

THE FIRST MERCANTILE SECURITIES CORPORATION CASE AND THE ISSUE OF MUTUAL LEGAL ASSISTANCE-

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at the Economics of Corruption Seminar
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History/Overview

- On 11/7/2002, Govt. of Republic of Kenya and First Mercantile Securities Corporation sign an agreement to finance acquisition of satellite communication equipment[VSAT, communication, computer, servers and other equipment] from Spacenet.
- Total contract price stated as US\$12,716,250.
- Kenya paid some US\$ 6.8 million but then defaulted when fraud was suspected.

Red Flags /Suspicious

- 23/6/2005 Ministry of Finance requested Controller and Auditor General to undertake special audit of all finance contracts.
- Board of PCK did not give approval.
- Contract single sourced against provision of Procurement law.
- Contract entered by Ministry of Transport.
- Identities of parties to contract uncertain. Financier not registered in Switzerland at time of contract.
- Kenya Anti-Corruption commenced investigations.

Request for Mutual Legal Assistance.

- On 3/5/2007, Kenya through KACC wrote a letter of request for mutual legal assistance from the Competent Judicial Authorities of the Swiss Confederation pursuant to the Swiss law on Mutual Legal Assistance in criminal matters.
- Request based on Section 12[3] of ACECA which provides- *'The Commission may in the performance of its functions work in co-operation with any foreign government or international or regional organization.'*

Court action in Kenya

- On 17/7/2007, First Mercantile Securities Corporation moved the High Court in Kenya to;
 - ▶ quash the request for Mutual Legal Assistance,
 - ▶ prohibit implementation of the MLA and
 - ▶ prevent KACC from interfering with First Mercantile Securities Corporations contractual rights.

Ruling by High Court of Kenya.

- On 20/12/2007, the High Court gave its ruling that:-
 - ▶ the request breached Kenyan law;
 - ▶ core function of KACC civil recovery and not to pursue criminal process;
 - ▶ there was a collateral purpose in pursuing criminal investigations during pendency of civil suit in Geneva.

Proceedings in the Court of Appeal.

- Kenya Anti-Corruption Commission appealed and the Court of Appeal held, inter alia:-
- Parliament conferred on KACC power to investigate corruption and economic crime;
- Sovereign Parliament of Kenya has given KACC power to work in co-operation with any foreign government when investigating corruption or economic crime.

Proceedings in the Court of Appeal

- KACC function of civil recovery cannot over-ride the investigative function
- Though KACC is not a prosecuting authority, it still needs to investigate to get evidence to institute recovery proceedings in civil courts.
- Very little or no reference to UNCAC.
- Appeal was allowed and High Court decision overturned.

Lessons/Thoughts.

- Investigations can be stall due to reasons beyond the control of investigating authorities.
- Judicial processes do/can lead to stalling of corruption investigations.
- Persons/companies under investigation do/can use the judicial system to protect themselves [abuse of judicial processes]
- Both Kenya and Switzerland signatories[9/12/2003and 10/12/2003 and 24/2/2009.]
- Articles 38, 46 and 48[2] of UNCAC not considered.UNCAC can serve as basis for cooperation.
- Was High Court of Kenya the right forum? What would be the result if proceedings were pursued under Federal Act on International Mutual Assistance in Criminal Matters [MAC-1981]

PROPOSAL

- Serious need to develop and initiate training programmes for personnel involved in investigation, prosecution and adjudication of corruption in developing countries to understand the dynamics of the international legal framework.

End of Presentation

Thank you for listening to me
and finally....

An Explosion of Applause for me and
ALL OF YOU.