



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC MISC NO. 4 OF 2019

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

VERSUS

SACHDEVA NABHAN & SWALEH ADVOCATE..... 1ST RESPONDENT

ANDREW BIKETI MUSUYA T/A MUKUYU PETROLEUM

DEALERS 2ND RESPONDENT

RULING

Introduction

1. Through an Originating Summons dated 23rd January 2019 and filed on 23rd January 2019 pursuant to Section 56 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003, the Ethics and Anti-Corruption Commission (herein referred to as the EACC), sought orders prohibiting the respondents, their agents, servants or any other persons, from wasting and or in any way dealing with the funds (3.5 million) held in the bank account No. xxxxxxxxxx in Prime Bank Ltd Mombasa Branch in the names of SACHDEVA NABHAN & SWALEH ADVOCATES – CLIENT’S account.

2. Consequently, the court granted ex parte orders to last for a period of six months and directed service of the application and the orders issued thereof to be served upon the respondents.

3. Aggrieved by these orders, the 2nd respondent moved this court on 12th February 2012 through a notice of motion dated 8th February 2019 filed under certificate of urgency seeking to set aside the said orders. The application which is brought under Article 47 (1) and Section 7 (1) of the 6th Schedule of the Constitution, Section 56 (4) and (5) of the Anti-Corruption and Economic Crimes Act (ACECA), Order 51 rule 1 of the Civil Procedure rules and Sections 1A, 3 and 3A of the civil procedure Act is predicated on grounds set out on the face of it and an affidavit of one Biketi Musuya sworn on 8th February 2019.

4. In response, the respondent (EACC) filed a replying affidavit sworn on 18th February 2019 by Yakub Adow Kuno an investigator working at the EACC. Despite filing notice of appointment of advocate dated 19th February 2019, the 1st respondent did not file any response.

The Applicant’s Case

5. It is the applicant’s/2nd respondent’s case that the ex parte orders issued on 23rd January 2019 freezing his funds held in the 1st respondent’s bank account have deprived him the right to property which is guaranteed under Article 40 of the Constitution. He averred that the property in question was legitimately acquired and not through any corrupt conduct.

6. He further averred that the orders were made against him without affording him an opportunity to be heard thus contravening Articles 47 (1) and 50 of the Constitution on the right to fair hearing thereby violating the basic tenets of the principles of natural justice that nobody should be condemned unheard.

7. He contended that Mukuyu Petroleum dealers was established to render legal and lawful business and not to facilitate fraudulent schemes to embezzle public funds. He claimed to have started his petroleum business long before he was employed in the Ministry of Health and Sanitation. He further stated that before 2010 when he joined the ministry he had made his money through legitimate businesses. That on 3rd November 2014, he was employed by the County Government of Transzoia as a principal accountant earning a salary of Kshs.129,521/= per month.

8. He averred that on 28th September 2015, he made a funds transfer from his Equity Bank account xxxxxxxxxxxx amounting to Kshs.5,000,000/= to his client's account held by the 1st respondent. That the said amount was part of a sum of money totalling to about 9million earned from his monthly salary, brokerage fees and other side businesses paid or credited to the said bank account from 16th November 2013 up to 9th October 2018 (see bank statements annexure ABM5).

9. He further averred that out of the said amount, he spent Kshs.4,300,000/= to buy a property No. 2443 (original No. 1874/3) of Section III Main land North (C.R 2485). To support that assertion, he produced transfer documents marked ABM6.

10. The deponent gave a breakdown of various bank accounts and a list of other properties which are the subject of proceedings in ACEC Misc. Application No. 48/2018 where the EACC is seeking recovery of the property. He termed the application freezing his accounts as vexatious, malicious, ill informed, ill willed and unfounded.

11. It was his contention that by freezing the account, he has been subjected to stress and that he is unable to meet his legal representation expenses. That the subsistence of the impugned orders will subject him to prejudice and suffering which outweighs that which the respondent/EACC will suffer should the court lift the orders.

12. Through their written submissions dated 12th March 2019 and filed on 13th March 2019 by the firm of Echesa and Bwire Advocates, the Applicant/2nd respondent, literally reiterated the averments contained in the affidavit in support of the application.

13. It was submitted that the respondent/applicant/EACC acted on speculation and that they have not advanced any reasonable and convincing evidence or grounds to justify the grant or retention of the freezing/preservation orders. To support this proposition counsel referred to the decision in the case of **Emmanuel Suipanu Siyanga vs Republic Cr. Appeal 124 of 2009 (2013)eKLR** and **Timothy Isaac Bryant and 2 Others versus Inspector General of Police and 7 others Misc. Cr. appeal No. 194/2014 (2014) eKLR.**

14. Mr. Bwire opined that a reasonable case must be made before a court can limit a person's rights and fundamental freedoms. To buttress this proposition, counsel referred to the decision in the case of **Manfred Schmitt and Another vs Republic and Another Cr. Revision No. 569 of 2012 (2013) eKLR.**

15. Counsel further submitted that Section 56 of the ACECA is unconstitutional on the premise that issuance of the prejudicial freezing orders against the 2nd respondent without affording him an opportunity to be heard violated Article 47 (1) of the Constitution.

16. Counsel urged the court to find that any decision made in violation of the rules of natural justice is void. To bolster this position, he referred the court to the case of **Dickson Ngigi vs Commissioner of Lands (1998) e KLR Civil Appeal No. 297 of 1997.**

The Respondent's/Applicant's Case

17. In opposition to the application, the respondent/applicant (EACC) relied on the averments contained in the replying affidavit of Yakub Adow Kuno in which he analysed the respondents/applicants constitutional and statutory mandate underscored under Article 79 of the Constitution, and Sections 23 of the Ethics and Anti-Corruption Commission Act 2011.

18. It was averred that upon conducting investigations, it was found that the applicant/2nd respondent had huge sums of deposits in his accounts interalia Kshs24,731,781 credited into bank account No. xxxxxxxxxxxxxx in the name of Mukuyu Petroleum Dealers which money was suspiciously earned within 6 months, Kshs.8,684,379 credited to account No. xxxxxxxxxxxxxx in the name of Mukuyu Petroleum Dealers held in Equity Bank between December 2015 – October 2018 and Kshs.20,663,175/= credited to bank account No. xxxxxxxxxxxxxx in the name of the applicant/2nd respondent.

19. That the said amounts of money are disproportionate to the applicant's/2nd respondent's known legitimate sources of income. Regarding notice, the respondent/applicant averred that, investigations are ongoing and notice is yet to issue and that the commission properly acted within the law by seeking exparte orders.

20. Regarding the freezing orders exerting financial pressure and constraints on his daily subsistence, it was averred that the applicant/2nd respondent had not established that he was fully dependent on the salary in the said account as there were no withdrawals ever made on that account. That to allow him partial access will amount to sanctioning use and enjoyment of proceeds of crime.

21. It was further averred that the applicant/2nd respondent has failed to provide books of accounts, tax compliance documents for alleged sources of income, loan statements, proof of business registration, business licences, invoices and receipts.

22. That the orders sought are premature and misconceived as the applicant is yet to institute proceedings pursuant to a concluded investigation and in compliance with Section 55 (2) (a) (b) and (c) of ACECA.

23. Turning onto the money frozen in the account, it was deposed that the respondent has failed to explain how the money came about into the applicant's bank account as Mukuyu Petroleum dealers does not physically exist.

24. In submission, Mr. Ayoo appearing for the respondent/applicant (EACC), relied on their submissions filed on 20th May 2019 which basically reiterated the averments contained in the replying affidavit.

25. Counsel asserted that there was proof of reasonable suspicion that the sum of Kshs.3,500,000/= held in the account of Schedeva and Co.

Advocates was out of proceeds of crime. Counsel submitted that the burden of proof that the property was not acquired out of proceeds of crime lies with the applicant/2nd respondent pursuant to Section 56 (5) of ACECA. To illustrate this proposition counsel relied on the decision in the case of **Ethics and Anti-Corruption Commission vs Njage and 2 Others (2017) eKLR** where the court 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 the respondent”.

26. That the threshold for grant of an order of preservation unlike an injunction is reasonable suspicion of acquisition of property as a result of corrupt conduct. To fortify his submission, counsel referred to the decision in the case of **Ethics and Anti-Corruption Commission vs Fast Lane Forwarders Ltd and 8 others (2017) eKLR** where the court held that before issuing freezing orders, the court only needs to satisfy itself that there are reasonable grounds to support the claim that that property was acquired through corrupt conduct.

27. That In a period of 5 years since he got employed with the County Government of Transzoia, the applicant could not have earned over Kshs.54,079,335.85.

Analysis and Determination

28. I have considered the application herein and the response thereto. I have also considered rival submissions by both counsel. Issues that crystalize for determination are:

- (a) Whether the exparte orders issued on 23rd January 2019 meet the threshold set out under Section 56 (1) of ACECA.**
- (b) Whether there are good grounds to discharge the freezing orders.**
- (c) Whether there is sufficient ground to warrant partial withdrawal of cash to enable the applicant meet his daily operations.**

Whether the exparte orders meets the threshold for grant of exparte orders

29. Before I proceed to determine the application, it is crucial to highlight on salient legal principles governing grant of freezing orders such as this one. The impugned exparte orders issued on the 23rd January 2019 freezing the applicants' account are a product of the provisions of Section 56 (1) and (2) of ACECA. Section 56 (1) provides:

“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 if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct”.

Sub-Section 2 – further provides -

“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.

Sub-Section 3 – goes on to provide that -

“An order under this section shall have effect for six months and may be extended by the court on the application of the commission”.

30. Section 56 (4) also provides an opportunity to the party affected with the orders under Section 56 (1) and (2) to challenge them and have the same discharged. That provision provides as follows –

“a person served with an order under this section may, within 15 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 the application”.

Sub-Section 5 further provides;

“the court may discharge or vary an order under Sub-Section (4) only if the court is satisfied on a 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”.

31. From the wording of Section 56 (1) quoted above, it is incumbent upon the court issuing freezing exparte orders to scrutinize the facts and evidence presented before it to arrive at an informed decision that there is sufficient proof of reasonable suspicion that the property the subject matter of the proceedings was obtained as a result of corrupt conduct.

32. The court is therefore duty bound to critically examine the evidence tendered before it and free itself from allegations based on mere speculation. The orders must be based on actual foundation discernible from the facts and evidence presented before the court. In the case of

Emmanuel Suipenu Siyanga vs R Cr. Appeal No. 124/2009 (Supra) the court had this to say on what constitutes reasonable suspicion:

“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. Suspicion cannot be held to be reasonable if it is founded on nonexistent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are no grounds which then made suspicion reasonable, it was not a reasonable suspicion”.

33. All that the commission needs to prove is reasonable suspicion that the property in question was obtained through corrupt conduct. The word reasonable suspicion has no standard parameters and it all depends on individual judge’s assessment as a matter of discretion. Unfortunately, the law places the bar too low for the commission to establish a prima facie case on proof of reasonable suspicion. Unfair as it may sound, it is the law and until its changed, it will continue to apply as a statutory provision.

34. It is upon the applicant to prove that the ex parte orders were issued without basis and that the property in question was obtained through legitimate means. Again, our laws does shift the burden of proof to the applicant to satisfy the court that such orders ought to be discharged for lack of merit. **See Ethics and Anti Corruption Commission vs National Bank of Kenya and Another (2017) eKLR.**

35. The gist of the application is the claim by the commission that a sum of Kshs.3,500,000/= held in account No. xxxxxxxxxxxx Prime Bank Ltd. Mombasa in the names of Sachdeva Advocates was out of proceeds of crime. It was alleged that the source of that money was associated with the applicant’s employment as a principal accountant with the County Government of Transzoia and that the money was deposited in the said advocate’s firm in collusion with the applicant for purposes of money laundering.

36. The commission urged that the applicant/2nd respondent has not explained the sources of that money. On the applicant’s side, he contended that the money was as a result of his salary for the aggregate period from November 2013 – October 2018 amounting to 9 million in total inclusive of fees from brokerage and assorted businesses. He attached a letter of employment (ABM-2), copy of letter for transfer of the money (ABM-4) and bank statement marked as ABM-5.

37. I have perused the applicant’s bank statement filed and marked annexure ABM-5 for Equity Bank account No xxxxxxxxxxxxxx from which Kshs.5,000,000/= was transferred to the 1st respondent’s account. His monthly salary From January 2013 up to September 2013, to the bank was Kshs.39,503/=. From October 2013 upto July 2014 the salary remittance was Kshs.40,000/=. Per month, From July 2014 – March 2015 the salary was Kshs.50,816/=per month and from April 2015 – August 2015 the salary was Kshs.98,536/=per month.

38. Before 25th September 2015 when the money was withdrawn and 2013, there are several huge deposits made by various depositors inter alia; Kshs.300,000/=: Kshs 324,000, Kshs 339,000 all made in April 2013 by Kibisi co., Community and the applicant, Kshs 330,000 on 14th Jan.2014, Kshs 332,000,660,000 and 250,000 on 4th July 2014, Kshs Kshs.322,000/= on 5th May 2013 by Community, Kshs.330,500/= on 14th January 2014 from Corporate, Kshs.329,500/= on 13th January 2014, Kshs.330,500 on 14th January 2014, 4th July 2014 Kshs.332,000/=: 6th December 2014 Kshs.250,000/=: 13th December 2014 Kshs.300,000/=: Kshs.200,000/= on 20th February 2015, Kshs.1,573,500/= at Kitale on 11th March 2015, on 12th March 2015 Kshs.100,000/= at Kitale, Kshs.800,000/= on 18th March 2015 by Mukuya 12th March 2015 Kshs.350,000/= by Martin, 26th March 2015 Kshs.500,000/= Kitale, Kshs.2,570,000/= on 26th March 2015 by Patrick, 16th April 2015 Kshs.700,000/= in Kitale, Kshs.600,000/= on 28th April 2015 Kitale, 30th April 2015 Kshs.110,000/= Kitale, 16th May 2015 Kshs.400,000/=:

39. According to the applicant, all these money was from his salary and brokerage fees plus small businesses. He did not state the type of brokerage and the nature of small businesses in reference and how much was generated from each source and when. From the salary remittance it is quite negligible for that period. It cannot be anywhere near Kshs.1.2million.

40. Indeed, there is every reason to suspect that the source of the money is suspect hence the need for an explanation. For instance, deposits made on 18th March 2015 at Kshs.800,000/=: 18th March 2015 at Kshs.450,000/=: 26th March 2015 Kshs.500,000/= and same day Kshs.2,570,000/= must be explained and a proper nexus drawn as to what business generated this amount of money within close proximity.

41. Based on this information, I am not convinced that a proper explanation has been tendered to enable this court discharge the orders. The applicant needs to lay a proper linkage between the money in his account with a particular economic activity from which such money was generated. This burden has not been discharged hence the ex parte orders are properly in place.

42. The other issue raised by the applicant is that he has been rendered in operational and financially stressed and constrained and therefore cannot meet his daily obligations. The answer lies on his salary. The salary has not stopped nor have his businesses been stopped. The sources of his money are still intact. He can continue doing his business normally and even open a new account to continue receiving his salary. He should not cry of any general financial starvation.

43. As to whether Section 56 (1) of ACECA contravenes Article 47 of the Constitution on the right to fair administrative action, one would have to examine the constitutional mandate of the EACC.

44. According to the applicant notice to explain the source of the property was not issued thus contravening Article 47 (1) which provides –

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and pecuniary fair”.

Sub-Article 2 states – if a right or a fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given a written reason for the action.

45. The commission's legal mandate to investigate corruption and economic crimes is borne out of Article 79 of the Constitution, Section 33 of the ACECA and Section 13 (2) (c) of EACC. Section 11 of the EACCA confers the commission with the power to investigate and establish the extent of liability for loss or damage to public property and where appropriate institute proceedings for recovery or restitution of property. The process of asset recovery proceedings is actualized by Section 55 & 56 of the ACECA which gives guidelines on how to approach a court of law by way of ex parte application to preserve property that forms the subject of inquiry or investigation.

46. Section 56 (4) of ACECA provides an opportunity to a party against whom such orders are obtained to come forward within 15 days after service and challenge the same. This process properly insulates the applicant from being condemned unheard. Section 56 provides timelines within which certain actions must be undertaken hence expeditious disposal of matters, efficient, lawful and reasonable procedure is embraced.

47. It will not be proper to argue that the court acted ultravires the constitution more particularly Article 47 of the Constitution by issuing ex parte orders. The orders issued are interim in nature to midwife a lawful process of inquiry. It is not indefinite hence one cannot claim deprivation of private property under Article 40 nor violation of Article 47 as reasons for freezing orders are given and the victim invited to give his part of the story.

48. In my opinion, Section 56 (1) is not ultravires to the Constitution. It is self executing in that it provides avenues for redress by any aggrieved party. For those reasons the argument that Section 56 (1) is unconstitutional is not tenable.

49. While at this point, I must however state that, there is a distinction between ex parte orders issued by the High Court under Section 56 (1) of ACECA in civil proceedings and those issued by the Magistrate's courts with the intention of commencing criminal proceedings under Sections 180 of the Evidence Act and Section 118 of the CPC where orders directing issuance of search warrants and inspection of accounts apply without notice to the affected parties. Unlike the orders under Section 180 of EA and 118 of CPC where a party is never given an opportunity to appear and give his side of the story which has now been declared unconstitutional by the Court of Appeal, the ACECA Section 56 (4) gives an opportunity to the party affected with the ex parte orders to seek orders to discharge the same. **(See Director of Public Prosecutions vs Tom Ojienda T/A Prof. Tom Ojienda and Associates Advocates and 3 others (1029) eKLR).**

50. It is my holding that the application dated 8th July 2019 is not merited and the same is dismissed with no order as to cost.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JULY, 2019

J.N. ONYIEGO

JUDGE