



Ethics and Anti-Corruption Commission v Musuya t/a Mukuyu Petroleum Dealers; Waleghwa & 5 others (Interested Parties) (Anti-Corruption and Economic Crimes Civil Suit 16 of 2019) [2023] KEHC 2218 (KLR) (Anti-Corruption and Economic Crimes) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2218 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 16 OF 2019
EN MAINA, J
MARCH 16, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPLICANT

AND

**ANDREW BIKETI MUSUYA T/A MUKUYU PETROLEUM
DEALERS RESPONDENT**

AND

SALOME WALEGHWA INTERESTED PARTY

BHINDER CORPORATION LIMITED INTERESTED PARTY

MILDRED KERUBO OBARE INTERESTED PARTY

WACHENYA AUTO GARAGE INTERESTED PARTY

SACHDEVA NABHAN & SWALEH ADVOCATES INTERESTED PARTY

LOLONG CONTRACTORS LIMITED INTERESTED PARTY

RULING

1. The 4th Interested Party/Applicant filed a Notice of Motion dated December 9, 2022 under Section 1A, 1B, and 3A of the [Civil Procedure Act](#), Order 51 of the [Civil Procedure Rules 2010](#), Articles 50(2) (k) and 159 of the [Constitution of Kenya](#) and seeking the following orders:

- “ a) That the Ethics and Anti-Corruption Commission does wholly discontinue this suit as against the 4th Interested Party.



- b. That the 4th Interested Party be discharged from the proceedings in this matter.
- c. That the Ethics and Anti-Corruption Commission does release the motor vehicle registration number KCF 863S and all the relevant documents relating to the same to the 4th Interested Party.
- d. That in the alternative, this Honourable Court does decline adoption of the consent dated May 23, 2022 discontinuing this suit as against the 3rd Interested Party and also discharging her from the proceedings in this matter.
- e. That also in the alternative, this Honourable Court does direct that the motor vehicle registration number KCF 863S be sold and the proceeds of sale be put into a joint interest-earning account between the Ethics and Anti-Corruption Commission and the 4th Interested Party or their respective advocates, pending the determination of this suit.
- f. That the costs of the Application be provided for.
- g. That this honourable court does issue any other orders it may deem fit to grant in the circumstances.”

2. The Application is made on the following grounds stated on the face of it and in the supporting affidavit of Wilson Muigai Wachira sworn on December 9, 2022: -

- “a) The Ethics and Anti-Corruption Commission and the 3rd Interested Party entered into a consent dated May 23, 2022 and which consent was served upon the advocates of the 4th Interested Party on August 4, 2022. By virtue of the said consent, the Ethics and Anti-Corruption Commission seeks to:
 - i. Wholly discontinue this suit as against the 3rd Interested Party.
 - ii. Discharge the 3rd Interested Party from the proceedings in this matter.
 - iii. Adopt the said orders with no order as to costs.
- b. The 4th Interested Party is only a party to this suit due to the motor vehicle registration number KCF 863S which it bought from the 3rd Interested Party.
- c. By virtue of the Ruling delivered by this Honourable Court on June 17, 2020, pursuant to the 4th Interested Party’s Application dated March 9, 2020, this Honourable Court directed the Director General of the National Transport and Safety Authority (NTSA) to:
 - i. Furnish the 4th Interested Party with the records of the audit trail of the motor vehicle Registration Number KCF 863S from the time it was imported into the country up to the time it was transferred to the 4th Interested Party.
 - ii. Give information as to who transferred the motor vehicle Registration Number KCF 863S to the 4th Interested Party.
 - iii. Give information as to which system was used to effect the transfer of the motor vehicle Registration Number KCF 863S,



whether it was the Transport Integrated Management Systems [TIMS] or the manual system.

- iv. Avail the following if the system used to effect the transfer of the motor vehicle Registration Number KCF 863S was the Transport Integrated Management System;
 1. The names of the TIMS accounts that were used.
 2. The Phone numbers that were used to receive the security codes for the log in, in order to effect the transfer.
- b. The Orders of this Honourable Court as contained in the Ruling dated June 17, 2020, were communicated to the Director General of the National Transport and Safety Authority (NTSA) by the advocates of the 4th Interested Party through a letter dated June 23, 2020.
- c. In compliance with the Orders of this Honourable Court, the Director General of the National Transport and Safety Authority (NTSA) availed the information requested through a letter dated July 8, 2020 confirming that:
 - i. The transfer of the motor vehicle Registration Number KCF 863S was effected through the TIMS System.
 - ii. The transfer was initiated by Mildred Kerubo Obare, the 3rd Interested Party herein, and the same was accepted in the system by Wachenya Auto Garage Limited, the 4th Interested Party herein.
- b. The 4th Interested Party intends to rely in this matter on the information availed by the Director General of the National Transport and Safety Authority (NTSA) and it has produced the same before this Honourable Court by way of a Further Affidavit sworn on July 13, 2020 by its Director, Wilson Muigai Wachira.
- c. Therefore, it is only just and fair that if the 3rd Interested Party, who sold the motor vehicle Registration Number KCF 863S to the 4th Interested Party, is being discharged from the proceedings of this matter, that the 4th Interested Party be also discharged from these proceedings and the said motor vehicle and all the relevant documents relating to the same be also released to the 4th Interested Party.
- d. The motor vehicle Registration Number KCF 863S was surrendered to the Ethics and Anti-Corruption Commission in good running condition on October 31, 2019 and received by its officer one Yakub Kuno who signed on the letter of surrender dated October 30, 2019 prepared by advocates for the 4th Interested Party. The surrender was pursuant to the Ruling of this Honourable Court delivered on October 22, 2019.



- e. The said motor vehicle remains in the custody of the Ethics and Anti-Corruption Commission to date. The 4th Interested Party is concerned that with each passing day the value of the motor vehicle continues to deteriorate and that by the time the matter is concluded the same would have deteriorated so much as to require total overhaul of its parts to transform it into a usable condition. And this would be very costly to the 4th Interested Party considering that it has not used the motor vehicle from the time it was purchased.
 - f. Therefore, the 4th Interested Party suggests that in the interest of all fairness and justice, the motor vehicle registration number KCF 863S be sold and the proceeds of sale be put into a joint interest-earning account between the Ethics and Anti-Corruption Commission and the 4th Interested Party or their respective advocates, pending the determination of this suit.”
3. The Application was vehemently opposed by the Ethics and Anti-Corruption Commission/Applicant through a replying affidavit sworn (undated) but filed herein on February 2, 2023.
4. The Applicant/Respondent contends that it is opposed to this application because the 4th Interested Party/Applicant is a necessary party to this case; that one of the prayers in the Originating Motion is that the 4th Interested Party’s motor vehicle KCF 863S Toyota Prado valued at Kshs5,600,000/- be forfeited to the State; that release of the motor vehicle to the 4th Interested Party/Applicant would not be in the public interest as the same is suspected to have been acquired through proceeds of crime; that the 4th Interested Party/Applicant had the option of consenting to the sale of the motor vehicle and the proceeds deposited in court but he opposed the application and cannot be heard to be asking for the sale of the vehicle now; that the 4th Interested Party/Applicant has not demonstrated reasonable grounds for its opposition to the consent to terminate the case against the 3rd Interested Party; that the 3rd Interested Party denies ever owning the motor vehicle or paying money for it and further denies ever selling it to the 4th Interested Party/Applicant and that the Applicant/Respondent is convinced that the 4th Interested Party is holding the motor vehicle in trust for the Respondent as espoused in Section 57(2) of the *Anti-Corruption and Economic Crimes Act*. Further that the Applicant/Respondent believes that the ownership of the motor vehicle moved from the Respondent to the 3rd Interested Party and later to the 4th Interested Party/Applicant without any consideration and should the 4th Interested Party/Applicant be removed from the proceedings the preservation order issued earlier in these proceedings shall lapse and the motor vehicle is likely to be disposed of; that the Applicant/Respondent has a prima facie case with a likelihood of success against the 4th Interested Party/Applicant and hence the application to discontinue the case against the 4th Interested Party should not be allowed.
5. In her replying affidavit sworn on January 31, 2023 in response to the 4th Interested Party/Applicant’s application, the 3rd Interested Party, deposes that she is opposed to the 4th Interested Party/Applicant’s prayer opposing the consent between her and the Commission/Applicant/Respondent; that no cause of action has been demonstrated against her in the pleadings and supporting documents filed by the Commission/Applicant; that the motor vehicle was imported on her behalf by the Respondent but because it exceeded the price of Kshs 2 million agreed between them she declined to take possession of it; that her names appeared on the records of the vehicle because she had given all her particulars to the Respondent; that given that her particulars had been used to import the vehicle it was only she who could sign for its transfer in the TIMS System and it was in those circumstances that she



signed the transfer to the 4th Interested Party/Applicant; that it is not true that she sold the vehicle to the 4th Interested Party/Applicant; that it was upon swearing an affidavit disclosing the above circumstances that the Commission/Applicant/Respondent agreed to discharge her from the case and the 4th Interested Party/Applicant ought not to oppose the application by the Commission/Respondent to remove her from the proceedings.

6. The 4th Interested Party/Applicant filed a further affidavit dated February 13, 2023 in which it deposes that it is a party to this case only because it purchased the motor vehicle from the 3rd Interested Party; that as a matter of logic if the Applicant wants to remove the 3rd Interested Party from the proceedings it follows that the 4th Interested Party/Applicant must also be removed; that the removal of the 3rd Interested Party from the case is a collusion between the Applicant/Respondent and the 3rd Interested Party to withhold certain crucial information from this court; that the 3rd Interested Party is a very necessary party to this case as she will help the court fully understand how the vehicle was transferred from one party to the other and her removal will prejudice the Applicant unless it too is removed and the vehicle is returned to it; that the 4th Interested Party therefore objects to the removal of the 3rd Interested Party from the proceedings and further that in regard to the Applicant/Respondent's earlier application that the motor vehicle be sold and the proceeds put in an interest earning account in the joint names of the Advocates for the Applicant/Respondent and the 4th Interested Party/Applicant its objection was only to the extent that it should have been allowed to sell the motor vehicle but it did not reject the sale of the motor vehicle as such. It reiterated its prayer to be removed from the proceedings.
7. Learned Counsel for the parties canvassed the application by way of written submissions.

Analysis and Determination

8. From the pleadings and rival submissions, I discern the issues arising for determination to be: -
 - b. Whether the motor vehicle KCF 863S Toyota Prado and its documents of ownership should be released to the 4th Interested Party
 - c. Whether 4th Interested Party should be discharged from the suit
 - d. Whether or not this court should adopt the consent dated May 23, 2022 discontinuing the suit against the 3rd Interested Party.

Whether the motor vehicle KCF 863S Toyota Prado and its documents of ownership should be released to the 4th Interested Party

9. The 4th Interested Party contends that the motor vehicle KCF 863S Toyota Prado was surrendered to the Ethics and Anti-Corruption Commission/Applicant on October 30, 2019 pursuant to the preservation orders of this court made on October 22, 2019. That the vehicle's condition has since deteriorated and the value lost. Further, that the vehicle was purchased from the 3rd Interested Party and as such, her removal from the case should also be extended to the 4th Interested Party. In the alternative, that the court should decline the consent dated 2May 3, 2022 to withdraw the case against the 3rd Interested Party.
10. The 4th Interested Party/Applicant is alleged to be the registered owner of motor vehicle KCF 863S Toyota Prado on behalf and as an agent of the Respondent who it is alleged acquired the motor vehicle using funds acquired corruptly at the time he was the Principal Accountant at the County Government of Trans Nzoia. The motor vehicle is amongst several other assets that are the subject of this forfeiture



suit. It is my finding that this is an issue that goes to the root of these proceedings and parties should be allowed to canvass the same.

11. The issue of whether the motor vehicle KCF 863S Toyota Prado should be sold was canvassed earlier in this case through an application dated June 21, 2019. At the time the Ethics and Anti-Corruption Commission/Applicant sought to have the motor vehicle sold and the money deposited in an interest earning account. The 4th Interested Party however opposed the application unless it was the one selling the vehicle. It also gave a condition that the proceeds of sale were to be deposited in an interest earning account in which its advocate would be a party. In a ruling delivered on October 22, 2019 the court held as follows:

“59.

- (c) Motor vehicle KCF 863S Toyota Prado worth Kshs 5,600,000/=. The purchase of this motor vehicle is surrounded by controversy, mystery and deceit if not drama between four individuals. According to the applicant, the motor vehicle belongs to the respondent having instructed the 2nd interested party to import the same and paid for it fully but caused the sale agreement drawn with the 2nd interested party as the seller and the respondent signing in the name of the 3rd interested party as the purchaser. The respondent denied buying the car as his but instead claimed that he secured a loan from his friend Khakame on behalf the 3rd interested party who bought the motor vehicle but refused to pay hence he took the motor vehicle and later sold it to the 4th interested party.

.....

62. The element of selling the property before a determination is made is not tenable. The alternative of repairing the motor vehicle and sell it is another opening to tamper with the status of the motor vehicle. I do not agree with the proposal by the applicant to sell the motor vehicles or the proposal by the 4th interested party who claims to have bought the motor vehicle from the 3rd interested party to have the motor vehicle repaired and then sold.
63. The property which is the subject of a dispute should not be alienated before determination of the suit (See Naftali Ruth Kinyua v Thuita Gachure and another (Supra) where the court of appeal upheld the doctrine of lis pendens while quoting a decision in the case of Bellamy vs Sabine (1857) 1 D e j 566 where the court held as follows –

“it is a doctrine common to the courts both of law and equity, and rests as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings”.
64. Having held as above, the only viable option to preserve the property is to have the same kept in the nearest police station possible pending hearing and



determination of the suit which should be fast tracked. Should the court finally find the motor vehicles were not legally obtained, it will forfeit them and if not, have the same released to the owner. The issue of wastage of the motor vehicles while stationary is an inevitable and attendant consequence of some legal recourse.”

12. I agree with the above finding. The motor vehicle KCF 863S is amongst the assets subject of this case. Nothing has changed since that determination and I see no justification therefore to revisit the ruling. Moreover, if the 4th Interested Party was aggrieved it should have appealed that ruling. The motor vehicle shall therefore remain preserved as per the ruling delivered on October 22, 2019.

Whether 4th Interested Party should be discharged from the suit.

13. The 4th Interested Party was joined to these proceedings in their capacity as the registered owners of motor vehicle KCF 863S, which is alleged to have been purchased by funds corruptly or fraudulently acquired by the Respondent. The Ethics and Anti-Corruption Commission/Applicant alleges that the real owner of the vehicle is the Respondent; that the 4th Interested Party merely holds the vehicle “in trust” for the Respondent so as to conceal its ownership. The issue that would have to be determined by this court is whether that is in fact the position. The 4th Interested Party therefore becomes a necessary party to these proceedings as defined in The *Black's Law Dictionary* 9th Edition at Page 1232 which also defines such a party as “a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings.”
14. It is my finding therefore, that the 4th Interested Party is a necessary party without which no effective decree can be made in respect of the motor vehicle registered in their name. As observed by this court in the ruling above, the ownership of the m/v KCF 863S appears to be convoluted as each of the parties made conflicting averments on its acquisition and registration. It is my finding therefore that the 4th Interested Party cannot be discharged from this suit at this juncture as it would be prejudicial to the Ethics and Anti-Corruption Commission/Applicant. To Ameliorate wastage of the vehicle the hearing of the case can be expedited.

Whether the consent dated May 23, 2022 discontinuing the suit against the 3rd Interested Party should be declined.

15. It is trite law that the Ethics and Anti-Corruption Commission/Applicant has the authority and discretion to enter into out of court settlements under Section 56B (2) of the *Anti-Corruption and Economic Crimes Act* which states:-

“ 56B. Out of court settlement

1. In any matter where the Commission is mandated by this Act or any other law to institute civil proceedings or applications, it shall be lawful for the Commission to issue a notice or letter of demand to the person intended to be sued, and may, in such notice or letter, inform the person about the claim against him and further inform him that he could settle the claim within a specified time before the filing of court proceedings.
2. The Commission may negotiate and enter a settlement with any person against whom the Commission intends to bring, or has actually brought, a civil claim or application in court.



3. The Commission may tender an undertaking in writing not to institute criminal proceedings against a person who—
 - a. has given a full and true disclosure of all material facts relating to past corrupt conduct and economic crime by himself or others; and
 - b. has voluntarily paid, deposited or refunded all property he acquired through corruption or economic crime; and
 - c. has paid for all losses occasioned by his corruption conduct to public property.
4. A settlement or undertaking under this section shall be registered in court.”

16. This provision is in consonance with Article 159(2)(C) of the Constitution which exhorts courts to encourage alternative dispute resolution mechanisms. In the case of Geoffrey Asanyo & 3 Others v Attorney General [2018] eKLR the Supreme Court stated:-

“Article 159 of the Constitution was the foundation of the exercise of judicial authority as donated by the people. It outlined principles that guided any person or body that exercised judicial authority. It provided for alternative dispute resolution as a principle in article 159(2)(c).

There should be no rule of procedure that precluded a court of law from allowing a withdrawal of a matter or recording a consent between parties before delivery of judgment and making the judgment moot. The rules of the Court were handmaidens of the Court in its delivery of justice. The epitome of justice between parties before a court was when the parties finally and voluntarily came to an amicable settlement of the dispute between them. The Court only came in as an impartial arbiter when the parties failed to agree amongst themselves.

In considering the matter between the parties, the Court should not close the door for parties to continue negotiating in order to reach at an amicable settlement. Parties had to remain at liberty to withdraw or consent to terms of the settlement of the matter before the Court. However, alternative dispute resolution should be free of coercion and malice and be entered into with free will.”

17. Order 25 of the Civil Procedure Rules also gives a plaintiff such as is the Ethics and Anti-Corruption Commission/Applicant herein, to withdraw (Order 25 Rule 1), discontinue (Order 25 Rule 2) and compromise (Order 25 Rule 5) its suit. Since by May 23, 2022 this case had already been set down for hearing and the hearing had in fact commenced, the consent recorded by Counsel for the Applicant and the 3rd Interested Party on May 23, 2022 would be a discontinuance under Order 25 Rule 2(2) which empowers this court discretion to grant the Plaintiff leave to discontinue his/her suit or to withdraw any part of his claim upon such terms as to costs as are just. A suit can also be adjusted wholly or in part by any lawful agreement or compromise (Order 25 Rule 5) and the court may then act accordingly. Counsel for the Respondent and the Interested Parties and the 4th Interested Party in particular cannot therefore be heard to say that their clients should be removed from these proceedings merely because the Applicant has discontinued its case against the 3rd Interested Party. This is more so because in my view the real issue in controversy is not whether the motor vehicle was transferred to the 4th Interested Party by the 3rd Interested Party, that issue is admitted, but whether the 4th Interested



Party paid any consideration for the motor vehicle and whether or not it being a registered owner of the vehicle is a decoy to conceal the real ownership of the vehicle. In my view, the 4th Interested Party has not demonstrated that the Applicant/Respondent's decision to terminate the case against the 3rd Interested Party is tainted with an ulterior motive. Neither has it raised any viable grounds as to why the voluntary settlement of the dispute between the 3rd Interested Party and the Applicant should be declined. The allegation that the removal of the 3rd Interested Party from the proceedings will hinder it in proving its case does not in my view have any basis as it shall still get an opportunity to cross examine the Applicant's witnesses and to adduce evidence including calling witnesses and producing documents to prove its case and should the court come to the conclusion that it actually purchased the motor vehicle from the 3rd Interested Party then the court shall act accordingly.

18. The upshot is that the 4th Interested Party/Applicant's Notice of Motion dated December 9, 2022 has no merit and it is hereby dismissed with costs. The Application by the Ethics and Anti-Corruption Commission/Applicant to discontinue the suit against the 3rd Interested Party is accordingly allowed.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 16TH DAY OF MARCH 2023.

E N MAINA

JUDGE

