



Ethics & Anti-Corruption Commission (EACC) v Wambugu (Environment and Land Miscellaneous Application E013 of 2022) [2023] KEELC 17056 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2022**

JO OLOLA, J

APRIL 27, 2023

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION (EACC) APPLICANT

AND

JOHN KAHUHO WAMBUGU RESPONDENT

RULING

1. By the Notice of Motion dated 26th September 2022, John Kahuh Wambugu (the Applicant) prays for orders:
 1. That this Honourable Court be pleased to extend time and admit the instant application for hearings;
 2. That this Honourable Court be pleased to discharge or vary the prohibitory orders issued ex-parte on 22nd August 2022; and
 3. That this Honourable Court be pleased to issue any other orders that it may deem just and fit in the circumstances.
2. The application which is supported by an Affidavit sworn by the Applicant is premised on the grounds that:
 - (i) The application has been brought without undue delay;
 - (ii) That on 22nd August, 2022 this Court issued a prohibitory order prohibiting the Respondent from dealing by way of sale, transfer, mortgage, development or in any other manner whatsoever with all that parcel of land known as Nyeri/Municipality Block 1/1403;
 - (iii) That under Section 56(1) of the *Anti-Corruption and Economic Crimes Act*, only the High Court is clothed with special jurisdiction to make an order prohibiting the transfer or disposal



of or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct;

- (iv) That this court did not have jurisdiction under Section 56(1) of the *Anti-Corruption and Economic Crimes Act* to issue the prohibitory orders of 22nd August, 2022;
 - (v) That the Ethics and Anti-Corruption Commission (EACC) did not prove to the Court that the Respondent/Applicant acquired the suit property by way of corrupt conduct;
 - (vi) That the suit property was not acquired by way of corrupt conduct; and
 - (vii) That under Section 56(4) of the *Anti-Corruption and Economic Crimes Act*, the Court may discharge or vary the prohibitory orders issued herein.
3. The Ethics and Anti-Corruption Commission (the Respondent) is opposed to the orders sought in the application. In a Replying Affidavit sworn on its behalf by the Commission's Investigator Simon Lei, the Respondent avers that the orders sought to be varied and/or discharged were issued on 22nd August, 2022 and that the same were served upon the Applicant on 26th August, 2022.
 4. The Respondent avers that under Section 56(4) of the *Anti-Corruption and Economic Crimes Act* (ACECA), the Respondent, if aggrieved by the orders, was required to file an application to vary or set aside the orders within 15 days of service. No explanation has been offered for the failure to file the application within the time stipulated.
 5. The Respondent further avers that the application is premised on a misapprehension of the law particularly on the test applicable for granting an application under Section 56(1) of *ACECA*. It is further the Respondent's case that the issues raised by the Applicant are the subject matter of the investigations and hence cannot form a ground for setting aside or varying the orders.
 6. I have carefully perused and considered the application and the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
 7. By the application before me, the Applicant urges the Court to be pleased to extend time and admit the instant application for hearing. In the main, the Applicant urges the Court to be pleased to discharge or vary the prohibitory orders issued herein ex-parte on 22nd August 2022 and in their place make any other orders that the Court may deem just and fit in the circumstances.
 8. It is the Applicant's case that the Environment and Land Court does not have jurisdiction under Section 56(1) of the *Anti-Corruption and Economic Crimes Act* (ACECA) to issue an order of prohibition and that this Court did not therefore have the jurisdiction to entertain the Respondent's application dated 22nd August, 2022.
 9. It was further the Applicant's case that he neither acquired the suit property by way of corrupt conduct nor did his predecessor in title acquire the same by way of corrupt conduct to warrant the orders issued herein. The Applicant in this regard asserts that he is a bona fide purchaser for value having purchased the property on 29th May, 2015 from one Raphael Muturi Njogu.
 10. As it were, the very first prayer made by the Applicant is for this Court to be pleased to extend time for the filing of this present application and to admit the same for hearing. As was aptly stated by



the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 Others (2015) eKLR:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”

11. In the matter herein, it was not contested that under Section 56(4) of ACECA, any person served with a preservation order like the Applicant herein had a time limit of 15 days within which to file an application seeking to discharge or vary the order. The Applicant did not dispute that as stated by the Respondent, he was served with the preservation orders on 26th August, 2022.
12. It is apparent as can be discerned from his application herein that the Applicant was aware he had come to Court to vary the orders outside the time stipulated by statute. In that respect, I have looked at the lengthy 30 – paragraph Affidavit filed in support of the application. Unfortunately, not even one single explanation is offered for the failure to bring the application out of time. As it were, it was incumbent upon the Applicant to explain the delay to the satisfaction of the Court otherwise this Court would have no ground to exercise its discretion in his favour.
13. Even if this Court were to extend time to admit the application, it was further clear to me that there was no valid ground upon which the orders sought by the Applicant could be granted.

On the main, the Applicant contends that this Court has no jurisdiction to entertain this matter and that the same ought to have been filed before the High Court. On that ground, the Applicant cites Section 56(1) of the ACECA which provides as follows:

“On an ex-parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.”

14. On account of the specific reference to the High Court in that Section of the Statute, the Applicant contends that an application under the said Section can only be placed before the High Court and that this Court had therefore no business issuing the orders of 22nd August, 2022. That interpretation, with respect, cannot hold.
15. If the Applicant had cared to check, he would have discovered that the ACECA was enacted in the year 2003, long before the present Constitution was promulgated in 2010 and the new legal regime pertaining the land matters was ushered in. As at the time of the enactment of ACECA in 2003, the Environment and Land Court did not exist. This Court is created pursuant to Article 162(2)(b) of the Constitution of Kenya, 2010, which clothes it with the mandate to hear and determine disputes relating to the environment and the use and occupation of and title to land.
16. Under Article 162(3) of the Constitution, Parliament was required to determine the jurisdiction and functions of the Court. Pursuant to that provision, Parliament enacted the Environment and Land Court Act, Act No. 19 of 2011. Section 13(2) of the said Act provides as follows:

“The Court shall have the power to hear and determine disputes –



- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuation, mining, minerals and other natural resources.
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”
17. Looking at the matters in dispute herein, I harbour no doubt in my mind that the preservation application filed by the Respondent herein relates to a dispute as to who between the Government and the Applicant herein owns the land in dispute. The ACECA was enacted prior to the promulgation of *the Constitution* of Kenya, 2010 and while the Act may have made reference to the High Court, it must now be read and interpreted in accordance with *the Constitution* which has now created this Court as a Court of Equal Status to the High Court. The contention that the application ought to have been filed in the High Court is therefore in my view, spurious and a total misapprehension of the law.
18. The last argument raised by the Applicant to justify the discharge of the orders of 22nd August, 2022 is the contention that the Respondent Commission did not discharge the evidentiary burden of proving that the property was acquired as a result of corrupt conduct to warrant the issuance of the orders. In this regard, the Applicant contends that just like himself, his predecessor in title had lawfully acquired the property and hence there was no basis upon which the Commission sought and obtained the preservation orders.
19. As we have seen from the provisions on Section 56(1) of the *ACECA*, this Court may grant prohibitory orders if satisfied that there are reasonable grounds to “suspect” that the property was acquired as a result of corrupt conduct. As it were, reasonable suspicion is in my view a subjective conclusion which can only be based on the material facts presented to the Court as at the time the application for preservation is made.
20. As was stated in *Ethics and Anti-Corruption Commission -vs- Fastlane Freight Forwarders Limited & 8 Others (2017)* eKLR:
- “The law merely required the High Court to satisfy itself that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct for it to make an order prohibiting the transfer or disposal or other dealing with the property.”
21. Clearly, a preservation order is sought for purposes of preserving the subject property pending investigations by the Respondent Commission as to how the property in dispute was procured. Given its ramifications and the possibility that the subject may as well turn out to be innocent, the law gives a time limit for the preservation of six (6) months. As was stated in the Fastlane case (*supra*):
- “... A freezing order is sought because the claimant fears the consequence of not restraining the defendant. Thus, in whichever Court the application is made, it is almost always without notice based on affidavit or draft affidavit evidence ...”
22. Arising from the foregoing, I was not persuaded that there was any merit in the Motion dated 26th September, 2022. The same was filed out of time and is misconceived. It is dismissed with costs.



**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THE 27TH DAY OF APRIL, 2023.**

In the presence of:

Ms Njuguna for the Applicant

Ms Omari holding brief for Ms Omweri for the Respondent

Court assistant - Kendi

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J. O. LOLA

JUDGE

