



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI**

**MISC. APPLICATION NO. 15 OF 2019**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....APPLICANT**

**VERSUS**

**MOSES KASAINI LENOKULAL.....1<sup>ST</sup> RESPONDENT**

**ORXY SERVICE STATION.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. Pursuant to Section 56 of the Anti-Corruption and Economic Crimes Act (ACECA), the applicant herein moved this court through an Originating Motion dated 19<sup>th</sup> March 2019 and filed on 21<sup>st</sup> March 2019 seeking orders as follows:

**(1) Spent.**

**(2) That this honourable court be pleased to issue an order prohibiting the respondents by themselves, their agents, servants or any other persons from withdrawing, transferring or in any other manner dealing with the funds in account No. [xxxx], [xxxx], [xxxx] and [xxxx] held at Kenya Commercial Bank Ltd pending conclusion of investigation and or institution of recovery proceedings.**

**(3) That the orders shall subsist for a period of six months.**

**(4) That directions as to service of this application and order of court be given**

**(5) That there be no order as to costs.**

2. The application is premised upon grounds stated on the face of it and an affidavit sworn by Joel Khisa a forensic investigator with EACC in which he averred that preliminary investigations conducted by the applicant had established that between the period commencing January 2013 and December 2018, several companies that tendered and were awarded high value contracts by the county government of Samburu to provide goods and services were associated or owned by employees of the county government of Samburu. That as a consequence, and owing to conflict of interest as defined under Section 2 of the Public Officer Ethics Act, the county government of Samburu lost 673 million.

3. It was further stated that several contractors to the county government of Samburu gave huge bribes to county officials to the tune of 86 million to influence tender awards in their favour.

4. That the second respondent, a business owned and incorporated by the 1<sup>st</sup> respondent was awarded a contract for the supply of diesel/petrol to the County Government of Samburu during the period when the 1<sup>st</sup> respondent was the governor of Samburu. Further, that the 1<sup>st</sup> respondent being a public officer as defined under Section 2 of the Public Office Ethics Act was in a fiduciary position hence in conflict of his personal and public interest while trading with the county government of Samburu through the second respondent company.

5. It was alleged that, during the material period, the 1<sup>st</sup> respondent through the 2<sup>nd</sup> respondent received a total Kshs 86,763,715.35 from the county government of Samburu being proceeds for the supply of diesel/petrol for the county motor vehicles. That he was illegally paid and the proceeds thereof subject to forfeiture proceedings. The applicant attached documents including a confirmation letter dated 28<sup>th</sup> February 2019 from the company registry to show that the 2<sup>nd</sup> respondent was registered on 7<sup>th</sup> October 2008 with Moses Kasaine Lonokulal and Lily

Sepeita Lenolkulal as the Directors. Documents to prove the contract awarded to the 2<sup>nd</sup> respondent for supply of fuel, local purchase orders and payment vouchers were also attached.

6. The applicant averred that there was sufficient evidence to show the flow of funds into the 2<sup>nd</sup> respondent's accounts from the County Government of Samburu and then withdrawn by the 1<sup>st</sup> respondent or transferred to the 1<sup>st</sup> respondent's accounts listed above. It was the applicant's claim that unless a preservation order was issued, the respondents were likely to withdraw or transfer the money hence defeat the objective of the intended forfeiture proceedings.

7. Upon being served, the respondents filed a notice of motion dated 24<sup>th</sup> April 2019 and filed on 25<sup>th</sup> April 2019 pursuant to section 56(4) seeking orders as below:

**1. Spent.**

**2. This honourable court be pleased to discharge and or vary the orders issued on the 22<sup>nd</sup> March 2019 prohibiting the respondents/applicants by themselves, their agents, servants or any other person from withdrawing, transferring or in any other manner dealing with the funds in accounts Nos [xxxx], [xxxx1, [xxxx] and [xxxx] held at Kenya Commercial Bank Ltd pending conclusion of investigation and or institution of recovery proceedings.**

**3. This honourable court be pleased to grant the respondents/applicants unconditional access to their bank accounts No. [xxxx], [xxxx], [xxxx] and [xxxx] held at Kenya Commercial Bank.**

**4. This honourable court be pleased to strike out the suit as against the 2<sup>nd</sup> respondent/2<sup>nd</sup> applicant.**

**5. This honourable court be pleased to dismiss with costs the applicant/respondent Originating Notice of Motion dated 19<sup>th</sup> March 2019.**

**6. This honourable court be pleased to issue any other orders that it may deem just and fit in the circumstances.**

8. The application is predicated upon grounds set out on the face of it and an affidavit sworn on 24<sup>th</sup> April 2019 by the 1<sup>st</sup> respondent. According to the applicants/respondents, the accounts freezing orders are unconstitutional, unfair, draconian and unreasonable as they are issued ex parte without affording the applicants/respondents the right to be heard contrary to Section 25 and Article 50 of the Constitution.

9. That the orders were issued without any basis in law as the respondent/applicant did not establish to the required threshold of the law any causal link between the funds/monies in the affected bank accounts and the alleged corrupt conducts/dealings of the applicants/respondents.

10. It was further averred that the orders were issued based on unreasonable and baseless apprehension of the law as it was not demonstrated that there was imminent danger or risk of transferring and or withdrawing of the funds from the bank accounts.

11. According to the 1<sup>st</sup> applicant/1<sup>st</sup> respondent, the monies in the affected bank accounts were obtained through legal and honest business dealings or transactions, and the 1<sup>st</sup> applicants/1<sup>st</sup> respondents' remuneration and benefits of office and not through corrupt conduct or dealings as alleged. That the freezing orders have deprived the 1<sup>st</sup> applicant the right of access and use of his monies.

12. In response to the application, the respondent/applicant (EACC) filed a replying affidavit sworn on 13<sup>th</sup> May 2019 by Joel Khisa. Their reply basically reiterated the contents contained in the affidavit in support of the application for freezing orders. The respondent averred that the orders were legally and lawfully obtained and that there is reasonable ground to believe or support the fact that the properties in question were obtained through corrupt conduct and that the sum of Kshs 121,000,000 has not been explained as the salary is much lower than the questioned amount.

13. Regarding failure to establish a causal link between the funds in the account and the alleged corrupt activities, it was contended that it was not required at this stage under Section 56 of ACECA. Touching on the alleged denial of the right to fair hearing, Mr. Khisa averred that, Section 56(4) of ACECA has taken care of that as a party is granted an opportunity to file an application to discharge the orders.

14. In answer to the claim that the respondent/applicant has not met the threshold for grant of freezing orders, the deponent averred that the burden of proof lies upon the applicants/respondents to prove that the subject property was obtained through legitimate means.

15. As to the legal status of the 2<sup>nd</sup> applicant, it was admitted that the same is a registered business and not a limited liability company hence not a legal entity capable of suing or being sued.

16. On 15<sup>th</sup> May 2019, parties agreed to canvass the application by way of written submissions. Subsequently, the 1<sup>st</sup> applicant/1<sup>st</sup> respondent filed his submissions on 6<sup>th</sup> June 2019 through the firm of Nyamodi and Co. advocates. The respondent/applicant filed theirs on 10<sup>th</sup> June 2019 and the matter was fixed for highlighting on 12<sup>th</sup> June 2019.

#### **The 1<sup>st</sup> Applicant's Respondent's Submissions**

17. During the hearing, Mr. Nyamodi for the applicant reiterated the averments contained in the affidavit in support of the application and

the grounds thereof. Counsel identified four issues for determination as follows:

- (a) **Whether the preservation orders of 22<sup>nd</sup> March 2019 issued at the instance of the respondent herein breaches and or infringed the 1<sup>st</sup> and 2<sup>nd</sup> applicant's rights.**
- (b) **Whether the respondent herein established to the required threshold that the funds/monies held in the accounts of the 1<sup>st</sup> and 2<sup>nd</sup> applicants herein were obtained as a result of corrupt conduct.**
- (c) **Whether the 2<sup>nd</sup> applicant has the legal capacity to be sued on its own name.**
- (d) **Whether this honourable court should vary and or discharge the preservation orders and allow the 1<sup>st</sup> and 2<sup>nd</sup> applicant unconditional access to the funds in the bank accounts held at Kenya Commercial Bank.**

18. It was Mr. Nyamodi's submission that his client was condemned as he was not served with the application before the preservation order was issued. That this was against the tenets of the Constitution under Article 50 (1) which underpins the right to a fair hearing which cannot be limited under any law. To support this proposition counsel referred the court to the decision in the case of **Standard Chartered Financial Services Limited and 2 others vs Manchester Outfitters Ltd (now known as King Woollen Millers Ltd & 2 others (2016) eKLR** where the court held that the right to a fair trial is not just a fundamental right. It is one of the inalienable rights enshrined under Article 10 of the Universal Declaration of Human rights (UDHR) and Article 6 of the international convention on civil and political rights (ICCPR) among other international conventions which this country has ratified. The court was further referred to the decision in the case of **Judicial Service Commission vs Gladys Boss Shollei and another (2014) eKLR** where the court emphasised on the right to a fair hearing as encompassing an individual being informed of the case against him; being given an opportunity to present his case before a court of independent or impartial body.

19. Counsel submitted that the ACECA having been enacted before the 2010 Constitution, the interpretation of Section 56 must be construed with necessary modification, adaptation and or alterations so as to be in conformity with Article 56 (1) of the Constitution and anything short of that should be declared invalid, void and constitutional. In support of this position counsel made reference to the holding in the case of **Communication Commission of Kenya and 5 others vs Royal Media Services and 5 others (2014 eKLR** and **Mbaki and others vs Macharia and another (2005) 2 EA 206** where the court stated that:

**“the right to be heard is a valid right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard”.**

20. As to whether the applicant had satisfied the threshold that the money in the accounts of the 1<sup>st</sup> applicant was earned out of corrupt conduct, counsel submitted that such burden of reasonable suspicion has not been discharged. That the evidence tendered lacks factual foundation or basis as encapsulated in the case of **Timothy Isaac Brayant and 2 others vs Inspector General of Police and 7 others Misc. Cr. Appeal No. 294/2014**. He averred that there was no evidence to show how much money moved from the county government of Samburu to the 2<sup>nd</sup> applicant's account and then to the 1<sup>st</sup> applicant's accounts.

21. Counsel submitted that the 2<sup>nd</sup> applicant is not a legal person hence improperly sued. Reliance was placed on the decision in the case of **Agatha Kaluki Mutie vs Director St. Teresa Academy (2013) eKLR**.

22. Concerning the burden imposed on the 1<sup>st</sup> applicant to prove the source of income, it was submitted that the monies in question were from his salary as evidenced from his payslips as well as sale of petroleum products from the 2<sup>nd</sup> applicant. Counsel contended that Section 56 (5) of ACECA is unconstitutional in so far it presumes the 1<sup>st</sup> applicant guilty before he proves himself innocent contrary to Article 50 (2) (a).

23. Mr. Nyamodi urged the court to find that there was nothing wrong in the 1<sup>st</sup> applicant doing business with the County Government of Samburu.

24. During the pendency of this ruling, Mr. Nyamodi did send a letter addressed to the Deputy Registrar forwarding a recent decision from the court of appeal in the case of the **Director of Public Prosecutions and Tom Ojienda t/a Proff Tom Ojienda and Associates Advocates and 3 others (2019 eKLR** in which the court held that ex parte orders of search warrants and inspection of accounts made against Proff. Tom Ojienda without prior notice was unconstitutional and invalid. Mr. Nyamodi invited the court to consider the said decision to arrive at an informed determination.

#### **25. Submissions by the Respondent/Applicant (EACC)**

26. Mr. Kenduiwa appearing for the respondent (EACC) filed her submissions on 10<sup>th</sup> July 2019 in which she literally adopted the averments contained in the affidavit in support of the application for freezing orders and the replying affidavit to the instant application. Counsel basically maintained that they had discharged their mandate as required of them under Section 56 (1) and that it was upon the applicant/respondent to show that the money in question was obtained legally.

27. Learned counsel submitted that the total salary earned by the applicant was Kshs.38,172,043/= for the entire period in question yet the amount that passed through his account was over Kshs.132,642,412/= transmitted through the 2<sup>nd</sup> applicant's account.

28. It is M/s Kenduiwa's submission that the applicant has not been denied the opportunity to a fair hearing and Section 56 (4) (5) and (6)

has given him an opportunity. In support of this position, counsel relied on this court's decision in the case of **Ethics and Anti-Corruption Commission vs Andrew Biketi Musuya T/A Mukuyu Petroleum Dealer in HCC Nairobi ACEC Misc. Cr. Appl. No. 48/2018** where this court found that Section 56 (5) and (6) had taken care of the right to be heard and therefore Article 50 was not in any way violated.

### **Analysis and Determination**

29. Before this court is the day to day acrimonious debate and legal discourse as to the constitutionality of Section 56 (1) of ACECA in so far as issuance of ex parte preservation orders is concerned and; Section 56 (5) and (6) which places the burden of proof on the person affected with those orders to prove that he is not guilty of any corrupt misconduct.

30. This issue has been deliberated upon by various courts but not with finality as a constitutional issue. It is high time this issue was taken up substantively as a constitutional reference matter for declaratory orders. Nonetheless, I will handle the issues raised as presented in the application and not as a subject of a constitutional reference.

31. I have considered the application herein and the response thereto. I have also considered the submissions of both counsel. Issues that crystallize for determination are:

- (a) Whether the ex parte orders made on 22<sup>nd</sup> March 2019 met the required criteria.**
- (b) Whether the orders are unconstitutional.**
- (c) Whether there are good grounds advanced by the applicants to discharge the orders.**
- (d) Whether the 2<sup>nd</sup> respondent was properly sued.**

32. Given the linkage between issue a and b, I would deal with the two concurrently.

### **Whether the respondent/applicant satisfied the criteria for orders under Section 56 (1) of ACECA and if so, whether the orders are unconstitutional**

33. The ex parte orders the subject of these proceedings were issued pursuant to Section 56 (1) of ACECA which provides that:

**“on an ex parte application by the commission, the High Court may make an order prohibiting transfer or disposal of or order 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”.**

After being served with the orders, the respondent is given an opportunity to discharge those orders within 15 days from the date of service.

34. For avoidance, of doubt Section 56 (4) provides that -

**“A person served with such 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”.**

35. Under Section 56 (5) of ACECA, such orders can be varied or discharged only if the court is satisfied that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.

36. The only statutory duty imposed upon the commission is to prove to the court that the property in question is reasonably suspected to have been obtained through illegitimate means or corrupt conduct. This sounds quite a lenient condition by all standards. However, the court is also duty bound to examine and interrogate the materials placed before it and to be satisfied that indeed there is a prima facie case established to warrant exercise of its discretion before issuing an ex parte order.

37. Once a court has issued the order(s), the burden automatically shifts to the person accused of being in possession or handled property obtained through corrupt conduct.

38. How then does the court measure reasonable suspicion? In the case of **Emmanuel Suipenu Siyanga vs R (2013) eKLR** the court gave some directions as what constitutes reasonable suspicion as follows:

**“.....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 existing at the time of its formation. If there are not grounds which then made the suspicion reasonable, it was not reasonable suspicion”.**

39. The gist of this application is the claim that the 1<sup>st</sup> applicant being the governor Samburu County used his office to influence awards to his business (the 2<sup>nd</sup> applicant/respondent) for the supply of petroleum products to the county government. According to the respondent (EACC), this was an illegal act and in conflict with the Public Officer Ethics Act No. 4 of 2003. Section 12(1) of the Public Officer Ethics Act provides that -

**“A Public Officer shall use his best efforts to avoid being in a position in which his personal interest conflict with his official duties”.**

Sub Section (3) further provides that:

**“A Public Officer whose personal interests conflict with his official duties shall –**

**(a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and**

**(b) refrain from participating in any deliberations with respect to the matter.**

Sub Section 4 further states– notwithstanding any directions to the contrary under Sub-Section 3 (c), a public officer shall not award a contract, or influence the award of a contract to-

**(a) himself;**

**(b) a spouse or relative or**

**(c) a business associate or**

**(d) a corporation, partnership or other body in which the officer has an interest.**

40. In the instant case, it is not controverted that the 2<sup>nd</sup> applicant is not a legal person as it is a mere business name. It is also not in dispute that the 1<sup>st</sup> applicant is the owner and operator of that business name. It is not in contention that the 1<sup>st</sup> applicant was at the material time the governor of Samburu and that he did trade with the county government by supplying petroleum products. His argument is that nothing prohibits a public officer from dealing or trading with the government.

41. To my knowledge, I am not aware of any law or requirement that bars a public officer from transacting business with any government be it national or county except where there is conflict of interest.

42. In this case, the governor is accused of having transacted business with his government to which he is the Chief Officer in supplying petroleum products through his business name Oryx Services Station. It is clear from the notification of the tender award (JK-2 in support of the application for freezing orders), payment vouchers of various amounts to the 2<sup>nd</sup> applicant for supply of fuel and the LPOs that the 1<sup>st</sup> applicant did transact business with the County Government a fact he does not deny.

43. It is the commission’s claim that the 1<sup>st</sup> applicant as a governor did influence the award to himself through his business name which was illegal as it was in conflict with his fiduciary duty as a public officer thus contravening the public officer Ethics Act.

44. At this point, the applicant only needs to prove that there is every reason to believe that the amount earned through Oryx was as a result of conflict of interest which shall be proved on a balance of probability should the main suit be filed.

45. According to Ifmis transactions marked Ex. No. JK3B, there is evidence that the county government of Samburu did pay Oryx Petrol huge sums of money for the period 22<sup>nd</sup> August 2014 to 29<sup>th</sup> May 2018. This evidence is not disputed. Indeed, there is no distinction between Oryx Petrol Station and the 1<sup>st</sup> applicant. They are one and the same thing. The money that Oryx received is indirectly money paid to the 1<sup>st</sup> respondent hence suspected to have been obtained through corrupt conduct given the element of conflict of interest alleged.

46. Although the 2<sup>nd</sup> applicant is not a legal person, its misjoinder is not prejudicial to the case. The anomaly is curable under Order 1 rule 9 of the civil procedure rules which provides that no suit shall be defeated by reason of the misjoinder or non- joinder of parties and that the court shall be guided by the merit of the case and the need to promote and protect the interest of justice. I do not find the joinder of the 2<sup>nd</sup> applicant fatal and that is a mere technicality curable under Article 159 (2) (d) of the Constitution as well as Order 1 rule 9 of the civil procedure rules.

47. Regarding the submission by Mr. Nyamodi that the commission had not established acausal link between the money in question and the corrupt conduct, one must counter check which money is targeted for forfeiture or recovery on account of being property illegitimately acquired. Section 56 of ACECA is concern with illegitimate wealth or property. It is not concern with any other money the targeted person may have earned through other legitimate means. To that extent, I do agree with Mr. Nyamodi that there has to be acausal link between the money in question and a corrupt conduct. I don’t agree with M/s Kenduiwa’s argument that proof of any causal link is not necessary at this stage and that it will arise when a substantive suit is filed.

48. As to whether there is a causal link in this case between the alleged corrupt conduct and the money in question, yes there is a nexus in respect to some accounts. This is clear from the monies received by Oryx from the County Government of Samburu which is evidenced by Ifimis payment records, payment vouchers and some money transfer from Orxy accounts to some accounts held by the 1<sup>st</sup> applicant.

49. From the ifmis statement attached by the commission and marked JK3B, money from Samburu County Government was paid to Oryx service station vide account No 1124724591. This was the service station’s major transactional account through which most payments were

made by the County Government. This is also evidenced by the bank statements attached and marked JK5B. For some reason and I would say strangely, this particular account was not among the frozen accounts. Why was the prime suspect account omitted from the list of frozen accounts?

50. However, there is a link between money transferred from oryx bank account to the 1<sup>st</sup> applicant's bank accounts No.[XXXX], and [xxxx]. Since there is already suspicion in the manner in which the award for the supply of petroleum products was made in favour of the 1st applicant, it is my finding that there was reasonable suspicion that the money may have been obtained through illegitimate means hence the justification in issuing freezing orders in respect of account Nos[xxxx] and [xxxx]. The fact that such money is mixed with some legitimate sources of income like salaries which goes through account no [xxxx], does not mean that the account can not be frozen. At this stage, preservation is necessary pending further proceedings when the two can be severed.

51. However, after perusing the entire record of the supporting documents attached by the commission, I am unable to find any bank statements or documents relating to account Numbers [XXXX] and [XXXX]. There is no proof that there is any money in those accounts and that it is suspected to be out of illegitimate means. The only money associated with the 1<sup>st</sup> applicant's corrupt conduct is money obtained from the County Government of Samburu.

52. The commission must on a prima facie basis establish a link between the money in those accounts and money illegally obtained from Samburu county Government or that the money is generally suspected to be obtained through suspected illegal means. In this case the commission is specific on the connection between the money in question and the illegitimate source being the illegal contract between the 1<sup>st</sup> applicant and his Government.

53. The commission cannot be allowed to casually walk into court with scanty information or evidence and seek to generally attach anything and everything in the name of a suspect under investigation based on a single suspicious financial transaction or deal. Kenyans have a right to invest and any particular transaction which is in question, should be treated in isolation from other legitimate transactions. Section 56 of ACECA should not be used to generally ground a person's legitimate investment or affairs. It should strictly be used to target ill-gotten property and not an open cheque to launch an assault on everything owned by a person under investigation regardless of the source of income.

54. In the instant case, I have not been persuaded that there is a link between the money obtained from the County Government of Samburu to account Nos [XXXX] and [XXXX] nor is there money transfer between these two accounts and Oryx accounts. We can not use section 56 of ACECA to achieve a mareva injunction through the back door thereby attaching all accounts of a litigant in anticipation of entry of a judgment where there is no substantive suit. In my view, there is no evidence adduced to justify freezing orders in respect of the two accounts aforesaid.

#### **Whether the applicants have discharged their burden of proof**

55. Although the applicants have shown that the money in the accounts arose from the sale of petroleum products and salary, part of the monies was from proceeds realized from the sale of petroleum to the County Government in questionable contracts. Sometimes it is not easy to separate the two at this stage other than to look for the stolen amounts when investigations are completed and a decision made on recovery or forfeiture of the illegitimate income.

56. Is Section 56 (1) of ACECA unconstitutional and therefore the orders flowing out of it void and invalid? Unlike an injunction under Order 40 of the CPRs which has a provision for interpartes hearing, ex parte orders under ACECA have a definite lifespan of 6 months subject to extension by the court if convinced.

57. Section 56 (1) has no provision for service before hearing nor does it have a provision for interpartes hearing. In constitutional or statutory construction, there is a rebuttable presumption that all statutes are constitutional unless and until declared invalid or unconstitutional. Before me there is no substantive prayer for a declaratory order that Section 56 is unconstitutional.

58. However, even assuming that the applicants are right, they must prove with precision the exact provisions of the Constitution and the nature of the right infringed or threatened to be infringed. **(See Anarita Karimi vs R (1979) No. 1 KLR).**

59. The right to be heard under Article 50 must go hand in hand with the right to fair hearing which is enshrined under Article 24 of the Constitution. According to Nyamodi his client was condemned unheard. However, Section 56 (4) has created room for a party aggrieved to challenge such orders within 15 days which the applicants have done.

60. Preservation of property is not synonymous to deprivation of property under Article 40 of the Constitution. The process is merely intended to support forfeiture proceedings and not to punish anybody. In my view, the law has provided a proper mechanism for anybody affected by the orders to challenge them. The orders are not cast in stone. The opportunity given to challenge ex parte orders is nothing but a right to fair hearing. Section 56 is self-contained and inbuilt. It takes care of Article 47 and 50 of the Constitution.

61. While faced with a similar situation in the determining the constitutionality of **Section 56 of ACECA, in the Case of Kenya Anti-Corruption Commission vs Lands Ltd and 7 others (2008) e KLR Justice Nyamu** had this to say:

**“Section 56 of ACECA does not undermine the principles of natural justice and equity. It has an inbuilt right of hearing. On the contrary, it provides other constitutional objectives and public interest concerns that are at the heart of the nation...”**

In his 4<sup>th</sup> holding, he went further to say:

**“Section 56 is not oppressive in that it has inbuilt provisions for a hearing on merit at the earliest opportunity and that hearing is in the high court which is the citadel of constitutional enforcement of fundamental rights and the constitution....”**

In Holding No. 5 – he stated as follows:

**“Section 56 is a tool against corruption and economic crimes and this is an objective embraced by all known democracies”.**

62. In view of the redress provided pursuant to Section 56 (4) (5) and (6), one cannot say that the ex parte order herein amounts to a violation of Article 50 of the Constitution. when Parliament passed ACECA, it was definitely aware of the constitutional requirement even under the old constitutional regime that no one is supposed to be condemned unheard. To be condemned unheard presupposes orders made with finality without any room left for challenging the orders or the process.

63. This section was intended in public interest to preserve property suspected to have been acquired illegally or irregularly from concealment or disposal before recovery process could commence.

64. It is therefore my finding that Section 56 (1) is not in violation of Article 50 of the Constitution. Does it offend Article 47 of the Constitution on Fair Administrative Action? Article 47 underpins the right to Fair Administrative Action which is expeditious, efficient, lawful, reasonable and procedurally fair. The same argument and finding when addressing the issue on the right to fair hearing under Article 50 (1) shall abide. The applicant referred the court to the decision in Professor Tom Ojieda case (Supra) in which the court declared unconstitutional or invalid ex parte orders issued by Magistrates’ courts with regard to search warrants and inspection of accounts under Section 180 of the Evidence Act and Section 118 of the CPC without notice to the party in the course of an investigation.

65. In my humble view, the facts in Proff. Tom Ojieda case can be distinguished as it was addressing lack of notice under Section 23, 26, 27 and 28 of ACECA relating to investigations on a criminal act and not civil proceedings. Under Section 56 of ACECA sufficient notice is deemed to be issued upon service of ex parte orders.

66. I am not sufficiently persuaded that Proff. Ojieda’s case applies in civil proceedings undertaken under Section 56.

**Whether the 2<sup>nd</sup> respondent was properly sued**

67. I have already dealt with the issue save to add that it was improper to have sued the second applicant as an independent legal personality when it is not a company so to speak. Since both parties admitted, I need not dwell into the subject as misjoinder is not a ground to defeat a suit.

68. In a nutshell, it is my finding that the applicant has not proved that the lifting of orders in his favour outweighs the advantages or benefits in retaining them. In case of any inconvenience on the applicant’s part, he can open new accounts and continue with his legitimate business as well as access his salary. He will not suffer any inconvenience in his daily operations and his money is safe until investigations are over.

69. It is my finding that the application herein partly fails and partly succeeds to the extent that;

- (a) The freezing orders affecting KCB account Nos [XXXX] and [XXXX] be and are hereby lifted.
- (b) The freezing orders in respect of KCB bank accounts Nos [XXXX] and [XXXX] shall remain in force.
- (c) Each party to bear own costs.

**DATED, DELIVERED SIGNED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF AUGUST, 2019.**

**J.N. ONYIEGO**

**JUDGE**