



**Ethics & Anti-Corruption Commission v Moses Kasaine Lenolkulal t/  
a Oryx Service Station (Civil Suit 21 of 2019) [2024] KEHC 2936 (KLR)  
(Anti-Corruption and Economic Crimes) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2936 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES**

**CIVIL SUIT 21 OF 2019**

**EN MAINA, J**

**MARCH 20, 2024**

**BETWEEN**

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

**AND**

**MOSES KASAINEN LENOLKULAL T/A ORYX SERVICE  
STATION ..... DEFENDANT**

**JUDGMENT**

**Background**

1. The Plaintiff brings this suit pursuant to Section 11(l)(k) of the Ethics and Anti-Corruption Act, 2011 to recover a sum of Kshs. 80,763,715/35 which it states are proceeds of corruption or related to corruption from the Defendant. Further, and in the alternative the Plaintiff seeks an order that the Defendant does forfeit the properties acquired through the investment of Kshs.80,763,715/35 which are proceeds of corruption as provided under Section 42(3) of the *Anti-Corruption and Economic Crimes Act*, 2003.
2. The impugned properties are identified as: LR No. 2259/744(1R 134495/1); LR No. 2259/745(IR.134494/1); LR No. 2259/749 IR. 134510/1); and LR No. 2259/750 (IR 134511/1); - all situated in Karen within Nairobi County.
3. Prior to instituting this suit, the Plaintiff had through Nairobi High Court Miscellaneous Application Nos. 13 of 2019 obtained an order for preservation of the listed properties; Nairobi High Court Miscellaneous Application No. 15 of 2019 for preservation of a sum of Kshs. 14,600,000/- held in KCB bank account Nos. 1103xxxxxx and 1108xxxxxx.



## The Parties

4. The Plaintiff is a Constitutional Commission established as a body corporate under the provisions of the Ethics and Anti-Corruption Act, 2011 pursuant to Article 79 of *the Constitution* of Kenya, 2010.
5. The Defendant is a male adult and was at all material times to this suit the Governor of the County Government of Samburu. Further, the Defendant is the sole registered proprietor of Oryx Service Station - a business name duly registered under the *Registration of Business Names Act* (Cap. 499 of the Laws of Kenya) - carrying on business in Samburu County and/or elsewhere within the Republic of Kenya.

## Plaintiff's Case

6. The Plaintiff in exercise of its mandate, investigated allegations that public officers in the County Government of Samburu in collusion with contractors were engaged in conduct constituting corruption and economic crimes wherein an amount of Ksh. 1.6 billion was illegally paid, embezzled, or otherwise fraudulently acquired between the year 2013 and 2018.
7. The Plaintiff's case is that, upon investigations, it was established that in the financial years 2013/2014 to 2018/2019, the Defendant, while serving as the Governor of Samburu County, knowingly and unlawfully entered into contracts with the County Government of Samburu for supply of fuel and received a sum of Kshs. 80,763,715.35/= through his registered business under the name of Oryx Service Station.
8. The Plaintiff maintains that by virtue of by being the Governor of County Government of Samburu, the Defendant was the Chief Executive Officer of the county, a public officer, and an agent of the county government, and as such, holding a private interest in the subject contracts, was in conflict with his powers and the functions of his public office. That the conduct amounts to conflict of interest and is also illegal, therefore, the payments made to Oryx Service Station constitute proceeds of corruption.
9. The particulars of the illegality are stated to be:-
  - a. Entering into the contract for the supply of fuel with Samburu County Government while serving as the Governor and agent of the County Government of Samburu in blatant abuse of his office.
  - b. Holding a private interest in the subject contract entered into with the County Government of Samburu, a public body in which he is an agent, in breach of Section 42(3) of the *Anti-Corruption and Economic Crimes Act*, 2003.
  - c. Using a business name to conceal beneficial ownership of the interest in the contracts for supply of fuel to the County Government of Samburu
  - d. Receiving payment for purported fuel supply from the County Government of Samburu.
  - e. Contracting in complete violation of express provisions of the law.
  - f. Acting contrary to his duty to promote and ensure competitive procurement within the County Government of Samburu.
  - g. Engaging in conduct that contravenes the national values and principles of governance provided for under Article 10 and values and principles of public service as provided under Article 232 of *the Constitution*.



- h. Being in contravention of the Public Officers Ethics Act with regard to conflict of interest
  - i. Acquiring public property or benefit from the County Government of Samburu contrary to the provisions of Section 45(1)(a) of the *Anti-Corruption and Economic Crimes Act*, 2003.
10. The Plaintiff avers that the Defendant purchased the impugned properties using the proceeds of corruption in an effort to conceal and launder the proceeds of corruption and contends that the same should be forfeited to the Government of Kenya.
  11. In support of their case, the Plaintiff relied on documents as listed in the 'Plaintiff's List of Documents' [Volumes 2,3,4, & 5] dated 9<sup>th</sup> September, 2019; 'Plaintiff's Amended List of Documents [Volume 1]' dated 21<sup>st</sup> February, 2020 and other documents as listed in the 'Plaintiff's Supplementary List of Documents' dated 5<sup>th</sup> March, 2020.
  12. To prove its case the Plaintiff called seven witnesses who testified as follows:- PW1: Joseph Mayani Lekanku stated that he was the Head of Treasury, Samburu County, Employee since 2014; that he was responsible for payments; that payment vouchers were made to Oryx Service Station for supply of fuel. He however maintained that there was no loss of public money; and that the delivery notes confirm that fuel was supplied to the County by Oryx Service Station.
  13. PW2: Joram Ramiti Lentoieni was the acting Head of supply chain management and previously the Deputy director supply chain. He testified that Oryx service station was the County's supplier between 2013 and 2018; that the Plaintiff requested for documents in regard to procurement and was supplied with the same. While conceding that he was not the custodian of those documents, he stated that among those documents was a Conflict of Interest filled by Moses Kasaine and Stephen Lekupe. He asserted that the proper procurement process was followed in supply of fuel to the County Government of Samburu. However, that he could not confirm whether the fuel was supplied by Oryx Service Station.
  14. PW3: Johnstone Kirui was a Bank manager, Kenya Commercial Bank, Maralal, Samburu County between 20<sup>th</sup> March, 2016 to 20<sup>th</sup> December, 2021. He produced bank account statements in respect of Account No.1103xxxxxx, Account No. 124xxxxxx, Account No. 1108xxxxxx, Account No. 1234xxxxxx all in the name of Moses Kasaine Lenolkulal and also Cheques, transfer vouchers, Cash withdrawal vouchers, transfer (RTGS) all touching on Oryx Service Station and Moses Kasaine Lenolkulal. He also testified that in the account opening documents for Oryx Service Station, the certificate of Registration showed owner as Moses Kasaine Lenolkulal and that he transacted on behalf of Oryx Service Station from time to time. He testified that on 22<sup>nd</sup> September, 2015 the bank received a letter dated 1<sup>st</sup> May, 2013 seeking withdrawal of Moses Kasaine Lenolkulal as a signatory to Account No. 1124xxxxxx. He stated that he could not tell whether the monies in the bank accounts were part of the funds believed to be proceeds of corruption. He confirmed, however, that the high transactions in the accounts of Oryx Service Station, occurred when the Defendant (Moses Kasaine Lenolkulal) was the governor of Samburu County.
  15. PW4: Alex Kinyanjui a Digital forensic analyst at EACC testified that he examined the IFMIS payments made by the County Government of Samburu to the Oryx Service Station. He produced a certificate under Section 106B(4) of the *Evidence Act* which is dated 13<sup>th</sup> March, 2019 and stated that payments amounting to Ksh. 76 million, were paid to Oryx Service Station by the County Government of Samburu through bank account No.1124xxxxxx. He contended that payments can be made without the goods or services being supplied/rendered but and in this case he was not in a position to determine if the county government lost public money through the IFMIS platform.



16. PW5: Joel Khisa Yongesa an Investigator Procurement Specialist with the Ethics and Anti-Corruption Commission since 12<sup>th</sup> August 2016 testified that in this case the investigations, which focused on the conflict of interest and not specifically on procurement process revealed that the listed properties were acquired by Defendant through funds in the sum of Kshs.86,837,894.55 received from the County Government of Samburu through his business name Oryx Service Station. He produced a lease agreement dated 26<sup>th</sup> November, 2013 between the Defendant and Hesbon Wachira Ndathi wherein the Defendant was to receive Kshs. 7 for every litre of fuel sold. He stated that the process in which the County Government of Samburu followed in procurement of goods and services, in the years in question, did not comply with the law; that for the years 2013 to 2016 the process used was irregular, riddled with conflict of interest, and no competitive bidding. He conceded that the Defendant had filed a declaration of Conflict of Interest in regards to the Oryx Service Station. He however maintained that despite that declaration there still existed the issue of the actual conflict of interest. PW5, averred that there was a link between the money paid by Samburu County government to Oryx Service Station and that the same was paid into the Defendant's bank account and thereafter to one John Keen's bank account as the Vendor of the impugned property.
17. PW6: Vincent Cheruiyot Siele testified that he was the Operations Manager, Kenya Commercial Bank, Mararal, Samburu County between April 2016 to March 2019. He stated that he provided the EACC with the statements of account for Oryx Service Station as well as those of the Defendant – a total of 14 accounts. A certificate under Section 106B of the Evidence Act was produced in court. He also testified that no transactions were flagged by the bank. He also testified that a change of signatories does not necessarily change the ownership of the account.
18. PW7: Peterson Wachira Worked at the Human Resource department in the Attorney General's office. In his testimony, he confirmed that Oryx Service Station is a business name with Moses Kasaine Lenolkulal as the sole proprietor. He too produced a certificates under Section 106B of the Evidence Act.

### **Defendant's Case**

19. In opposition to the Plaintiff's case, the Defendant filed a statement of defence dated 17<sup>th</sup> October, 2019. He traversed the contents of various paragraphs in the Plaintiff, and put the Plaintiff to strict proof thereof.
20. It is the Defendant's case that warrants obtained to investigate him were irregularly obtained and in any event did not extend to investigation of the impugned properties. The Defendant maintained that he duly filed a declaration of Conflict of Interest form with the County Government of Samburu, upon his election as the Governor wherein he declared his interest in the Oryx Service Station. It is also his case that he declared his income, assets and liabilities for the period in question, which declaration included proceeds from Oryx Service Station; that on 1<sup>st</sup> May, 2013 he leased Oryx Service Station to a 3<sup>rd</sup> Party namely Hesbon Wachira Ndathi; that by an agreement dated 2<sup>nd</sup> May, 2013 the Defendant and the 3<sup>rd</sup> Party agreed he (the defendant) would be compensated for what was owed to him and what was due to him from the business transactions prior to the date of the lease.
21. He stated that all the business dealings between the County Government of Samburu and Oryx Service Station were independent of his office as the Governor and that Hesbon Wachira Ndathi was acting for and on behalf of Oryx Service Station but not on his (Defendant's) behalf.
22. It is the Defendant's position that the impugned properties were lawfully acquired through his legitimate sources of income and hence he cannot be deprived of them through forfeiture. He asserted that he was charged with offences under the Anti-Corruption and Economic Crimes Act in ACC NO.



- 3 OF 2019: Republic v Moses Kasaine Lenolkulal & 10 Others, which offences arise from the same subject matter and raise similar issues as those in the instant suit and that the criminal proceedings are yet to be determined, a fact the Plaintiff did not disclose to this High Court. He stated that granting the orders/prayers sought in this suit would amount to an injustice, as the grounds are unfounded and this court should dismiss this case with costs and interest.
23. He relied on documents in his Bundle of Documents and ‘Defendant’s Further List and Bundle of Documents’, ‘List of Witnesses’ dated 20<sup>th</sup> February, 2020 and ‘Defendant’s Further List of Witness’ dated 24<sup>th</sup> January, 2022.
  24. He called two (2) witnesses. The Defendant’s witnesses in summary testified as follows:
  25. In his testimony the Defendant who gave evidence as DW1 testified that he was the Governor of Samburu County from August 2013 to August 2017; and August 2017 to August 2022. He maintained that he filed a declaration of conflict of interest dated 5<sup>th</sup> April, 2013 declaring his interest in Oryx Service Station. The declaration was addressed to the County Secretary and received on 9<sup>th</sup> April, 2013. That he filed his wealth declaration first on 1<sup>st</sup> November, 2015 which indicated Oryx Service Station as a sources of income.
  26. Additionally, that he leased the Oryx Service Station to Hesbon Wachira Ndathi through an agreement dated 1<sup>st</sup> May, 2013. He stated that prior to leasing the service station he was the sole signatory to Oryx Service Station bank account but after the agreement Hesbon Wachira Ndathi was added as a co-signatory and that he (the defendant) remained a signatory to the account until 22<sup>nd</sup> October 2015.
  27. The Defendant maintains that he never made any bids in regard to supply of fuel on behalf of Oryx Service Station, but that the bids were done by its new owner, Hesbon Wachira Ndathi. He denied using his position as the Samburu County Governor to influence any procurement.
  28. In his testimony, he conceded to receiving a sum of Kshs. 265 million from the County Government of Samburu but maintained the funds were his salaries and emoluments; that he purchased the properties in Karen: 2 acres which were then subdivided into 4 parcels of 0.5 acres each from the said emoluments.
  29. He contended that at no time did the Auditor General raise any query on loss of funds arising from supply of fuel yet the County had been audited many times and reiterated that from the year 2013 all the fuel was sourced and supplied by Hesbon Wachira Ndathi. He maintained that the Oryx Service Station was still his as he had only transferred its operations, but retained ownership of the premises.
  30. In cross examination, the Defendant denied the contents and authenticity of an agreement wherein he and Hesbon Wachira Ndathi were to inject a capital of Kshs. 1 million each. This despite conceding that the signature thereon looked like his. It was his position that the lessee was not operating the Oryx Service Station on his behalf but distinctly as his tenant. He disputed that the lease agreement between him and Hesbon Ndathi was a scheme to conceal his beneficial interest in the Service Station.
  31. On how he acquired the properties in issue, the Defendant stated that he took a car loan and mortgage which he spent on purchasing the Karen properties. He explained that whereas he purchased the land in 2014 he executed the deed in 2015, then took the mortgage and constructed the house. That before disbursement of the mortgage of Kshs. 21 million, he paid Kshs. 11 million to the seller in October, 2015. He stated that in July 2015 he had received Kshs. 8 million from Oryx Service Station. Also paid the seller Kshs. 5 million on 1<sup>st</sup> October, 2015 before disbursement of the mortgage in November, 2015. He also confirmed that the transactions were all conducted through his personal account, the same account which received money from Oryx Service Station.



32. The Defendant stated that on 28<sup>th</sup> July 2015, he paid Kshs. 2 million for the purchase of building materials on behalf of the service station; that his source of income was salaries, gratuity, and per diems, rental income from the service station, farm produce and sale of machineries. That the first gratuity was received after construction of the house; while the second gratuity was received during pendency of this matter and thus the funds were not applied in the construction of the house.
33. In the end, he maintained that during the period he was the Governor he never purchased fuel for the service station and contended that that was done by Hesbon Wachira Ndathi.
34. However, he conceded that he received monies from Hesbon Wachira Ndathi but stated that the same was for his stock, debtors, and bank balance from when he still operated the Oryx Service Station.
35. The Defendant called as his second witness, CPA Charles Okeyo Owuor (DW2), a Certified Public Accountant in Kenya Member No. 11104/2458; also a Certified Investments Financial Analyst. He produced a report dated 16<sup>th</sup> October, 2021 whose finding was that the sources of income and the expenditure were balancing. Also attached to the report was a declaration of conflict of interest by Moses Kasaine Lenolkulal. He stated that there were rental schedules in regard to the service station and that the same were also in the Kenya Revenue Authority (KRA) portal hence public information.
36. In summing up, Learned Counsel for the parties filed written submissions. Those of the Plaintiff are dated 15<sup>th</sup> January 2024 and those of the Defendant 5<sup>th</sup> February 2024.

#### **Plaintiff's Submissions**

37. Learned Counsel for the Plaintiff submitted that in the case the Plaintiff seeks to prove conflict of interest as defined in Section 42(3) of the *Anti-corruption and Economic Crimes Act* by demonstrating that the Defendant was an agent of a public body and that he knowingly acquired or held, directly or indirectly a private interest in the contract connected with the public body.
38. On proof of agency, Counsel averred that there is no dispute that the Defendant was the Governor of Samburu County Government from March 2013 to 2019. As such, he was the Chief Executive of the County under Article 179(4) of *the Constitution*; a public officer under Section 2 of the *Anti-Corruption and Economic Crimes Act*, 2003 and Section 2 of the *Public Officer Ethics Act*, 2003; and an agent of the County Government of Samburu under Section 38 of the *Anti-Corruption and Economic Crimes Act*, 2003.
39. On Defendant knowingly acquiring and holding, a direct or indirect private interest in the contract connected with the public body, Counsel submitted that the Plaintiff called a witness, Joram Ramiti (PW2) through who it proved on a balance of probabilities that the Defendant contracted with the Government of Samburu in regard to supply of fuel during the period 2013 to 2019; that the witness produced Notifications of Award of tender to Oryx Service Station and Local Purchase Orders(LPO); the witness confirmed that LPO's are contracts. Counsel noted that the Plaintiff waived his right to have the witness recalled for cross examination by his Advocate.
40. As to the Payment, it is contented that PW1, Joseph Lekalkuli Mayani, the Samburu County Head of Treasury produced payment vouchers for a sum of Kshs. 80,763,715.35/= as proof of payment for the fuel supplied to the County Government of Samburu by Oryx Service Station.
41. That the Plaintiff also called Alex Kinyanjui (PW4) a digital forensic analyst working with the Plaintiff who produced IFMIS statements showing that Samburu County had in fact paid a total of Ksh. 84, 695,996.55 to Oryx Service Station between the relevant period.



42. Consequently, the Plaintiff had proved that the Defendant received money from the Government of Samburu in regard to the supply fuel during the period 2013 to 2019.
43. On the issue of private interest, Counsel submitted that Mr. Peterson Wachira (PW7) an officer of the Registrar of Companies, produced records from the Business Registration Service showing that the Defendant was the registered sole proprietor of Oryx Service Station a business name registered in February, 2010. Counsel asserted that in his examination in chief the Defendant conceded to being the registered proprietor of Oryx Service Station.
44. On the defence by the Defendant of having declared conflict of interest but still being awarded tenders to supply fuel through his business name [Oryx Service Station] Counsel stated that the declaration of conflict of interest did not sanctify the subsequent illegal contracts; that the Oryx Service Station and the Samburu County Government should not have traded with each other, in light of the conflict of interest.
45. In regard to the Defendant's allegation that he had leased the Oryx Service Station to one Hesbon Wachira Ndathi, and that he no longer had any dealings with the service station from May, 2013, Counsel submitted that a lease for any property or business interest does not amount to a transfer of ownership of the business and neither does operation of the business. Counsel asserted that the Defendant remained as the sole registered proprietor of the station and Oryx Service Station is the Defendant's. Counsel pointed out that whereas the lease agreement indicated that it was renewable every three years from May 2013, there was no evidence of renewal after 2016 and that the lease related to the premises.
46. Counsel submitted that the purported lease was merely intended to conceal the Defendant's interest in Oryx Service Station and to allow him to gain an economic advantage in transacting with the County for sale of fuel during his tenure as Governor of Samburu County. Counsel contended that the purported lease is a mischief by the Defendant; that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of "Camouflage" as observed in the case of Schabir Shaik & Others -vs- State Case CCT 86/06(2008) ZACC 7 cited with approval in the case of Assets Recovery Agency Lilian Wanja Muthonit/a Sahara Consultants & 5 others [2020].
47. Counsel stated that by Defendant's own admission, he withdrew from being a signatory in the Oryx Service Station account number 112472591 sometime in 2015 yet all that time while he was still a signatory and the Governor for Samburu County the Oryx Service Station engaged in supply of fuel to Samburu County Government thus creating direct interest in Oryx Service Station and supply of fuel tenders in Samburu County.
48. Further, that Vincent Cheruiyot (PW6) a witness from KCB Bank Limited testified that a change in signatories does not in any way change ownership of an account and the account holder can either give limited or unlimited powers. Counsel stated that the Plaintiff had demonstrated that Hesbon Ndathi was merely a proxy intended to conceal the Defendants interest in the County and that the Defendant still had an interest in Oryx Service Station before and after the purported lease of business and the withdrawal of signature. That whether the Defendant ran the petrol station or not and whether he had leased the station or not, he had a direct or indirect interest in the fuel contracts with Samburu County.
49. Regarding the Audit Report produced by DW2, an independent auditor, Counsel for the Plaintiff stated that the same had no bearing to the issue before this court, which is one of conflict of interest; that the Audit Report was to the effect that there was no disparity between the Defendant's earnings and his expenditure and as such it would have been relevant if the issue was one of unexplained assets.



50. Counsel contended that having established a conflict of interest between the Defendant trading as Oryx Service Station and the County Government of Samburu while still its governor, the consequent payments received pursuant to the subject contracts constitute proceeds of corruption or crime or related to corruption. For the definition of what constitutes 'proceeds of crime' Counsel relied on Section 2 of the Proceed of Crime and Anti-Money Laundering Act and [Mutual Legal Assistance Act, 2011](#).
51. Further, Counsel submitted that through the evidence of Joel Khisa (PW5), an investigator with the Commission, the Plaintiff had proved that the Defendant purchased the Karen properties from one John Keen during the time he was trading through Oryx Service Station and using funds co-mingled with those of Oryx Service Station.
52. Counsel stated that the defence put forward by the Defendant was neither consistent nor convincing; that the mortgage was disbursed in November, 2015 a year after the sale agreement with John Keen was entered into and that transfer of monies was done before the mortgage loan was disbursed. Counsel further stated that there was a credit from Oryx for Kshs. 8,624,587/= to the Defendant on 28<sup>th</sup> July, 2015 and thereafter on the same page in August 2015 a transfer of Kshs. 1,921,295/= to Tuff Steel Bars for construction; that from the same funds from Oryx Service Station there was in October 2015 a transfer of Kshs. 5,000,000/= to John Keen which transfer was before the mortgage and the funds were directly from Oryx Service Station and further that there was a transfer from the Defendant to John Keen on 12<sup>th</sup> October, 2015 for Kshs. 11,000,000 from the Oryx Service Station account.
53. Counsel submitted therefore that the Plaintiff has proved that the Karen property and the funds in the account are tainted by the proceeds of corruption or corrupt conduct.

#### **Defendant's Submissions**

54. Learned Counsel for the Defendant submitted that the Defendant had disassociated himself from Oryx Service Station; however, that to secure his assets/interests, meaning his fuel stock, creditors and bank balance accrued before he became the Governor, the Defendant remained a signatory of the Oryx Service Station bank account until October, 2015; That the change of signatory was through a letter dated 1<sup>st</sup> May, 2013 which was received at the bank on 22<sup>nd</sup> October, 2015, as confirmed by Johnstone Kirui (PW3), the then Branch Manager of the KCB Maralal. Counsel submitted that Joel Khisa (PW5), Investigating Officer for Plaintiff, did not testify or establish that the Defendant bought the fuel that was sold by Oryx Service Station to the County Government.
55. Counsel argued that once the Defendant had declared his conflict of interest, it was upon the procurement team at the County to decide whether to engage in business with him or with Oryx Service Station or not. Counsel stated that the Defendant did not influence the award of tenders to Oryx Service Station. Therefore, that as no evidence to the contrary was adduced, the tendering process was not flawed and was lawful.
56. Counsel disputed that the Defendant concealed his activities through a sophisticated and complex scheme of declaring conflict of interest and pretending to lease out his business to a third party. Counsel submitted that the Defendant was not the recipient of the entire amount sought to be recovered, that there is a third party, who also received and benefited from the amounts paid to Oryx Service Station by the County and hence the Plaintiff cannot recover from the Defendant what they have not demonstrated was received and utilized by him (Defendant).
57. Counsel stated that the alternative prayer for judgment in favor of the Plaintiff for a sum of Kshs. 80,763,715.35 places an obligation on the Plaintiff to specifically prove that the Defendant was





unlawfully/illegally paid that exact amount; that there was no fuel supplied for that amount and that therefore, the County is entitled to a refund of that amount. Counsel averred that the prayer cannot issue since PW1, the Plaintiff's own witness confirmed that all the payment vouchers he produced in court were for fuel supplied and there was no loss of money.

58. Counsel argued that the law requires a public officer to declare conflict of interest, which the Defendant had done and therefore, it cannot be said that he acquired or held a private interest in Oryx Service Station with a view of defrauding the county; that the alleged criminal activity sought to be relied upon by the Plaintiff is that the Defendant committed an act of conflict of interest by acquiring a private interest in the contracts between Samburu County Government and Oryx Service Station and the alleged offence would be founded upon Section 42 of the Anti-Corruption and Economic Crimes Act No 3 of 2003. Counsel stated that the said Section 42 only makes it an offence where the agent fails to disclose his interest, the agent votes or participates in the proceedings of his principal in relation to the decision or if the agent knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body. Counsel maintained that the Defendant declared the Conflict of Interest under Section 43 of the repealed Public Procurement and Asset Disposal Act, 2005 and that as Article 73(2)(c)(ii) of the Constitution of Kenya and Section 59 (3) of the Procurement and Asset Disposal Act, 2015 have similar provisions which require a public officer who has such interest to declare it in writing, the Defendant complied with the law by declaring the conflict of interest in writing. Therefore, that on that account the Defendant cannot be faulted.
59. Counsel also submitted that since the Defendant had rendered an explanation as to why he remained a signatory to the Oryx Service Station bank account while still the governor, then the received amounts cease to be viewed as proceeds of crime; and that in any case, fuel was supplied to the county government.
60. Counsel submitted that the Karen properties are not proceeds of crime, but were paid for by the Defendant from funds generated legally and nothing has been converted, transformed or intermingled.

### **Issues for Determination**

61. I have carefully considered the evidence adduced by both sides, the rival

### **Submissions of their advocates and the law.**

62. There is no dispute that the Defendant was at all times material to this case, the Governor of Samburu County Government and hence its Chief Executive under Article 179(4) of the Constitution of Kenya. There is also no dispute that the Defendant was at all material times the registered proprietor of Oryx Service Station. The issues that arise for determination therefore are:-
  - i. Whether the Defendant's relationship with Oryx Service Station and the business relations between that service station and the County Government of Samburu posed a conflict of interest in view of the Defendant's position as the governor of the County.
  - ii. Whether the declaration of conflict of interest afforded the Defendant a carte blanche to do business with the County of which he was Governor and; whether doing so amounted to an offence under Section 42 (3) of the Anti- Corruption and Economic Crimes Act as alleged.
  - iii. Whether the Plaintiff is entitled to the orders sought.
  - iv. Who shall bear the costs of this case.



## Analysis and Determination

### **Issue (i): Whether the Defendant's relationship with Oryx Service Station and the business relations between that service station and the County Government of Samburu posed a conflict of interest in view of the Defendant's position as the governor of the County.**

63. The Black's Law Dictionary, tenth Edition defines conflict of interest as "A real or seeming incompatibility between one's private interests and one's public or fiduciary duties." The same dictionary defines "fiduciary" as "someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure e.g. the corporate officer is a fiduciary to the Corporation, 2. Someone who must exercise a high standard of care in managing another's money or property...."
64. The Defendant was the first Governor of the County Government of Samburu having been elected by the people of that county in the year 2013. As Governor of the county and as I have already stated, he became the Chief Executive of that County (see Article 179 (4) of *the Constitution*). As such he became a fiduciary of the people of Samburu County when it came to management of public property and finances. As a state officer he now became bound, inter alia, by the values and principles of *the Constitution* of Kenya, Chapter six of the Constitution, the *Leadership and Integrity Act* and the law pertaining to Public procurement. Both the *Leadership and Integrity Act* and the Public Procurement and Disposal Act, 2005 contained explicit provisions on conflict of interest. (see Section 43 of the Public Procurement and Disposal Act, 2005 and Section 16 of the *Leadership and Integrity Act*). My answer to issue No. (i) is therefore that given his position in the County any business conducted by him and the County through Oryx Service Station would amount to a conflict of interest.

### **Issue (ii) whether the declaration of conflict of interest afforded the Defendant a carte blanche to do business with the County of which he was Governor and; whether doing so amounted to an offence under Section 42 (3) of the Anti- Corruption and Economic Crimes Act as alleged.**

65. On this issue the Defendant's case is that having foreseen that the County Government of Samburu would require Oryx Service Station given the limited service stations in Maralal (The County Headquarters), once he became Governor he took it upon himself to declare a conflict of interest in accordance with the then Section 43 of the Public Procurement and Disposal Act, 2005. For the Plaintiff that was not a panacea for the Defendant doing business with the County to which the Defendant's response was that in addition to declaring the conflict he leased the business to one Hesbon Wachira Ndathi.
66. As to whether the declaration of conflict of interest, whether orally or in writing, gave the Defendant a carte blanche to do business with the County, my finding is that it did. My interpretation of Section 43 of the Public Procurement and Disposal Act 2005 which required an employee or agent of a procurement entity who had a conflict of interest with respect to procurement, was firstly to ensure that they did not take part in the proceedings and to void such proceedings if they did. In my view the declaration of conflict of interest, per se was not and could not have been a stamp of legality to procurement proceedings but a means of warning the public entity that it could not do business with the employee or agent. This becomes even more apparent when one considers the provisions of Section 16 of the *Leadership and integrity Act* and more especially sub section (2) & (4) which states:-

16. Conflict of interest.

- (2) Without limiting the generality of subsection (1), a State officer or a public officer shall not hold shares or have any other interest in a corporation, partnership or other



body, directly or through another person, if holding those shares or having that interest would result in a conflict of the State officer's or public officer's personal interests and the officer's official duties.

.....

- (4) The Commission or a public entity may give direction on the appropriate action to be taken by the State officer or public officer to avoid the conflict of interest and the State officer or public officer shall—
  - (a) comply with the directions; and
  - (b) refrain from participating in any deliberations with respect to the matter.”

67. Further, it is my finding that with or without a declaration of conflict of interest the Defendant was prohibited from participating in a tender for supply of goods or services by Section 17 of the [\*Leadership and Integrity Act\*](#). The Section states:-

“ 17. A State officer or a public officer shall not participate in a tender for the supply of goods or services to a public entity in which he or she is serving or is otherwise similarly associated, but the holding of shares by a State officer or a public officer in a company shall not be construed as participating in the tender of a public entity unless the State officer or public officer has a controlling shareholding in the company.”

68. It is noteworthy that Oryx Service Station is a business name to which the Defendant is a sole proprietor and the issue of shares does not therefore arise.

69. My answer to the first limb of issue No. (ii) is that the declaration of conflict of interest did not in any way permit the Defendant to do business with the County of Samburu.

70. In regard to the second limb it was the Defendant's case that he did not do business with the County because as soon as he became the Governor he leased Oryx Service Station to one Hesbon Wachira Ndathi. He produced the lease agreement as proof. It is the Defendant's case that any contracts awarded to the service station thereafter were to Hesbon Ndathi but not himself and that whatever monies he received from the service station were what was already owed to him and what was due to him from the said Hesbon Ndathi from the full stock at the time of the agreement and the bank balances. It is the Plaintiff's case however that this lease was just a decoy, that if there was a lease then it concerned the premises only and that in any case it was not renewed after it expired in 2016.

71. I have considered the evidence and submissions on this issue very carefully and my finding is that even though the Defendant entered into a lease agreement with the said Hesbon Wachira Ndathi for lease of the service station, it was only on paper. The business continued to be his, both in fact and in law. This is borne by the fact that the Defendant continued to be a signatory of the Oryx Service Station's bank account at the local Kenya Commercial Bank until 22<sup>nd</sup> September 2015 a fact which he himself admitted. This in effect meant that he remained in control not only of the money but by extension of its business. His allegation that he did so to secure his debts and fuel stock and bank balance is not persuasive, firstly given the time it took for him to deliver the letter and secondly because this being such a serious issue of integrity the umbilical cord should have been cut off immediately and not waited until October 2015 to hand over a letter which he purports to have written in 2013.

72. Moreover an issue arises whether the purported agreement between him and Hesbon Ndathi, whom he did not even call as a witness, pertained to the buildings only or whether it extended to the business



as well. It is my finding that given that he continued being a signatory to the account of the service station he continued partaking in the business of the station. He did not relinquish the business. It is also curious that the service station could have had so much fuel in the tanks that it remained in stock for three years. If it was a matter of debts then same could have been paid to him by Hesbon Ndathi even without him being a signatory to the account. In other words, he need not have continued to be a signatory and to hand onto the service station if he had indeed leased it to another person. It is also noteworthy that he did not state the amount or value of the stock or the debts he was trying to protect. To my mind, the Defendant did not transfer the business of Oryx Service Station and as it continued to do business with the County, it was he who was doing business with the County. The purported lease agreement was but a decoy intended to hoodwink the public and the County and to disguise the source of funds that eventually ended up in the Defendant's pockets.

73. It is my finding even were we to believe that he leased the Petrol Station to Hesbon Ndathi, the Plaintiff has adduced evidence which on a balance of probabilities proved that the Defendant indirectly received awards from the County Government as he did not relinquish the operations of the business to Hesbon Ndathi. It was one thing to lease the premises to Hesbon Ndathi and another to transfer the business to him which I find he did not. I am therefore satisfied that the Defendant who was an agent of Samburu County knowingly and directly held a private interest in a contract emanating from the County, a public body, contrary to the provisions of Section 42(3) of the [Anti-Corruption and Economic Crimes Act](#).

**Issue No. (iii):- Whether the Plaintiff is entitled to the orders sought.**

74. On this issue there is, in my considered view, cogent evidence that Oryx Service Station was paid a sum of Kshs.80 million through the IFMIS (Integrated Financial Management Integrated System) on account of fuel supplied to the County during the period in issue. The local purchase orders and payment vouchers produced by PW2 attest to this. Whereas the Defendant received much more than that what the Plaintiff is concerned with is the Kshs.80 million paid to him through Oryx Service Station in fragrance breach of Section 42(3) of the [Anti-Corruption and Economic Crimes Act](#). The Defendant however contends that that money was not lost since the County received consideration for it. In other words, that since the service station supplied fuel worth that amount then it did not lose any money. It is his case that as a matter of fact no audit query was raised by the Auditor General in regard to the supply of fuel. My take on this is that the loss of money is not the issue in this case. Neither is the issue whether or not the Defendant took part in or influence the award of the tender to Oryx Service station. It is about upholding the principles of good governance and integrity required of state officers. If the law clearly prohibits a State of public officer from conducting business with a public entity or organ for which he works, then such business is illegal. Section 42(3) of the [Anti-Corruption and Economic Crimes Act](#) is express on that. The funds received by the Defendant from the County on account of fuel sold by Oryx Service Station amounts to illicit enrichment.
75. My decision finds support in the case of Ethics and Anti-Corruption Commission v Vulcan Lab Equipment Ltd & Another [2020] eKLR where the Court of Appeal stated:-

“ ..... The contract was also illegal for being entered into in breach of various provisions of the PPDA and the PPDR. I think that the whole rushed Process reeked of corruption and blatant illegality.... This court has been consistently categorical that it will not aid those who would seek to use the judicial process to enforce contracts that bear the blight and blemish of a corruption or illegality and are against the public interest. .... In Blue Sea Shopping Mall Ltd v City Council of Nairobi & 3 others [2015] eKLR this court differently constituted authoritatively held that that a contract entered into in a procurement process that is flawed



for violating he PPDA is stricken by invalidity and illegality and cannot be given effect by the courts...”

76. Similarly, it would be remiss of this court to hold that the Defendant should be allowed to enjoy what he earned through an illegality.
77. There is cogent evidence which proves that out of the monies (the Kshs.80 million) paid to him on account of the supply of fuel to the County, he paid a sum of Kshs. 60 million to one John Keen as consideration for the property in Karen. A sum of Kshs.14,600,000 was also found in his KCB Bank accounts No. 1103xxxxxx and 1108xxxxxx. My finding is that the Karen properties and the cash in the two accounts are tainted in view of the illegality of the source and the fact that there is evidence that proves on a balance of probabilities that contrary to his government the Defendant paid for the properties on dates prior to those on which he received the mortgage.
78. The upshot is that this court finds that the Plaintiff has proved its case on a balance of probabilities and is therefore entitled to the prayers sought.

**Issue (iv):- Who shall bear the costs of this case.**

79. Costs generally follow the event and as this case is no exception the Defendant shall bear the costs.
80. Accordingly, I enter judgment for the Plaintiff against the Defendant and it is hereby ordered as follows:
  - a. That a permanent injunction be and is hereby issued restraining the Defendant by himself, servant, agent or any other person from alienating, selling, charging or further charging, leasing, developing, sub-dividing, wasting, transferring, disposing and/or in any other way dealing with the parcels of land known as LR No. 2259/744 (IR 134495/1), LR No. 2259/745 (IR 134494/1), LR No. 2259/749 (IR.134510/1) and LR No.2259/750 (IR. 134511/1) all located in Karen Nairobi.
  - b. That an order shall issue for forfeiture of the parcels of land known as LR No. 2259/744 (IR 134495/1), LR No. 2259/745 (IR 134494/1), LR No. 2259/749 (IR.134510/1) and LR No.2259/750 (IR. 134511/1) together with the developments thereon to the Government of Kenya.
  - c. That an order shall issue for forfeiture of the sum of Kshs.14,600,000/- held at KCB Bank account Nos. 1103xxxxxx and 1108xxxxxx held at Maralal Branch in the name of Moses Kasaine Lonolkulal, the defendant herein.
  - d. That in the alternative the Defendant pays to the Government of Kenya the sum of Kshs.80,763,715.35/= together with interest at 12% per annum from the date of receipt until payment in full as prescribed in the Anti-Corruption and Economic Crimes Regulations 2003.
  - e. That the costs of this suit shall be borne by the Defendant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF MARCH 2024.**

.....

**E. N. MAINA**

**JUDGE**

