



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

MISCELLANEOUS APPLICATION NO. 48 OF 2018

IN THE MATTER OF AN APPLICATION BY ETHICS AND ANTI-CORRUPTION COMMISSION FOR AN ORDER UNDER SECTION 56 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003 TO PROHIBIT THE WITHDRAWAL, TRANSFER OR DISPOSAL OF OR OTHER DEALINGS (HOWSOEVER DESCRIBED) WITH THE MONIES BELOW:

KSHS.1,414,961 HELD IN ACCOUNT NO. [xxxx] IN EQUITY BANK LIMITED, IN THE NAME OF ANDREW BIKETI MUSUYA – KSHS.1,601,181 HELD IN ACCOUNT NO. [xxxx] IN EQUITY BANK LIMITED, IN THE NAME OF MUKUYU PETROLEUM DEALERS – KSHS. 12,739,682.05 HELD IN ACCOUNT NO. [xxxx] COOPERATIVE BANK LIMITED, IN THE NAME OF MUKUYU PETROLEUM DEALERS WHICH MONIES IS SUSPECTED TO HAVE BEEN ACQUIRED AS A RESULT OF CORRUPT

CONDUCT

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION..... APPLICANT/RESPONDENT

VERSUS

ANDREW BIKETI MUSUYA T/A

MUKUYU PETROLEUM DEALERS..... RESPONDENT/APPLICANT

RULING

Introduction

1. Vide an originating summons dated 24th October 2018 filed pursuant to Section 56 of the ACECA, the Ethics and Anti-Corruption Commission (herein referred to as the Commission) sought ex parte orders prohibiting Andrew Biketi Musuya T/A Mukuyu Petroleum Dealers, their agents, servants or any other persons from withdrawing, transferring, disposing, wasting and/or in any way dealing with the funds held in the bank accounts listed as:

(i) [xxxx] in Equity Ltd, Kitale Branch in the name of Andrew Biketi Musuya

(ii) [xxxx] in Equity Bank Mtwapa Branch in the name of Mukuyu Petroleum Dealers.

(iii) [xxxx] in Co-operative Bank Ltd, Mtwapa branch in the name of Mukuyu Petroleum dealers.

2. The application is based on grounds that the respondent in the exparte application Andrew Biketi Musuya a Principal Accountant working with County Government of Transzoia is under investigation over allegations that in collusion with a private consultant engaged in a fraudulent scheme to embezzle public funds through inflated or fictitious contracts. That as a result, he and his wife plus a private consultant have accumulated illicit wealth to the detriment of the public.

3. Upon perusing the exparte application, the duty Judge granted the orders sought on 24th October 2018 to last for a period of six months in compliance with Section 56 (1) of ACECA. The applicant was then directed to serve the affected banks and the respondent.

4. Aggrieved by the said order, Andrew Biketi Musuya (original respondent) swiftly moved to court through a notice of motion dated 8th November 2018 and filed the same date seeking orders as follows:

(1) That for reasons to be recorded this application be certified urgent,

Service thereof be dispensed with and the application be heard exparte in the first instance in respect of prayer 2 hereof.

(2) That the order of the honourable court issued on 24th October 2018 be varied to allow the respondent to partially access the funds in bank account No. [xxxx] held at Co-operative Bank of Kenya Ltd in the name of Mukuyu Petroleum dealers, up to Kshs. 5 million or as the court shall determine fair, pending hearing and determination of this application interpartes.

(3) That the order of this honourable court issued on 24th October 2018 be varied to allow the respondent to partially access the funds in bank account No. [xxxx] held at Equity Bank Ltd, Kitale branch in the name of Andrew Biketi Musuya up to Kshs.127,000 being the respondent's salary from County Government of Transzoia or as the court shall determine fair, pending hearing and determination of this application interpartes.

(4) That the orders of preservation issued herein on 24th October 2014 by the honourable court be set aside/discharged.

(5) That the honourable court be at liberty to issue any further orders in the interest of justice.

5. The application is predicated upon Article 47 (1) and Section 7 (1) Schedule Six of the Constitution, Section 56 (4) and (5) of the Anti-Corruption and Economic Crimes Act, Order 51 rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the CPA. It is anchored upon grounds set out on the face of the application and supporting affidavit sworn by the respondent on 8th November 2018.

Applicant's Case

6. It is the applicant's (original respondent) contention that the issuance of the impugned order was ill informed as the income which forms the basis of the current investigation and intended prosecution of the applicant was not acquired as a result of any corrupt conduct. He stated that, the said income was lawfully acquired over a period of 10 years. That Mukuyu Petroleum dealers is a legal entity registered in the year 2008 and that it was not established with the aim of facilitating any fraudulent scheme to embezzle any public funds.

7. He further averred that, Mukuyu Petroleum dealers was registered much earlier even before he was employed in the Ministry of Health. He went further to justify his sources of income from among others, his investment in a club known as Mtello which could generate Kshs.200,000/= per month. He attached a single business permit from Kapenguria Municipal Council as proof that the said club did exist.

8. He averred that due to political challenges, he was forced to close the club sometime in July 2010. He however contended that by the time he closed shop, he had made over Kshs.23,000,000/=. He further stated that he was a maize farmer between the year 2006 – 2016 out of which he earned a total of Kshs 28,031,770. He attached several sales receipts marked ABM.4 as proof of his farming activities. He further claimed that by the time investigators visited his home, he had in store 1327 bags of maize which at the then government price of 2,700/= per bag would fetch Kshs.3,582,900/=.

9. It was his contention that, he joined the county government of Transzoia on 3rd November 2014 as a principal accountant at job group P earning a salary of Kshs 129,527 per month. He attached employment letter dated 3rd November 2014 and copies of payslip (annexure ABM.7).

10. It is the applicant's claim that sometime in July 2012, he entered into a memorandum of understanding with Mr. Isaiah Walubengo trading as Josim Instantaneous Consultium Co. (K) Ltd Certified Public Accountants of Kenya for establishment of a financial and management consultancy in the name of Josim Instantaneous Consultium (K) Co. Ltd in which he was to receive 40% of the net profit. That the business was incorporated on 8th January 2015 and has continued to flourish over time.

11. To prove that the company has undertaken financial consultancy services to both government institutions and non-governmental organisations, the respondent attached a summary of notable programmes and assignments undertaken (annexure ABM-9). He attached a local service order dated 3rd September 2018 from Vihiga County government for financial consultancy services rendered worth Kshs 20,000,000/= (Annexure ABM-10).

12. Regarding the payment voucher forming the basis of the impugned investigations, the applicant stated that, the voucher which is said to have been made out to Josim Instantaneous Consultium (K) Co. Ltd and Walubengo & Associates was a mispost on the part of the county government occasioned by the similarities in names as Isaiah Walubengo who is the director of Josim Instantaneous Consultium (K) Co. Ltd and Johnston Walubengo who is the proprietor of Walubengo & Associates are two different persons. He denied that payment was made to Josim Instantaneous Consultium. Instead, he attached a copy of a ledger from Transzoia County showing that payment was made to Walubengo and Associates (Annexure ABM-12).

13. He averred that since he joined Transzoia County Government he has never sat in any procurement committee in which Josim Consultium was a bidder. To support his claim, he attached a statement of accounts marked as ARM-13 to prove that from a chain of consultancy services rendered by Josim to various organisations, he got his 40% share amounting to Kshs73,466,000. Further, the applicant attached a statement of accounts marked ABM-14 to prove that between 1st January 2015 and 5th January 2017 he earned an aggregate amount of Kshs 38,117,687. He also attached loan agreements he entered with his friends from which he received a total sum of Kshs 12,000,000 between 26th April 2014 and 10th September 2017 (See Annexure ABM-15).

14. The applicant went further to state that using the above stated income and earnings, he entered into a contract with a contractor for construction of houses, (flats) at Mtwapa which generated a sum of rental income of Kshs.24,731,781 between 7th December 2015 and 15th October 2018. It is his contention that a sum of Kshs 8,624,379 reflected in his account No. [xxxx] and Kshs 9,000,000/= was out of farming activities, salary, consultancy services and brokerage.

15. Concerning motor vehicle Registration No.KBV 467q, the applicant stated that, it was bought before he got employed with Transzoia County government (See annexure ABM.23 being sale agreement, transfer and registration). Regarding motor vehicle Reg. No. KCF 158S, he denied ownership claiming that he was not aware of its existence. As to motor vehicle Reg. No. KCH 124M, he stated that it was his wife's car bought out of her own income.

16. Finally, he maintained that, as a result of the said orders freezing his accounts, his family is suffering as they cannot afford to buy food, meet their health care expenses and other necessities hence subjecting him and the family into indigency. He therefore prayed for review of the orders by allowing him to access the accounts and have partial withdrawal of Kshs 5,000,000.

Respondent's Case

17. In response, the respondents filed a replying affidavit sworn by Charity Muiruri on 28th November 2018 challenging the application. She averred that, the applicant (original respondent) has failed to sufficiently explain the source of monies preserved by an order of this court hence the same remains suspect. She questioned existence of huge sums of money deposited in his accounts allegedly from business to which he has not explained in his application.

18. The deponent maintained that the applicant had failed to explain and account for huge deposits made of Kshs 600,000/= deposited on 16th December 2015, Kshs.2,564,346, Kshs 1,000,000/= and 1,300,000/= on 17th December 2015 (See Annexure CM2 – being bank statements). Further, it was alleged that, as at 7th December 2015 account No. [xxxx] Co-operative Bank in the name of Mukuyu Petroleum dealers Equity Bank had 7,700,000. However, on 7th December 2015, Kshs 3,500,000/= was deposited and on 17th December 2015 Kshs 4,200,000/= was deposited. That no explanation regarding the source of this money was given hence suspected to be illegally acquired money.

19. It was further averred that preliminary inquiries by the commission (respondent) had established that Mukuyu Petroleum dealers does not exist physically. As a result, the commission has sought confirmation from the Energy Regulatory Authority and is awaiting a response. The deponent further stated that despite Mukuyu Petroleum dealers having been formed in November 2008, it only activated its account for the first time on 7th December 2015 when the applicant had started working with Transzoia County government.

20. The respondent gave a list of assets acquired during the period the applicant had joined the county government i.e. L.R Bungoma/Naitiri/2534 0.8 Ha acquired on 23rd February 2017, LR Bungoma/Naitiri/2774 acquired on 29th May 2018, LR Bungoma/ Naitiri/ 2724 acquired on 18th January 2018 and LR Bungoma/Kamakoiswa acquired on 16th April 2008 plus motor vehicles Harrier KCH 124M and Toyota Prado KCF 683S acquired on 28th June 2016 and November 2015 respectively.

21. Regarding access to the preserved cash in the account, she asserted that, it will be tantamount to allowing a suspect of crime to continue using and enjoying money that was illegally acquired. She averred that the respondent is at liberty to direct his employer to direct payment of his salary to a new account for purposes of receiving his salary. Further, that the applicant has another account No[xxxx] held at Co-operative Bank which account has a balance of Kshs 517,109 as at 20th November 2018 which is not frozen.

22. It was also contended that a variation order will jeopardise ongoing investigations which when completed may lead to a discharge order after six months expiry period, or institution of a fresh suit. That a memorandum of understanding entered between the applicant and Josim Instantaneous Consultium Ltd was a conduit for the applicant to siphon out money from Transzoia county government through dubious transactions leading to the loss of Kshs 50,305,771 deposited in the applicant's bank account No. [xxxx] Equity Bank (See Annexure CM9).

23. The deponent stated that, the amount so far preserved is Kshs.15,755,804 yet the commission is investigating payment of Kshs 50,305,781 paid to Josim Consultant (K) Ltd to which the applicant holds 40% share. She questioned the mode of payment of millions of shillings in cash to the applicant as his share in Josim Consultium co. LMT. M/s Muniu clarified the relationship between Josim Instantaneous Consultium whose ownership consists of Isaiah Walubengo and the applicant as a shareholder and the Josima Instantaneous Consultant (K) whose ownership consists of Isaiah Walubengo and Johnstone Walubengo. It was further alleged by the commission that Isaiah Walubengo is not an accountant by profession hence questionable on how a lay person would be a financial analyst, expert or consultant.

24. In response to the applicant's allegation that he was never a member of any procurement committee., M/s Muniu adduced a letter dated 8th December 2014 in which the applicant was appointed as a member of the county procurement committee responsible for approval of all procurement worthy Kshs 500,000/= and below (See annexure CM.15). Regarding proceeds earned from Mtello Club and sales made out of maize produce, M/s Muniu averred that there were no audited accounts to show how the applicant made over Kshs 28,000,000 from a club in Kapenguria in a span of 1½ years and receipts from sales of maize produce.

25. As regards proceeds from friends as loans, M/s Muniu challenged the applicant to prove how he received the Kshs 12,000,000/= from friends and whether he has refunded them. As to Kshs 38,117,687/= earned between 1st January 2015 and 5th January 2017 from Hirola Investment and Kshs 73,626,000 from Josim Instantaneous Consultium, the commission claimed that investigations are on high gear to establish the genuineness of those sources. It was deponed that, since the applicant has stated that he has several sources of income; he cannot claim to have been crippled or strangled financially.

26. In their rejoinder to the replying affidavit, the applicant filed a further affidavit sworn on 18th January 2019 in which he stated that the Kshs.1,000,000/= alleged to have been deposited in one of his account was as a result of maize sales. He further stated that monies deposited in Mukuyu Petroleum account was out of rent from various houses and the rest of the deposits was out of his consultancy services.

Submissions by Counsel for the applicant (Original Respondent)

27. During the hearing, the firm of Echesa and Bwire appearing for the applicant represented by Mr. Mukuha, basically reiterated the averments contained in the affidavit in support of the application, a further affidavit sworn on 18th January 2019 plus their written submissions dated 18th January 2019. Learned counsel submitted that the allegations of corruption levelled against the applicant are speculative, misrepresentation of facts, baseless, imaginary, misguided and false information. Learned counsel submitted that there was no proof that the monies deposited in the applicant's accounts and investment was out of corrupt dealings. Counsel cited Section 107 and 108 of the Evidence Act that he who alleges a fact must prove it. She opined that there was no reasonable suspicion proved by the commission that the applicant had acquired wealth illegally. To buttress this position, counsel relied on the decision in the case of **Timothy Isaac Bryant and 2 others vs Inspector General of Police and 7 others Misc. Cr. Appeal No. 294 of 2014** in which the high court made reference to the definition of the word suspicion as defined in the case of **Emmanuel Suipenu Siyanga vs R Cr. Appeal No. 124/2009 (2013)** as follows:

“Such suspicion must have been reasonable and it follows that the factual basis which would make any suspicion which is actually formed, a reasonable one must also exist at the material time. A suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not grounds which then made suspicion reasonable, it was not a reasonable suspicion”.

28. Further reference was made relying on the case of **Vitu Limited vs the Chief Magistrate Nairobi and two others HC Cr. Misc. Cr. Appeal No. 475/2004 (unreported)** where the court held that, when a police officer or investigator approaches the court for a warrant of arrest, there must be reasonable suspicion of an offence being committed or about to be committed. Learned counsel further expressed himself that a court is not a conveyor belt to issue warrant of arrest or issue search and seizure order as a matter of course without cogent reasons advanced and due consideration of a person's fundamental rights. To bolster this position, counsel relied on the decision in the case of **Manfred Schmitt and Another vs Republic and Another Cr. Rev. No. 569/2012.**

29. Regarding the constitutionality of Section 56 of the Constitution, learned counsel submitted that, issuance of exparte orders under Section 56 of ACECA was unconstitutional as the applicant was condemned unheard thus offending Article 47 (2) of the Constitution hence a breach of the principles of natural justice. To reinforce that position, counsel referred the court to the cases of **General Medical Council and Sparck Man (1943) 2 LL ER 337 and A.G vs Ryan (1980) A.C. 718** and **Mirugi Kariuki vs AG Nairobi Civil Appeal No. 70/1991 and Dickson Ngigi vs Commissioner of Lands (1998) e KLR Civil Appeal No. 297/1997 in which the court held that:**

“.....the right to hearing before a decision is made is a basic right which cannot be taken away by the hopelessness of one's case”.

30. Lastly, learned counsel urged the court to allow the applicant partial access to his account to utilize his salary which is tied there. She referred the court to the case of **EACC vs Equity Bank of Kenya and Another (2018)** in which Justice Ong'udi allowed the applicant/respondent access to his account to withdraw Kshs100,000/= per month for his upkeep.

Submissions by the Respondent (original applicant)

31. In challenging the applicant's application, the respondent (original applicant) represented by R. Murugi filed their submissions on 1st March 2019. M/s Mwangi reiterated the averments contained in the affidavit in reply to the application. Learned counsel broke down the issues for determination into three:

- (i) The law and principles applicable to discharge of preservation order.**
- (ii) Whether the commission demonstrated to the court reasonable suspicion that the monies were acquired as a result of corrupt conduct.**
- (iii) Whether the respondent/applicant has satisfied the court that the monies were not acquired as a result of corrupt conduct.**

32. It is her submission that the burden of proof under Section 56 (5) of ACECA lies with the party seeking discharge of preservation

orders. Counsel quoted the case of **Ethics and Anti-Corruption Commission vs Njage Makanga and 2 others (2017) eKLR** where it was held that:

“.....the burden of proof as articulated under the provisions of Section 56(5) of the Anti-Corruption and Economic Crimes Act is on a balance of probabilities and in this case lies with respondent/applicant”.

33. As regards proof of reasonable suspicion that the said monies were acquired as a result of corrupt conduct, counsel submitted that at the exparte stage, the evidential facts need not answer the description of any specific offences of corrupt conduct. To buttress this position M/s Murugi referred the court to the case of **Ethics and Anti-Corruption Commission vs National Bank of Kenya and Another (2017) eKLR**.

34. Concerning the threshold upon which a court can grant preservation orders under Section 56, counsel opined that the same was purely based on reasonable grounds to suspect. Lastly, learned counsel asserted that the applicant has not demonstrated that he has been subjected to any hardship that outweighs the risk of the money in the accounts from being concealed or transferred. To support that position, M/s Murugi referred the court to the case of **Ethics and Anti-Corruption vs Catherine Nkirote Manga and 2 others (2017) eKLR**.

Analysis and determination

35. I have considered the application herein, supporting affidavit, affidavit in reply, submissions by Mr. Mukuha for the applicant, written submissions by M/s Murugi for the respondent and well researched authorities. Issues that emerge for consideration are:

(1) Whether there was reasonable suspicion of corrupt conduct to warrant freezing and preservation of the applicant’s bank accounts.

(2) Whether there exist good reasons to discharge the orders.

(3) Whether there is sufficient ground to warrant partial withdrawal of cash in the tune of 5 million to enable the applicant meet his daily upkeep, medical expenses and school fees.

Whether the exparte orders were issued on reasonable suspicion of corrupt conduct by the applicant in acquiring monies preserved in various accounts

36. The exparte orders issued on 24th October 2018 are anchored under Section 56 (1) and (2) of the ACECA which provides:

Sub-Section 1 – On an exparte application by the commission, the high court may make an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct.

Sub-Section 2 – An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.

37. Section 56 (4) further goes to provide that:

“a person served with an order under this section may, within fifteen days after being served, apply to the court to discharge or vary the order and the court may, after hearing the parties, discharge or vary the order or dismiss it.

Sub-Section 5 – states as follows:

“The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct”.

38. According to Section 56 (1) and (2), the only duty imposed upon the commission to obtain exparte order is reasonable suspicion that a certain property in the possession of a person under investigation was obtained through corrupt conduct. The key question is, what is reasonable suspicion? According to concise Oxford English Dictionary 12th Edition, the word reasonable is defined as **“fair and sensible; able to reason logically; as much as appropriate or fair; moderate”**. The word suspicion is also defined as **“a feeling that something is possible or likely; a feeling or belief that someone is guilty of an illegal or dishonest action”**

What amounts to reasonable suspicion?

39. From the above definition, it is clear that the commission is not duty bound to prove beyond reasonable doubt or with mathematical precision that a person being suspected of any corrupt conduct did indeed commit the act complained of. What therefore constitutes reasonable suspicion is quite broad, subjective and relative. The best yard stick is the use of an ordinary person’s lens. Reasonable suspicion therefore should be distinguished from mere speculation, vendetta meant to settle scores, malice, political pressure or any other extraneous factors. The evidence relied on should not be overtly hopeless.

40. As correctly stated in the case of **Timothy Isaac Bryant & Others vs Inspector General of Police & 7 Others Misc. Criminal appeal (Supra)**, reasonable suspicion must be based on existent facts and not mere imagination or malice. Reasonable suspicion should be logically measured from an ordinary person’s lens based on cogent existing material facts which any reasonable person will have reason to doubt the

source of wealth in question. It is the responsibility of the applicant to demonstrate his grievance against the exparte order (See ARA vs Pamela Aboo (2018) eKLR).

41. The commission (respondent) claimed in its exparte application that the appellant herein had acquired massive wealth within a short period of 3 years, after joining the county government of Transzoia sometime 3rd November 2014. That with a meagre salary of Kshs101,559 a month, coupled with other responsibilities, he could not have amassed millions of shillings as stated in the application. It was further alleged that the applicant had taken advantage of his position as a principal accountant in the county government to do business with his employer through Josim Consultium hence conflict of interest. That in using a company known as Josim Instantaneous Consultium Co. Ltd to which he was in partnership with one Isaiah Walubengo a lay person in the accounts field as a partner, accessed contracts from the county government hence a payment of Kshs.50,305,771 through account No. [xxxx] Equity Bank.

42. According to the applicant, all monies deposited in his accounts were lawfully acquired. Unfortunately, Section 56 (4) and (5) shifts the burden of proof to the applicant (suspect). It is trite law that he who asserts existence of a set of facts and wishes the court to believe in its existence must prove the same (Section 109 of Evidence Act). Section 108 of the Evidence Act lays the burden of proof squarely on he who would fail if no evidence were given on either side.

43. In this case the onus lies on the applicant to convince this court that the monies deposited in the frozen accounts were legally or lawfully earned and that they are not associated with any criminal conduct. Although Section 56 (1) and (2) lays blame on a suspect based on suspicion hence indirectly presumes such person guilty on the interim basis pending further investigation, that is the law currently and same must be enforced.

44. According to the applicant, between the period January 2009 – July 2010 he used to operate a club known as Mtello in Kapenguria from which he earned Kshs 200,000 per week making a total of Kshs 23,933,200 by the time he closed down the business. He attached a business permit to prove that he was the proprietor of the said club. However, there were no audited accounts to prove that the Kshs 23,000,000/= allegedly made within a span of 1 ½ years did exist. Is the Kshs 23,000,000 profit or gross income? On the face of it, I do agree with M/s Murugi's submissions that it is suspicious that such a huge sum of money would be raised from a club located in Kapenguria for a period of 1½ years. Regarding a sum of Kshs 28,051,770 allegedly earned from maize farming, the applicant attached maize sales receipts and a stock of 1,377 bags of maize which according to the commission is subject to investigations because it requires elaborate counter checking before making a conclusion on the genuineness of the receipts.

45. The commission also questioned deposits of Kshs 3,500,000/= on 7th December 2015 and Kshs4,200,000 on 17th December 2015 being a span of 10 days hence suspicious deposits. The commission further questioned a deposit of Kshs600,000, Kshs1,000,000 and Kshs 1,300,000 between 16th December 2015 and 17th December 2015 in Equity Account No. 119016592. To the applicant, this was money from maize sales from which he allegedly earned Kshs 28,031,770/=. A careful examination and perusal of the maize sales receipts attached and marked ABM-4 in the supporting affidavit, there is no receipt reflecting sale of maize around the months of November or December 2015. The last receipt for sale of maize attached is dated 15th August 2015 and thereafter 17th February 2016. It is therefore not clear how the amount of Kshs 600,000/=: Kshs1,000,000/= and Kshs1,300,000/= was sourced before being deposited. This is a clear indication of reasonable suspicion that the money may have been obtained through illegal means.

46. The other deposits flagged by the respondent was a sum of Kshs 3,500,000/= made on 7th December 2015 and Kshs 4,200,000/= made in Co-operative Bank (CM3 of the replying affidavit) . In response through his further affidavit at Paragraph 11 and annexures 13 and 14 of the supporting affidavit, he claimed that the said amount was proceeds realized from maize sales, consultancy and brokerage services. This is a general statement which does not make specific reference to the source of the money deposited on those specific days. The exhibits referred to ABM-13 and 14 in reference to Paragraph 33 and 34 of the supporting affidavit, do not show any evidence of any payments made or realized from maize sales, brokerage or consultancy at that particular time when money was deposited.

47. According to the banking deposit slip marked CM 3 in support of the replying affidavit, a sum of Kshs.3,500,000/= was deposited in cash in Co-operative bank by the applicant himself. It does not show the source. If it was rent, or maize proceeds or consultancy, the consumers of those services would most probably be the depositors of such a huge sum of money in the applicant's account. The explanation given by the applicant is just a general statement which is not convincing or tied to a specific source. He has not sufficiently discharged that onerous burden of proving his case on a balance of probability as required of him under Section 56 (5) of ACECA.

48. Concerning over Kshs.50 million paid to Josim Instantaneous Consultium Co. Ltd. as consultancy fees, the respondent stated that the applicant's partner one Isaiah Walubengo is not an accountant by profession hence incapacitated in rendering such professional services. It then reasonably goes without saying that, the creation of a memorandum of understanding between the applicant and Isaiah was most probably just but a gimmick for the applicant to trade with his employer through the back door hence an act of conflict of interest subject to proof upon further investigations.

49. In a nutshell, the respondent had established reasonable cause to warrant issuance of exparte orders by the court which prima facie empowered the court to issue the same. On the other hand, the applicant has not met the threshold for discharging those orders on account of reasonable suspicion not established.

50. Regarding partial access to the frozen accounts to withdraw Kshs5,000,000/= to meet daily maintenance expenses, school fees and medical expenses, the applicant claimed that his salary was tied in the frozen accounts hence unable to sustain his livelihood. However, the respondent (commission) stated that, he should open another account to continue receiving his salary, consultancy or brokerage fees or even rent. In the case of Ethics and Anti-Corruption Commission vs Equity bank of Kenya & Another (Supra) the court allowed partial access to the applicant's account to withdraw Kshs.100,000/= per month for his daily upkeep so as not to be rendered destitute.

51. However, the circumstances in the above case are different from this case and can aptly be distinguished from the prevailing circumstances in this case. In the instant case, the applicant has his salary intact. He has the leeway to open another account to continue discharging his brokerage and consultancy services as well as receive his salary and fees. His flourishing maize farming has not been

affected. In any event he has an account not affected with over 50,000/=This is not a case of being rendered destitute to warrant access to frozen account lest the court be accused of perpetuating and condoning further wastage of ill gotten wealth. Supposing at the end of investigations, the applicant is to be charged with a criminal offence or substantive suit and a compensation or recovery order is made, how will the suspect (applicant) be able to refund the already withdrawn and spent “stolen” money through a court order?

52. Before making an order on partial access of frozen accounts, a court should be very cautious and apply that discretion sparingly and only in desperate situations based on existence of humanitarian grounds or circumstances without affecting the amount likely to be recovered in case found guilty. To that extent, that ground is not available.

53. Regarding the constitutionality of ex parte orders, Section 56 (1) and (2) is a provision of a legal statute which has not been declared unconstitutional. In any event, the same section does recognize the right to be heard under Sub-Section (5) and (6) in which the applicant has an opportunity to file an application challenging the orders within 15 days upon being served. With this provision, the applicant has been accorded a right of hearing. It is not every ex parte order that is illegal or unconstitutional. Even under Order 40 of the Civil Procedure Rules, ex parte injunctions are issued for 14 days yet they are not unconstitutional. What is crucial here is the opportunity to be heard which is taken care of. The ex parte order is not sealed or cast in stone hence subject to challenge.

54. The applicant has therefore not been disenfranchised or denied his right to be heard under Article 50 of the Constitution. Further, he has not been subjected to unfair administrative actions as the commission was exercising a statutory mandate hence no proof of bias, illegality, irrationality or abuse of office thus breaching principles of natural justice.

55. It is my conviction that, the application herein is not convincing and has not met the threshold to discharge or vary the ex parte orders of 24th October 2018. Accordingly the application dated 8th November 2018 be and is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MARCH, 2019.

J.N. ONYIEGO

JUDGE