IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & OTIENO-ODEK JJA)

CIVIL APPEAL No. 184 of 2018

BETWEEN

STANLEY MOMBO AMUTI……..……. …….…..…. APPELLANT

AND

KENYA ANTI-CORRUPTION COMMISSION..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Achode, J.) delivered on 23rd November 2017

in

Anti-Corruption & Economic Crimes Court Misc. No. 5 of 2016

formerly

HCCC No. 448 of 2008 (OS))

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JUDGMENT OF THE COURT

UNEXPLAINED ASSETS and NOTICE TO EXPLAIN

1. The scourge of money laundering, economic crimes and corruption is threatening the moral and social fabric of society. In Kenya, one of the legislative instruments designed to deal with the scourge is **Anti-Corruption and Economic Crimes Act of 2003**. In its preamble, the Act seeks to provide for prevention, investigation and punishment of corruption, economic crimes and related offences. The Act establishes the Kenya Anti-Corruption Commission as a body corporate whose Chief Executive Officer is the Secretary/Director to the Commission.

2. Entrenched in the Act is the concept of “unexplained assets” which is a legal innovation to combat the vice of “doubtful

source of wealth, money laundering and suspicious corrupt practices." Underlying the concept is the theme "You fail to satisfactorily explain the lawful source of assets, you forfeit it."

3. ***Section 2*** of the **Anti-Corruption and Economic Crimes Act (ACECA)** defines "unexplained asset" to mean:

"Assets of a person:

(a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

(b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation."

4. For purposes of investigating and inquiry into unexplained assets, **Section 26** of the Act provides:

"26(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property:

(a) enumerating the suspected person's property and the times at which it was acquired; and

(b)stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

(2) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

(3) The powers of the Commission under this section may be exercised only by the Secretary."

5. At the outset, it is necessary to describe the nature and character of Notice issued under ***Section 26*** of **ACECA.** A ***Section 26*** Notice is a civil investigatory tool aimed at collecting information and data from a person suspected of corruption or economic crime. By virtue of ***Section 55 (9)*** of the Act, the provisions of ***Section 55 ACECA*** are retroactive and *a* ***Section 26*** Notice may issue regardless of when the property was acquired. The Notice can issue in relation to property acquired before the Act came into force. Evidence recovered pursuant to ***Section 26*** on unexplained assets is for civil recovery only. Pursuant to ***Section 30*** of the Act, the material received pursuant to the Notice cannot be used in criminal proceedings against the respondent (except in certain limited circumstances including prosecution for perjury, or on a prosecution for another offence where the respondent has provided inconsistent evidence).

BACKGROUND FACTS

6. On 9th July 2008, the respondent issued a Notice under ***Section 26*** of the Act requiring the appellant to furnish a statement of his property. In relevant excerpts, the Notice stated:

"…...Your various assets, located in different parts of the country are estimated at tens of millions of Kenya Shillings and are found to be <u>disproportionate</u> to your salary considering that your salary from employment in the Public Service was your only source of income during the period within which you acquired the said assets. You are therefore reasonably suspected of engaging in Corruption and Economic Crimes." *(Emphasis supplied)*

7. The Notice issued to the appellant identified specific properties, motor vehicles and bank accounts including cash and cheque deposits which the appellant was required to explain and furnish the source of monies that led to acquisition or development of the enumerated assets. The appellant was required to explain the source of cash deposits made to his accounts.

8. Of relevance to this appeal, the Notice required the appellant to explain his wealth for 16 years being the period 1992 to 2008. It is contended in this appeal that the respondent unlawfully altered the period of investigation and inquiry to 10-months namely from September 2007 to June 2008.

9. The appellant complied with the Notice and gave explanation for his wealth and assets in a response dated 17th July 2008. Dissatisfied with the explanation, the respondent by way of Originating Summons (OS) moved to the High Court pursuant to ***Section 55*** of the **ACECA** seeking orders for forfeiture of the unexplained assets.

10. The gist of the respondent's application was for the trial court to determine whether the appellant was in possession of unexplained assets; whether a declaratory order should issue declaring various properties of the appellant to constitute unexplained assets liable to forfeiture; whether the appellant should be condemned to pay the Government of Kenya the sum of Ksh. 140,976,020/= being the cumulative bank deposits made by the appellant between September 2007 and 30th June 2008 and whether the appellant should pay the Government Ksh. 32,500,000/= being the value of real land properties constituting unexplained assets or any other amount the court finds to constitute unexplained assets.

11. Upon hearing the Originating Summons, the learned judge (Achode J.) in a judgment delivered on 23rd November 2017 held the appellant was in possession of unexplained assets valued Ksh. 41,208,000/=. A decree was issued that the appellant is liable to pay the Government of Kenya the sum of Ksh. 41,208,000/=. More specifically, the learned judge expressed herself as follows:

"96. In the present case, I have considered the property acquired at or around the time the defendant was reasonably suspected of corruption or economic crime; and whose value is disproportionate to his known sources of income at or around that time, and for which I consider that there is no satisfactory explanation. I am satisfied that the Plaintiff proved on balance of probability that the property listed below fits into the definition of the term unexplained assets as defined under Section 2 of the ACECA and should be forfeited to the State:

1. Ksh. 9,500,000/= said to have been advanced by one Samuel Gitonga.

2. Ksh. 15.5 million said to be professional fees from a Sudanese National.

3. Ksh. 10,900,000/= said to be instalments paid by Evelyn Mwaka and Antony Nganga Mwaura for sale of property.

4. Ksh. 1,000,000/= said to be funds for a community project.

5. Ksh. 4,308,000/= cash seized from the Defendants house.

I therefore declare the foregoing sums of monies to be unexplained assets and order that the Defendant do pay the Kenya Government Ksh. 41,208,000/= being the sum total of the monies listed above. There are no orders as to cost."

GROUNDS OF APPEAL

12. Aggrieved by the judgment and decree of the High Court, the appellant has lodged the instant appeal citing the following abridged grounds in his memorandum:

(i) The judge misdirected herself on Articles 40 and 50 of the Constitution and Section 55 of the Anti-Corruption and Economic Crimes Act (ACECA) as to the threshold on forfeiture of property.

(ii) The judge erred in ignoring that the appellant was not issued with a mandatory notice under Section 26 of the ACECA to explain his property acquired within ten (10) months from September 2007 to June 2008 and the judge further erred in failing to find the Originating Summons was defective after the period was unlawfully altered from 16 years to 10 months without the consent or authority of the Director of the Commission.

(iii) The judge erred by ordering forfeiture of the appellant's property amounting to Ksh. 9.5 million said to have been advanced by Samuel Gitonga yet the property was not enumerated and listed in the Notice dated 9th July 2008 and the same was not subject to the proceedings in the Originating Summons.

(iv) The judge erred in making an order for forfeiture of the appellants' property of Ksh. 15.5 million said to be professional fees from a Sudanese National yet the same was not enumerated and listed in the Notice dated 9th July 2008 and the same was not subject to the proceedings in the Originating Summons.

(v) The court erred in making an order for forfeiture of Ksh. 10.9 million said to be instalment by Evelyn Mwaka and Antony Mwaura for sale of property yet the property was not enumerated and listed in the Notice dated 9th July 2008 and thus the appellant was not afforded a reasonable opportunity to explain the property.

(vI The judge erred in making an order for forfeiture of Ksh. 1,000,000/= said to be community project yet the property was not enumerated and listed in the Notice dated 9th July 2008 and thus the appellant was not afforded a reasonable opportunity to explain the property.

(vii) The court erred in making an order for forfeiture of Ksh. 4,308,000/= yet the property was not enumerated and listed in the Notice dated 9th July 2008 and thus the appellant was not afforded a reasonable opportunity to explain the property.

(viii) The judge erred in making an order for forfeiture of the appellant's properties without setting out clearly the matters alleged to constitute the particular kind or kinds of unlawful conduct through which the properties were obtained.

(ix) The judge erred in finding that property can be forfeited without conviction for a criminal offence.

(x) The judge erred and ignored the direction given by the Court of Appeal in ***Stanley Mombo Amuti -v- Kenya Anti-Corruption Commission (2015) eKLR*** *at paragraph 31 thereof.*

13. At the hearing of this appeal, learned counsel ***Mr. Franklin Omino*** appeared for the appellant while learned counsel ***Mr. Phillip Kagucia*** appeared for the respondent. Both parties filed written submissions and list of authorities.

SUBMISSIONS BY APPELLANT

14. Counsel for the appellant rehashed the background facts leading to the judgment of the trial court. Counsel submitted the appellant was handicapped in explanation of his assets because the respondent had seized all documents relevant to answering to the Notice that was issued under *Section 26* of the ACECA; that despite the handicap and lack of documentation, the appellant in his response to the Notice gave explanation to the best of his knowledge and recollection.

15. Counsel for the appellant abridged and categorized the grounds of appeal into three:

(i) Errors of law and fact arising from the hearing and determination of the Originating Summons.

(ii) Errors of law and fact due to ignorance and disrespect of law and facts under Sections 26 and 55 of the ACECA.

(iii) Errors of law and fact arising from finding that certain properties subject of the judge's decision were not explained.

16. Submitting on errors on the Originating Summons (OS), counsel urged that the respondent did not issue a Notice to the appellant to require him to explain the property acquired within the period of 10 months from September 2007 to June 2008; the Notice issued required the appellant to explain his properties over a period of 16 years from 1992 to 2008 and not ten-months; that the respondent had illegally altered the Notice period in the Originating Summons without the consent of the Director and thus the OS was *null* and *void ab initio.*

17. A further ground of appeal is that the judge erred in ordering forfeiture of properties that were not part of the Notice dated 9th July 2008 that had been served upon the appellant pursuant to ***Section 26*** of the ACECA; that as regards properties ordered to be forfeited, the respondent did not issue Notice under ***Section 26*** of the Act requiring the appellant to offer explanation; the forfeited properties were not enumerated in the Notice dated 9th July 2008; in addition, the properties were not listed in the Originating Summons and consequently, the appellant was denied justice and a reasonable opportunity to explain the legitimate source of the properties.

18. Counsel submitted that the record reveals the respondent, through its witnesses, testified that there was neither an allegation of corruption nor abuse of office against the appellant; that all the enumerated properties were private not public properties; the respondent tendered evidence that the appellant's properties were private not public; that the forfeited properties comprised assets that the appellant was never requested to explain and the said properties were not enumerated in the Originating Summons. As a result of the foregoing, it was submitted the proceedings before the learned judge under the OS were illegal and ultra vires.

19. Submitting on alleged errors of law, the appellant contended that the judge erred in appreciating the context in which ***Articles 40*** and ***50*** of the Constitution apply; the court further erred in its interpretation and application of ***Section 55*** as read with **Section 26** of the ACECA. In relation to ***Article 40***, the appellant contended that no person has lodged any complaint regarding his properties and thus the State is obliged to uphold **Article 40** of the Constitution which stipulates that the State shall not deprive a person any property unless it has been unlawfully acquired; that there is no evidence on record to show the appellant's properties were unlawfully acquired; the respondent's witnesses testified there is no complaint of corruption or abuse of office against the appellant and therefore it was not within the jurisdiction of the learned judge to invoke a civil recovery of property without proof of any unlawful act or conduct on the part of the appellant.

20. It was submitted that the judge erred in applying ***Section 55*** of the ACECA because the section only applies to a public officer if his act or conduct constitutes corruption or an economic crime; it was urged **Section 26** of the Act did not apply to the

facts of the instant case because no Notice was given to explain the properties declared to be forfeited; the judge erred in ignoring the fact that the Notice given was defective to the extent the period under investigation was shortened without authorization by the Director of the respondent Commission.

21. The appellant further submitted the judge erred in her evaluation of the evidence by failing to find there was no obligation on the part of the appellant to testify and satisfy the court that his assets were acquired otherwise than as a result of corrupt conduct when the respondent had already testified there were no allegations of corrupt conduct or abuse of office on the part of the appellant. Counsel submitted that the appellant was not given an opportunity to explain how he acquired the assets the subject of forfeiture order by the court; the appellant contends that under ***Section 55*** of ACECA, unexplained assets is not the issue but to have assets acquired as a result of corrupt conduct is the key issue for determination.

22. The appellant submitted that in his response to the Notice dated 9th July 2008, he annexed a loan agreement which showed he had lawfully received cash from one ***Samuel Gitonga*** for construction and development of his plot; that the judge erred in finding the loan agreement between the appellant and Mr. Gitonga was not convincing because the said Mr. Gitonga was not called to testify; to this extent, it was submitted that the judge erred as she was asking the appellant to prove his innocence; and that the probative value of the agreement was not reduced by failure to call Mr. Gitonga to testify.

23. Reiterating submissions on the forfeited property, the appellant urged that there was no Notice issued requiring him to explain the Community Project and source of Ksh. 1,000,0000/= towards the project; that there was no Notice issued under ***Section 26*** of ACECA to explain the Ksh. 15.5 million received as professional fees from a Sudanese National; and that the Constitution does not place the onus on a party to prove that he/she acquired property lawfully.

24. The appellant contend both ***Articles 50*** and ***35*** of the Constitution and the Fair Administrative Actions Act require every person to be informed in advance the evidence the prosecution intends to rely upon and to have reasonable access to that evidence; that to hold the appellant did not explain the properties contravenes his rights under ***Article 50*** because the forfeited properties were not included in the Notice issued pursuant to ***Section 26*** of ACECA. Based on the foregoing submissions, the appellant urged us to set aside the judgment dated 23rd November 2017.

RESPONDENT'S SUBMISSIONS

25. The respondent through learned counsel Mr. Phillip G. Kagucia opposed the appeal by way of written submissions and oral highlights. The respondent urged that the appellant cannot at this appellate stage challenge the validity of the Notice issued under ***Section 26*** of the ACECA; and that any challenge to the Notice should have been done as a preliminary matter as was the case in **Dr. Christopher Ndarathi Murungaru -v- KACC & another - Nairobi HC Misc. Civil Application No. 54 of 2006**

26. The central theme in this appeal is the judge erred in law in failing to identify the period of investigation. The appellant contends that the period of investigation was properly identified by the Director in the Notice dated 9th July 2008 as 16 years and no other Notice was issued varying the period of investigation to 10-months.

27. On the contestation that the Notice cited a period of 16 years whilst the suit vides Originating Summons (OS) was confined to a period of 10-months, the respondent submitted that there was no inconsistency as the 10-month period falls squarely within the Notice period and would not have required a separate Notice. It was further submitted that the appellant's response to the Notice dated 9th July 2008 was unsatisfactory in so far as the period of 10 months between 1st September 2007 and 20th June 2008; and that the OS leaves no doubt regarding the period giving rise to the proceedings; that the period of 10 months between 1st September 2007 and 30th June 2008 is repeatedly mentioned in the OS.

28. The respondent submitted that the Notice dated 9th July 2008 issued under ***Section 26*** of ACECA met the threshold for forfeiture of unexplained assets; that in this matter, upon investigations it was reasonably established that the appellant had unexplained assets disproportionate to his known legitimate source of income ***Section 55 (2) (a)***; that inspite an opportunity being granted as per ***Section 55 (2) (b)***, the appellant failed to give a satisfactory explanation of the disproportionate assets.

29. The appellant contends that the judge erred in ordering forfeiture of cash Ksh. 4,308,000/= recovered at his office and residence; the basis of contestation is that the said sum was not mentioned in the Notice dated 9th July 2008. The respondent submitted that the sum of Ksh. 4,308,000/= was captured at paragraphs 4 and 5 of the Notice dated 9th July 2008 and the appellant was required to explain the source thereof.

30. On the contestation that the learned judge did not properly evaluate the evidence to the requisite threshold, the respondent cited the case of **Ethics and Anti-Corruption Commission -v- Stanley Mombo Amuti (2105) eKLR** where this Court held that under the ACECA, the burden of proof remains with the Commission and it was for the court to determine if the burden was discharged. It was submitted that the respondent called two witnesses who tendered oral and documentary evidence before the judge and established on balance of probability that the appellant had unexplained assets. The respondent urged this Court to re-assess the testimony of ***Enoch Otiko*** (PW2) who established that the cumulative cash deposits in the appellant's accounts totaled Ksh. 140,976,020.55 during the period 1st September 2007 and 30th June 2008; and that these deposits were disproportionate to the appellant's known lawful source of income.

31. On factual basis, counsel for the respondent submitted that the appellant concurred with the Investigating Officer in his response to the Notice that he had cash outflows of Ksh. 43,208,000/= during the 10-month period; this means for the appellant to spend Ksh. 43,208,000/= he must have received it; the question is he was unable to explain where did the cash come from"

32. The respondent submitted extensively on the law on forfeiture of unexplained assets; that ***Article 252*** of the Constitution provides the constitutional underpinning for the powers and functions of the respondent; that **Section 11 (1) (j) ACECA** empowers the respondent to institute and conduct proceedings in court for purposes of confiscation of proceeds of corruption.

33. On the issue of evidential burden of proof, it was submitted the trial court properly exercised its discretion under ***Section 55 (5)*** of the ACECA to decide whether or not the respondent had satisfied the court that the appellant possessed unexplained assets. Citing the case of **Mbogo -v- Shah (1968) EA 93**, the respondent urged this Court not to interfere with exercise of discretion by the judge.

34. Submitting on the contestation that the appellant was not given reasonable opportunity to explain the source of the assets identified for forfeiture, the respondent urged this Court to note that although the suit was initiated the suit by way of OS, by consent of the parties recorded on 10th March 2016, the trial proceeded by way of oral evidence and the appellant had opportunity to satisfy the trial court that his assets were acquired other than by way of corrupt practices; the appellant was given opportunity through cross examination to test the veracity of the respondents evidence; that the learned judge upon evaluating the entire evidence on record arrived at correct conclusions and findings that the appellant had unexplained assets. The respondent submitted it is noteworthy the appellant did not call a single witness in support of his assertion that assets acquired during the period of interest were legitimate.

35. Responding to the contestation that the appellant's property rights under ***Article 40*** of the Constitution were violated as well as the right to fair hearing under ***Article 50,*** it was submitted it had not been demonstrated how the rights of the appellant were violated.

36. Counsel cited the comparative experience from Columbia submitting that the remit of civil forfeiture encapsulates more than alleged criminality of the appellant and extends to the regime of proprietorship; that in the instant appeal, the appellant is not entitled to property/assets whose source he cannot adequately explain. The respondent urged us to dismiss the appeal with costs.

ANALYSIS

37. We have considered the grounds of appeal, submission by counsel and the authorities cited. As was stated in **Abok James Odera t/a A. J Odera & Associates -v- John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** we remind ourselves of our primary role as a first appellate court namely: to re-evaluate, re-assess and re-analyze the evidence on the record and then determine whether the conclusions reached by the learned judge are to stand or not and give reasons either way.

38. Central to this appeal is the contestation that the Notice issued pursuant to ***Section 26*** of the ACECA indicated the period of investigation and inquiry to be 16 years from 1992 to June 2008; that the Originating Summons (OS) lodged by the respondent illegally reduced the period to 10-months without authorization by the Director of the Anti-Corruption Commission; that due to the alleged illegal and unauthorized reduction of the period of investigation, the OS as filed is fatally defective; to this end, the appellant submitted the judge erred in law in failing to identify the period of investigation and to strike out the defective OS.

39. We have examined and scrutinized both the Originating Summons dated 19th September 2008 and the Notice dated 9th July 2008 requiring the appellant to furnish a statement of property pursuant to ***Section 26*** of the ACECA. The Notice expressly required the appellant to furnish to the Kenya Anti- Corruption Commission, within 14 days of service, a written statement of the properties acquired between 1992 and June 2008. (Emphasis supplied). The Originating Summons at paragraph 4 thereof is a prayer for the trial court to condemn the appellant to pay the Government of Kenya the cumulative sum of Ksh. 140,976,020/= being bank deposits by the appellant between September 2007 and June 2008.

40. It is the appellant's ground of appeal that the Originating Summons is fatally defective as it relates to a period of 10-months and not 16 years.

41. We have considered the appellant's submission on the validity of the Originating Summons and the Notice. The 10-month period from September 2007 to June 2008 is within the 16-year timeline of 1992 to June 2008 stated in the Notice dated 9th July 2008. The Notice required the appellant to furnish details of the enumerated property and cash deposits for the 16-year period. In our view, the greater period includes the lesser period and no fresh or new Notice was required for the 10-months between September 2007 and June 2008. This lesser period is already within the longer 16-year time-frame. Further, the OS at paragraph 4 thereof and at paragraph 10 of its Supporting Affidavit deposed by ***Mr. Anthony Kahiga*** dated 19th September 2008 expressly identified and informed the appellant the period under investigation was September 2007 to June 2008. It is not the duty of the trial court to identify the period of investigation. Under **Section 26** as read with **Section 55** of the ACECA, it is the duty of the respondent Commission to identify the period under investigation. The learned judge correctly found that the evidence on record identified the period of investigation to be September 2007 to June 2008. Accordingly, the ground and submission that the learned judge erred in failing to identify the period of investigation has no merit. Likewise, the contestation that the OS as filed is fatally defective for being grounded on a 10-month period has no merit.

42. The next pivotal ground of appeal is that the judge erred in ordering forfeiture of properties that were not enumerated in the Notice dated 9th July 2008 issued to the appellant pursuant to ***Section 26*** of the ACECA; that in relation to the properties ordered to be forfeited, the respondent did not issue a separate Notice under ***Section 26*** of the Act requiring the appellant to offer explanation; further, the properties were not listed in the Originating Summons and the appellant was denied justice and a reasonable opportunity to explain the source of the properties identified for forfeiture.

43. We have considered the appellant's submission in relation to the properties and assets identified and ordered to be forfeited by the learned judge. The assets to be forfeited are identified by the judge are the following:

i. sh. 9,500,000/= said to have been advanced by one Samuel Gitonga.

ii. Ksh. 15.5 million said to be professional fees from a Sudanese National.

iii. Ksh. 10,900,000/= said to be installments paid by Evelyn Mwaka and Antony Nganga Mwaura for sale of property.

iv. Ksh. 1,000,000/= said to be funds for a community project.

v. Ksh. 4,308,000/= cash seized from the Defendants house

44. We have also analyzed the appellant's response dated 17th July 2008 prepared in response to the Notice dated 9th July 2008. In his response, the appellant conceded that the Notice required him to explain the source of cash recovered from his house and office. He admits that a total of Ksh. 4,308,000/= was recovered from his house and office. He explains the source to be accumulated savings, salary, rent, professional fee and sale of plots. The appellant's response aptly demonstrates that he was given an opportunity to explain the source of cash recovered at his house and office. From the evidence on record, we find the appellant's right to fair hearing under ***Article 50*** of the Constitution as well as his right to be accorded reasonable opportunity to explain the source of the monies recovered as required by **Section 55 (2)** of the ACECA were not violated.

45. In relation to the sum of Ksh. 15,500,000/=, the appellant in his response stated the money was "cash brought in by the late ***Joseph Mabior***, a Sudanese National." In his Notes attached to the response, the appellant states "the letters relating to the particulars of the late Joseph Mabior and the amount of Ksh. 15.5 million was in the personal file taken away by the investigators and he had no access to the file.

46. We have considered the appellant's submission that the sum of Ksh. 15,500,000/= was neither enumerated nor indicated in the Notice dated 9th July 2008. In our view, the appellant was required to explain the source of cash deposits in his various bank accounts for the period under investigation. It is instructive to note the record shows there is no deposit of Ksh. 15,500,000/= as a single deposit transaction that would corroborate receipt of this specific sum from anyone. Rather, the evidence reveals several cash deposits in tranches of Ksh. 100,000/=.

47. On the contention that he was not given an opportunity to explain the source of Ks. 15.5 million, we find that it is the appellant through his response who introduced the sum of Ksh. 15,500,000/= as being cash received from a Sudanese National. The appellant himself admitted and confessed receiving the said sum of Ksh. 15,500,000/=. The appellant not only placed in issue the sum of Ksh. 15,500,000/= but also had a reasonable opportunity to explain the origin and source of the money. The trial court made a finding that the appellant's explanation that the money was professional fees from a South Sudanese National not satisfactory. The judge observed *inter alia* that the nature of the professional services rendered was not explained; and that the duration of the alleged work done was not explained and no fee note was tendered in evidence. We have considered the learned judge reasoning in light of the provisions of **Section 55 (2**) of ACECA and ***Section 112*** of the Evidence Act**.** The evidentiary burden to tender credible satisfactory explanation of the source of the Ksh. 15.5 million rested with the appellant. We hasten to add that no report of the work or services rendered was put in evidence. The appellant has not demonstrated to our satisfaction that the learned judge erred in her analysis of the evidence on record to arrive at the determination that the source of the admitted sum of Ksh. 15.5 million was not satisfactorily explained.

48. We now consider if the judge erred in ordering forfeiture of Ksh. 9,500,000/= explained by the appellant to have been

advanced by one ***Samuel Gitonga***. The appellant in his response explaining source of cash inflows to his bank account stated that he borrowed the sum of Ksh. 9,500,000/= from friends. In support, he tendered in evidence a loan agreement between himself and one ***Samuel Getonga M'Ringera*** for Ksh. 9,500,000/=; the loan agreement states that the monies was paid in cash. It is instructive to note that the said ***Samuel Getonga M'Ringera*** was not called to testify. The appellant not only placed in issue the sum of Ksh. 9,500,000/= but also had a reasonable opportunity to explain the origin and source of the money. If a relevant issue is placed before the trial court, the court has jurisdiction to pronounce itself on the issue. We find the trial court did not err in considering the question whether the admitted sum of Ksh. 9,500,000/= was part of unexplained assets.

49. The appellant in explaining the source of cash deposits in his bank accounts put in issue and stated that he had received cash deposit for sale of Plot No. 121/186 at Komarock from one ***Evelyn Jennifer Mwaka***. In his response, he stated that he had also received cash installment deposit from ***Mr. Antony Nganga Mwaura*** in relation to Plot No. A. 18. We find the appellant not only placed in issue the sum of Ksh. 10,900,000/= but also had a reasonable opportunity to explain the origin and source of the money. Accordingly, we find that the judge did not err in considering the question whether the admitted sum of Ksh. 10,900,000/= was part of unexplained assets.

50. Concomitantly, the appellant in his response also put in issue the sum of Ksh. 1,000,000/= said to be funds for a community project. Once again, it is the appellant who brought to light and placed in issue the sum of Ksh. 1,000,000/=. He admitted receiving the money as source of his asset. We find that the appellant not only placed in issue the sum of Ksh. 1,000,000/= but also had a reasonable opportunity to explain the origin and source of the money. We find the trial court did not err in considering the question whether the admitted sum of Ksh. 1,000,000/= was part of unexplained assets.

51. The totality of our re-evaluation of the evidence as revealed by the appellant's response dated 17th July 2008 lead us to find that in relation to the properties/assets identified for forfeiture by the learned judge, it is the appellant who identified the assets in explanation of sources of cash flows in his bank accounts. We are satisfied the appellant had an opportunity to explain the source of these cash assets and his right to fair hearing as embodied in ***Article 50*** of the Constitution was not violated.

52. We now turn to consider the issue whether the trial court properly evaluated the evidence on record in arriving at the decision that the total sum of Ksh. 41,208,000/= was unexplained assets that the appellant should forfeit to the Government of Kenya. In this context, the appellant submitted that the learned judge erred in exercise of her discretion under ***Section 55 (2)*** of ACECA in arriving at the decision the respondent had established on balance of probability the appellant had unexplained assets.

53. More specifically, the appellant contends that the judge erred because after the respondent called all its witnesses, the court failed to examine the evidence adduced and make a finding that she was satisfied on a balance of probabilities that the appellant had unexplained assets to trigger her decision to call the appellant to prove by evidence the assets complained of were acquired otherwise than as a result of corrupt conduct; the judge erred as she did not satisfy herself on the need to call the appellant to testify.

54. The gist of the appellants foregoing submission is that the judge erred in exercising her discretion to call the appellant to give evidence without putting on record that the court was satisfied a *prima facie* case on balance of probability had been established by the respondent.

55. We are cognizant of the dicta where the Supreme Court expressed that an appellate court should be very hesitant to assume jurisdiction in cases where a litigant is challenging the exercise of discretion by another Court. In **Teachers Service Commission -v -Kenya National Union of Teachers & 3 Others, SC Application No. 16 of 2015; [2015] eKLR,** the Supreme Court held it has no jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal.

56. The limitation to an appellate court's interference with the exercise of judicial discretion was well expressed in **Daniel Kimani Njihia -v- Francis Mwangi Kimani & Another SC Application No. 3 of 2014; [2015] eKLR** (***Daniel Kimani***) where the Supreme Court stated thus [paragraph 21]:

"Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution.''

57. In **Francis Wambugu -v- Babu Owino & others, SC Petition No. 15 of 2018,** on the issue of an appellate court entertaining an appeal founded on exercise of discretion of the trial court, it was stated:

"[76] In determining therefore an issue based on the exercise of a discretion, as has been observed, a Court can only be faulted if the use of the discretionary power was based on a whim, and that it can be established that the Court did not consider the prevailing circumstances and take into account what needed to be considered, or considered what ought not to have been considered. To infringe upon this discretionary power, would be tantamount to a judicial review of the decision of another Court's decision. This is an exercise which this Court, and indeed every other Court, should refrain from engaging in as it would be considered, or indeed viewed as, an interference in another Court's judicial independence and exercise of discretion."

58. In the instant matter, under ***Section 55 (5)*** and ***(6)*** of the ACECA, the trial court has discretion to decide if the Commission has tendered evidence on balance of probability establishing the appellant had unexplained assets. In addition, the court had discretion to let the appellant satisfactorily explain the source of his assets. The Section provide as follows:

"**55 (5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.**

(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct."

59. In **Basil Criticos -v- Independent Electoral and Boundaries Commission & 2 others SC Petition No.22 of 2014; [2015] eKLR**, the Supreme Court held that interfering with an exercise of discretion on the part of the trial court would be tantamount to directing a court on how to exercise its powers, in essence restraining its liberty. In **Musa Cherutich Sirma -v- IEBC & 2 others, SC Petition No. 13 of 2018,** the Supreme Court held that an appellate court can only interfere with exercise of discretion if the appellant can show that in exercise of its discretion:

i. the …court acted on a whim or that;

ii. its decision is unreasonable and

iii. it is made in violation of any law or the Constitution or that;

iv. it is plainly wrong and has caused undue prejudice to one party.

60. In the instant appeal, the appellant has not demonstrated to our satisfaction that the learned judge in permitting the appellant to testify exercised her discretion under ***Section 55 (5)*** and **(6)** of the Act unreasonably, whimsically or injudiciously or that an injustice has occurred or violation of any law or the Constitution has taken place. (See **Deynes Muriithi & 4 others -v- Law Society of Kenya & another SC Application No 12 of 2015; [2016] eKLR).** Accordingly, we see no reason to interfere with the exercise of the discretion by the learned judge.

61. The appellant further urged that the learned judge erred in failing to find the respondent had not proved the threshold for unexplained assets. The threshold for determining unexplained assets is provided for in ***Sections 2*** and ***55 (2)*** of the **Anti-Corruption and Economic Crimes Act.**

62. ***Section 2*** of Act defines "unexplained asset" to mean:

"assets of a person—

a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation."

63. ***Section 55 (2)*** of the Act stipulates:

"The Commission may commence proceedings under this section against a person if:

(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and

(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

64. In our considered view, a reading of ***Section 2*** and ***55 (2)*** of the Act establishes the threshold for existence of unexplained assets to be:

i. There must be set time period for the investigation of a person;

ii. The person must be reasonably suspected of corruption or economic crime;

iii. The person must have assets whose value is disproportionate to his known sources of income at or around the period of investigation and

iv. There is no satisfactory explanation for the disproportionate asset.

65. In this appeal, we now re-evaluate the evidence on record to ascertain if the trial court erred in finding that the threshold for

unexplained assets had been attained against the appellant. In evaluating the evidence, in relevant excerpts, the trial court expressed itself as follows:

"**77. On the advances from friends and family, the Defendant testified that he received from friends and particularly Ksh. 9,500,000/= from one Samuel Gitonga vide an agreement dated 18th January 2008. This is an averment which was however, not supported by any evidence. The said Samuel Gitonga did not testify nor did the Defendant provide any documentary evidence to support his allegation. The court was not told of any difficulty in securing Mr. Gitonga's attendance in court to testify on behalf of the Defendant if the defendant so wished.**

78……

79. With regard to professional fees, the Defendant testified that some of the deposits into his bank accounts came from payments made to him for professional accounting services he had rendered. In particular, he stated that he earned Ksh. 15.5 million from a Sudanese National. There was however not a shred of evidence to back such an averment. In my view, for the defendant to attract professional fee of the magnitude of Ksh. 15.5 million, he would have to have served a very large corporate body for a considerable amount of time or work to earn such an amount.

80. The Defendant did not provide the name or company of the so called Sudanese National that he served, the period for which services were rendered and the nature of the actual services provided and the fee notes raised. It is not clear why he chose to bank the said fees in tranches of Ksh. 100,000/= via ATM over a period of days. It is doubtful that the Sudanese National would have paid such a large amount of fees in cash and in such small bits over a number of days, instead of making one bank transfer or a few large transfers.

81. On the deposits from Community Funds, the Defendant told the court that he collected Ksh. 1,000,000/= through fund raising for purposes of electricity on behalf of his community back in his village. One would expect there would be some sort of committee to oversee such a noble idea or even the area chief or sub-chief would lend credence to such assertion. I note however, that not a single witness testified in support of the project. The Defendant said the relevant invoice was among documents impounded by the Plaintiff from his house and office. He however, did not supply any copies of documentation from Kenya Power and Lighting Corporation for such a project.

82. On the funds from sale of property, of interest are the deposits made by Jennifer Evelyn Mwaka t/a Evemil Enterprises and Antony Mwaura Nganga t/a Toddy Merchants and Hardy Enterprises into the Defendant's Bank Account No. 8240656. The deposits made in the period under investigation by these two persons amounted to Ksh. 10.9 million.

83. The Defendant admitted that he received money from Jenifer Evelyn Mwaka and Antony Nganga Mwaura amounting to Ksh. 10.9 million. This he explained was because he was in the process of selling a plot of land to Mr. Nganga at a cost of Ksh. 35,000,000/=. The Defendant supplied the Plaintiff with a sale agreement between himself and Antony Nganga as evidence of that sale….

88. The authenticity of the sale agreement which indicated that the Defendant received money from Mr. Nganga in February and March 2008 and the plot alleged to have sold was Plot No. A 18 Umoja Inner core is doubtful. The sale agreement was not part of the documents found and retrieved from the Defendant's house during the search. The alleged sale agreement…...was not signed nor was it witnessed.

90. From the foregoing I make a finding that there was no sale of property between the Defendant and Ms Jenifer Evelyn Mwaka or Mr. Anthony Nganga Mwaura.

91. Then there was also the matter of Ksh. 4,308,000/= cash seized from the Defendant's house…. He did not however tell the source of this money.

66. The appellant faults the learned judge in her evaluation of the evidence on record as reproduced verbatim above. It was submitted that the judge erred in finding the sale agreement with one Samuel Gitonga was not authentic; it was submitted the probative value of the sale agreement was not diminished simply because Mr. Gitonga was not called to testify; that the original sale agreement was produced in court.

67. We have considered the appellant's contention the judge erred in evaluating the evidence relating to the sale agreement with one Samuel Gitonga. We have considered the reasons given by the judge in arriving at the finding that the said agreement was not authentic. For instance, the evidence on record reveals that another offer was made by the appellant to sell the same property which had already been sold to ***Jennifer Evelyn Mwaka***; it is improbable that the appellant would knowingly sell the same property to two different persons. The appellant submitted that the sale did not go through due to the investigations by the respondent. It is trite in contract law, when there is total failure of consideration, refund of any monies paid under the contract is due and owing. Be that as it may, in the instant matter, if at all the sale did not go through, there is no evidence of refund by the appellant of the cash installments paid as deposit. The record shows neither Samuel Gitonga nor Jennifer Evelyn Mwaka were called to testify and throw light on the nature of the cash transactions with the appellant. In his submission before this Court, the appellant neither addressed nor contradicted the specific reasons given by the judge for finding that the sale agreement was suspect and not authentic. We see no reason to interfere with the evaluation of evidence and findings of the learned judge in relation to the sale agreement with Samuel Gitonga and Jenifer Evelyn Mwaka.

68. Apart from the factual contestations in this appeal, the appellant urged the learned judge erred in law in her interpretation and application of ***Sections 26*** and ***55*** of the ACECA in so far as relates to the concept of "unexplained assets." We now consider this contention.

69. The Kenyan concept of "unexplained assets" is akin to "Unexplained Wealth Order" (UWO) under the **United Kingdom Proceeds of Crime Act 2002 ("POCA"). Section 362A of the UK POCA** defines an unexplained wealth order is an order requiring the respondent to provide a statement—

(a) setting out the nature and extent of the respondent's interest in the property in respect of which the order is made;

(b) explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met);

(c) where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and

(c) setting out such other information in connection with the property as may be so specified.

70. In the UK case of **National Crime Agency -v- Mrs A [2018] EWHC 2534,**

it was held that for an unexplained wealth order to issue, there must be reasonable grounds for suspecting that the known sources of an individual's lawfully obtained income would have been insufficient for the purpose of enabling the individual to obtain the property. The court observed that one of the critical factors to be taken in account is the "income requirement" and an individual required to explain source of wealth should lead sufficient evidence to defeat any "reasonable grounds for suspicion" under the income requirement.

71. The **UK Section 362A** of POCA is *in pari materia* to ***Section 55 (2)*** of the Kenya ACECA which lay emphasis on assets being disproportionate to an individual's known legitimate sources of income. ***Section 55 (2)*** embodies the concept of "income requirement" whereby an individual's assets should be proportionate to his/her legitimate known source of income.

72. In the instant matter, one of the grounds urged by the appellant is that his right to property as guaranteed by ***Article 40*** of the Constitution as well as the right to fair hearing under ***Article 50*** were violated by the learned judge. The appellant urged his right to be presumed innocent under ***Article 50 (2) (a)*** of the Constitution was violated as the court shifted the burden of proof and required him to prove his innocence. It was submitted that the appellant was not informed in advance of the evidence in possession of the respondent because the forfeited properties were neither listed nor enumerated in the Notice dated 9th July 2008.

73. We have considered the appellant's contention that the requirement to give explanation for unexplained assets interferes with his constitutional right to property. The protection of the right to property has socio-political, moral, ethical, economic and legal underpinning. The right protects the sweat of the brow - it does not protect property acquired through larceny, money laundering or proceeds of crime or any illegal enterprise. When an individual is alleged to have assets disproportionate to his known lawful source of income, is asking such a person to explain and account for the unexplained disproportionate assets a violation of the constitutional protection of the right to property" The answer is in the negative. There is no violation of the right to property if an individual is requested to explain the source of his assets that is disproportionate to his legitimate source of income. Comparatively, while considering a similar contestation, the UK court in **National Crime Agency --v- Mrs. A [2018] EWHC 2534,** rejected submission that requirement to clarify unexplained wealth violates property rights. The court expressed that if there is any interference with property rights, such interference is proportionate and strikes a "fair balance"; that where there are grounds to believe a property has been obtained through unlawful conduct, the requirement to explain is justifiable.

74. In this matter, persuaded by the merits of the UK comparative jurisprudence, we are satisfied that the provisions of ***Sections 26*** and ***55 (2)*** of the ACECA do not violate the right to property as enshrined in ***Article 40*** of the Constitution. In any event, constitutional protection of property does not extend to property that has unlawfully been acquired. If it were to be held that the requirement to explain violates the right to property under ***Article 40*** of the Constitution, enforcement of a Notice issued under ***Section 26*** of ACECA and the requirement to explain the source of disproportionate assets would be rendered nugatory. We decline to so hold.

75. Another ground urged by the appellant is that neither an allegation of corrupt conduct nor abuse of office has been leveled against him; that no criminal charge or conviction has been visited upon him and as such, the trial court erred in making an order for forfeiture without proof of any corrupt conduct or economic crime on the part of the appellant. In rebuttal, the respondent cited the case of **Murphy -v- M (G) [2001] 1ESC 82**, where it was held that *in rem* proceedings for forfeiture of property is civil in character.

76. The trial court in considering this submission at paragraph 92 of its judgment expressed that a claim for civil recovery of unexplained assets can be determined on the basis of conduct in relation to property without identification of any particular unlawful conduct; that in the instant matter, the respondent was not required to prove the appellant actually committed an act of corruption in order to invoke the provisions of ACECA. The learned judge cited dicta from the case of **Director of Assets Recovery Agency & others -v- Green & Others [2005] EWHC 3168** where it was stated:

"In civil proceedings for recovery under Part 5 of the Act, the Director need not allege the commission of specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained."

77. We have considered the appellant's contestation that no allegation of corrupt conduct or abuse of office has been leveled against him and that he has never been charged or convicted of an offence under the ACECA.

78. The concept of "unexplained assets" and its forfeiture under ***Sections 26*** and ***55 (2)*** of ACECA is neither founded on criminal proceedings nor conviction for a criminal offence or economic crime. ***Sections 26*** and ***55*** of ACECA are non-conviction based civil forfeiture provisions. The Sections are activated as an action *in rem* against the property itself. The Sections require the Anti- Corruption Commission to prove on balance of probability that an individual has assets disproportionate to his/her legitimately known sources of income. ***Section 55 (2)*** of the Act make provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it. ***Section 55 (2)*** of ACECA is in sync with ***Section 112*** of the Evidence Act, Cap 80 of the Laws of Kenya. ***Section 112*** of the **Evidence Act, (Cap 80 of the Laws of Kenya)** provides:

"In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him."

79. Under ***Section 55 (2)*** of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired.

80. In the instant matter, the appellant was given reasonably opportunity to explain his disproportionate assets. He gave evidence on oath, he tabled documentary evidence, he did not discharge his evidential burden to offer satisfactory explanation as required under ***Section 55 (2)*** of the ACECA. In our considered view, a person with lawful income has no trouble proving the legal origin of his or her assets. The law protects only the rights of those who acquire property by licit means. Those who acquire property unlawfully cannot claim protection provided by the legal system. It is in this context that ***Article 40 (6)*** of the Constitution provides that protection of the right to property does not extend to property that has been unlawfully acquired.

81. Whereas the appellant was under no obligation to call any witnesses to testify on his behalf, there were three crucial individuals that he ought to have called to testify: these were Mr. Samuel Gitonga, Ms Evelyn Mwaka and Mr. Antony Nganga Mwaura. These individuals were crucial to corroborate the appellant's testimony that the named individual lawfully gave him cash in form of friendly loan or installment towards purchase of Plot/Houses.

82. On his part, the appellant contends that it was the respondent that should have called these individuals because statements had been taken from them. Further, the appellant testified and explained corroborative documents relevant to the testimony of these individuals had been seized by the respondent when a search was conducted at his office and residence.

83. In civil as in criminal proceedings, the plaintiff (prosecution) is solely responsible for deciding how to present its case and choosing which witnesses to call. In the instant case, the respondent alone bore the responsibility of deciding whether a person will

be called as a witness in its case. **(See Dabbah -v- Attorney-General for Palestine (1944) AC 156; Whitehorn -v-R (1983) 152 CLR 657)**. A court cannot ordinarily direct a party to call any witness. Save in exceptional circumstance, a trial court cannot call any witness. In the instant case, the appellant's contestation that the respondent should have called Mr. Samuel Gitonga, Evelyn Mwaka and Antony Nganga Mwaura as witnesses has no legal foundation. In law, the appellant cannot compel the respondent to call a witness to support or rebut the respondent's case; all that the respondent is obligated to do is call credible and material witnesses to prove its case to the required standard.

84. We note that the failure to call a particular witness or voluntarily to produce documents or objects in one's possession is conduct evidence. (See **J. Wigmore, Evidence § 265, at 87 (3d ed. 1940).** In principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent's evidence is true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference will not be allowed if a party introduces evidence explaining the reasons for his conduct, and reason for failure to call a witness and if the evidence is truly unavailable or shown to be immaterial.

85. Comparatively, in **Bukenya and Others -v- Uganda [1972] EA 549**, it was stated that a court may infer that the evidence of uncalled witnesses would have tended to be adverse. In **Mann Holdings Pte Ltd and another -v- Ung Yoke Hong [2018] SGHC 69,** the Singapore High Court drew adverse inference against a party who had failed to call crucial witnesses to testify at trial. In **Elgin Finedays Ltd -v- Webb 1947 AD 744**, it is stated at 745:

"… it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him …".

86. In the instant appeal, ***Section 55 (4)*** of the ACECA stipulates that the person whose assets are in question shall be afforded the opportunity to cross- examine any witness called and to challenge any evidence adduced by the Commission and, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.

87. In this matter, the appellant did have opportunity to cross-examine the respondent's witnesses. Pursuant to ***Section 55 (5)*** of the ACECA, the appellant when he took the witness stand on oath, was given an opportunity to satisfy the learned judge that his assets were acquired otherwise than as the result of corrupt conduct. The judge found he did not offer satisfactory explanation of his disproportionate assets.

88. In our re-evaluation of the evidence on record, we are satisfied that the appellant did not offer satisfactory explanation as to the source of admitted sum of Ksh. 15.5 million from the alleged Sudanese National; the source of Ksh. 1,000,000/= allegedly for community electricity project; the source of Ksh. 10.9 million and the source of Ksh. 9.5 million for sale of properties. We thus find the appellant's contestation that the judge erred in applying and interpreting ***Sections 26*** and ***55*** of ACECA to have no merit. We also find the judge did not err in holding that the admitted cash monies received were part of the appellants "unexplained assets" that should be paid over to the Kenya Government.

89. In the final analysis, our evaluation of the evidence on record and applicable law lead us to find that this appeal has no merit and is hereby dismissed with no order as to costs. We affirm and uphold the judgment and decree of the learned judge dated 23rd November 2017.

Dated and delivered at Nairobi this 10th day of May, 2019

P.N. WAKI

……

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……..

JUDGE OF APPEAL

J. OTIENO-ODEK

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

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