaneously or consequentially. One of the subtle distinctions of the two processes is the standard of proof. While in criminal prosecution the standard of proof is that of beyond reasonable doubt, the standard of proof in civil recovery proceedings is that of a balance of probability (preponderance of evidence).
8. In civil recovery proceedings, the disadvantage to subject the Defendant is that the threshold of proof that the Authority needs to satisfy is lower than that of criminal law. While for criminal proceedings the advantage to the subject the Defendant is that the Authority is required to prove the case beyond reasonable doubt. That is why many a subject may prefer being prosecuted than being sued. So that they can cling to the higher threshold of proof, which is like a fruit hanging so high above the ground. Unlike the civil threshold which they consider a low-lying fruit for the Authority their tormentor.
9. In my view, where the proceedings are civil, the subject just like the Authority has similarly the advantage of a lesser threshold of proof which if diligently undertaken he can easily walk over.

10. The other notable aspect is on the burden of proof. On this I need to clarify as I did recently in NAIROBI HC ANTI-CORRUPTION SUIT NO. E022 OF 2023 EACC V. WILSON NASHON KANANI, that in civil recovery proceedings just like in criminal proceedings, the legal burden of proof is on the Authority (the Commission); and only the evidential burden of proof may be borne by the subject.

11. That evidential burden unlike the legal burden which remains on the Plaintiff or Prosecution throughout the proceedings, swings like a pendulum and keeps shifting between the two adversaries in the course of the hearing.

12. In the end, while this Preliminary Objection sounds attractive, is psychologically compelling and makes a lot of academic sense, it is lacking in legal sufficiency and lacks legal merits; hence is for dismissal. Consequently, it is hereby dismissed accordingly, and with no order as to costs.

DATED and DELIVERED at NAIROBI on this 20th day November 2024.



PROF (DR) NIXON SIFUNA

JUDGE