



**REPUBLIC OF KENYA**

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

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

**ACEC MISC. APPLICATION NO. 5 OF 2019**

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

**VERSUS**

**DAAYO CONSTRUCTION & GENERAL SUPPLIES LTD.....1<sup>ST</sup> RESPONDENT**

**FINE TRUST CONSTRUCTION CO. LTD..... 2<sup>ND</sup> RESPONDENT**

**COSMOS CARS LTD.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Through an ex parte originating summons dated 11<sup>th</sup> February 2019 and filed the same day, the Ethics and Anti-Corruption commission (herein referred to as the commission) moved this court under Section 56 of the Anti-Corruption and Economic Crimes Act Cap 65 (ACECA) seeking orders as follows:

**(1) Spent.**

**(2) That a prohibition order do issue prohibiting the 1<sup>st</sup> respondent, by itself or through its agents or servants from interfering, disposing of, wasting or in any other way dealing with Kenya Commercial Bank Ltd. account number 1220004286, Wajir Branch for a period of six (6) months.**

**(3) That a prohibition order to issue prohibiting the 2<sup>nd</sup> respondent, by itself or through its agents or servants from interfering, disposing of, wasting or in any other way dealing with Kenya Commercial Bank Ltd. account number 1220004286, Wajir Branch for a period of six (6) months.**

**(4) That a prohibition order do issue prohibiting the 3<sup>rd</sup> respondent by itself or through its agents or servants from selling, transferring, disposing of, wasting, or in any other way dealing with motor vehicle registration number KCQ 004U chassis number URJ202-4147576 engine number 1UR-06675846 Toyota Land Cruiser VX 8 LC 200 series for a period of six (6) months.**

**(5) An order placing motor vehicle registration number KCQ 004U chassis number URJ202-4147576 engine number 1UR-06675846 Toyota Land Cruiser VX 8 LC 200 in the immediate custody of the applicant for inspection and valuation pending conclusion of investigations.**

2. The application is premised upon grounds stated on the face of it and an affidavit sworn on 11<sup>th</sup> February 2019 by Erick Otieno an investigator working with the commission. Upon being satisfied with the materials placed before it, the court granted the ex parte orders with a six months lifespan pursuant to section 56(1) of the ACECA. The applicant was then directed to effect service of the orders upon the respondents.

3. It was the commission's claim that they were in possession of reliable information that the 1<sup>st</sup> respondent Daayo Construction & General Supplies was irregularly awarded a tender to supply two motor vehicles for the government of Wajir County at a cost of 26 million. That out of the Kshs 26million budgeted for the purchase of two motor vehicles, only Kshs14 million was spent for the purchase of only one motor vehicle KCQ 004U which was procured from the 3<sup>rd</sup> respondent.

4. That the balance of 14 million was irregularly transmitted to the 2<sup>nd</sup> respondent, Fine Trust Construction Ltd. Co. for unknown reasons. It was on this basis that the commission sought orders to preserve the said assets by prohibiting their transfer or disposal.

5. Upon being served with the above quoted orders, the respondents through the firm of Waudo and Co. Advocates filed a notice of motion dated 17<sup>th</sup> April 2019 and filed on 18<sup>th</sup> April 2019 seeking orders as follows:

**1. Spent.**

**2. That leave be granted to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent/Applicants to file this application out of time.**

**3. That this honourable court be pleased to do hereby discharge and or vary the order issued on 12<sup>th</sup> February 2019 restraining the 1<sup>st</sup> respondent herein, its agents or servants from transferring, disposing of, wasting, or in any way dealing with Kenya Commercial Bank Ltd Account Number 1220004286, Wajir Branch for a period of six (6) months.**

**4. That this honourable court be pleased to and do hereby discharge and or vary the order issued on 12<sup>th</sup> February 2019 restraining the 2<sup>nd</sup> respondent herein, its agents or servants from transferring, disposing of, wasting, or in any way dealing with Kenya Commercial Bank Ltd Account Number 1226968627, Wajir Branch for a period of six (6) months.**

**5. That the costs of this application be provided for.**

6. In response, the commission (respondent) filed a replying affidavit on 8<sup>th</sup> May 2019 by Eric Otieno challenging the application.

7. Meanwhile the respondent (commission) filed another application dated 21<sup>st</sup> May 2019 seeking to bar Mr. Waudo from representing the applicants/respondents on grounds that being a former employee of the commission two years had not lapsed as required by the Leadership and Integrity Act.

8. On 12<sup>th</sup> July 2019 the court delivered a ruling dismissing the application. Subsequently, parties agreed to canvass the application by way of written submissions.

#### **The Applicant's/Respondent's Case**

9. It is the Applicant's case that they did not file their response within 15 days as required under Section 56 (4) of ACECA due to factors beyond their control. Firstly, they were served with the said orders six weeks after they were issued. Secondly, that Yasmin Jana Abdulahi who is the Director of Fine Trust Construction Company Ltd. and the spouse of Osman Abdi Jinalle who is the Director of Daayo Construction and General supplies was indisposed. They therefore prayed for extension of time and application be deemed as duly filed.

10. Further, the applicants averred that the respondent did not adduce any evidence or facts to warrant the court to exercise its discretion properly. That the legal threshold to issue preservation orders was not met as no legal basis was established. They further stated that the allegation of embezzlement of public funds was a lie and without evidence to support the claim.

11. They averred that there is evidence to show that the impugned procurement had been planned for by the county government of Wajir as envisaged under the Public Procurement and Asset Disposal Act 2005. To prove that claim, they attached a copy of the annual procurement plan marked annexure OJ5.

12. That the County Government of Wajir procedurally placed tender notice in the Saturday Nation newspaper of 3<sup>rd</sup> February 2018 inviting bids (Annexure OAJ6). They attached Tender Notice on the Daily Nation of 6<sup>th</sup> February 2018 correcting the advertisement and closing dates (OAJ7).

13. They contended that the 1<sup>st</sup> applicant/respondent submitted a bid for the tender and emerged the successful bidder (see OAJ8 being a copy of tender award notifications). They claimed the tender award was Kshs.39,440,000/= for the purchase of two motor vehicles and not Kshs 26 million as claimed by the commission. To prove that position, they attached a copy of the relevant local purchase order (Annexure OJ9).

14. It was further contended that sometime 3<sup>rd</sup> July 2018, the 1<sup>st</sup> respondent/applicant gave a friendly loan of Kshs.12,000/= to the 2<sup>nd</sup> applicant/respondent which is a sister company. That the transfer of funds from the 1<sup>st</sup> applicant/1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent/applicant was not intended to embezzle public funds.

#### **The respondent's / applicant's case (Commission)**

15. Vide a replying affidavit sworn on 8<sup>th</sup> May 2019 by Eric Otieno the investigating officer to the commission, the deponent averred that the 1<sup>st</sup> applicant/1<sup>st</sup> respondent submitted to the County Government of Wajir, a forged tender bond No. MD1732702301 purportedly issued by KCB LTD which was later disowned. He attached a copy of the forged bid bond and a letter from KCB confirming that the bid bond was not genuine.

16. That in a bid to misrepresent its experience on supply of motor vehicles, the 1<sup>st</sup> applicant cited transactions allegedly undertaken with the County Governments of Kitui and Kisii which was refuted through their letters dated 25<sup>th</sup> October 2018 and 31<sup>st</sup> January 2019 respectively. He stated that the County Government of Wajir failed to do due diligence in terms of Section 83 of the Public Procurement and the Asset Disposal Act 2015 to find out that the 1<sup>st</sup> respondent had no experience hence declare the tender contract unresponsive.

17. That the budget of Kshs.39,440,000/= is not supported by any budgetary provision hence the irregularity of the transaction. That there is no proof of any personal loan of 12 million out of 26 million given to the 2<sup>nd</sup> respondent. That the County Government had not gotten consideration for a sum of 12 million.

18. He further averred that the procedure in procuring government motor vehicles is governed by government framework which includes a list of firms qualified to supply motor vehicles and that the government does not need a 3<sup>rd</sup> party to procure motor vehicles. He contended that the award to the 1<sup>st</sup> respondent was contrary to Article 201 and 207 Chapter 2 of the Constitution.

## **Submissions**

### **The applicant's/respondent's Submissions**

19. The applicants/respondents filed their submissions on 16<sup>th</sup> July 2017 through the firm of Waudo and Co. advocates basically reiterating the averments contained in their affidavit in support of the application. Mr. Waudo pleaded with the court not to dismiss the application on grounds that it was filed 7 days outside the prescribed time after service.

20. It was counsel's submission that the delay of 7 days is not unreasonable. To support his prayer counsel relied on the decision in the case of **Gladys Gathoni Chege T/A Digiage Agency vs Ethics and Anti-Corruption (2016) eKLR** and **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 others (2014) eKLR** where the court observed that extension of time is a discretionary power vested on the courts and the said power should be exercised judicially. It was counsel's view that extension of time has not been challenged and that the reasons for the delay is justified.

21. According to Mr. Waudo, the respondents/applicants have not established a prima facie case nor met the threshold to warrant grant of preservation orders as contemplated under Section 56 (1) of ACECA. Mr. Waudo referred the court to the decision in the case of **Ethics and Anti-Corruption Commission vs Ministry of Medical Services and Another (2012) eKLR** where the court held that to grant orders under Section 56 (1) a prima facie case must be presented that the property in question has been the subject of some corrupt dealings. That it is not enough for the commission to walk into court and expect to get orders and where the court is misled such orders shall be vacated.

22. On what constitutes a prima facie case, the court was referred to the decision in the case of **Mrao Ltd vs First American Bank of Kenya Ltd and 2 others (2003) KLR 125** where the court held that:

**“in civil cases, a prima facie case is a case in which in the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the later. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial”.**

23. Counsel further submitted that the commission did not prove the element of reasonable suspicion as its claim is not founded on any existent facts. To support this position, he placed reliance in the holding in the case of **Timothy Isaac Bryant and 2 others vs Inspector General of Police and 7 others (2014) eKLR** and **Emmanuel Suipanu Siyanga vs Republic (2013) eKLR**.

24. Counsel submitted that the allegations that the procurement process was tainted with illegalities is unfounded as there was proof that; the tender was properly advertised; one of the subject motor vehicles delivered and, accordingly registered in the county government's names. That the evidence of overpricing was not based on any tangible evidence either by valuation or market reports. That the delay for non-delivery of the second motor vehicle can only lead to contractual dispute between the supplier and the procuring entity and cannot be criminalized as done by the respondent commission.

25. It was Mr. Waudo's contention that the ex parte order made under Section 56 (1) of the ACECA is in the essence a final order thus condemning the party against whom such order is made unheard hence contravening Article 47 on the right to Fair Administrative Action and Article 50 on the right to fair hearing. To bolster this proposition counsel relied on the decision in the case of **Watatua and Another vs R Cr. Appeal No. 20/2013 (UR)** as cited in **Timothy Isaac Brayant and 2 others V Inspector General of Police and 7 others (supra)** where the court held that:

**“in certain cases, as stated in the Kibiti case (Supra) where properties or monies in bank accounts may be dissipated before the matter is heard, ex parte orders may be granted but only for a short period .....”.**

26. It was submitted that the right to Fair Administrative Action is a constitutional right which even the South African Constitution recognizes. Counsel quoted a decision in the case of **The President of the Republic of South Africa and others vs South African Rugby Football union and others CCC 16/98/2000 (1) SA** where the south African constitutional court held that the entrenchment of the right to Fair Administrative Action in the Constitution was to exercise constitutional control to regulate actions taken by public administration.

27. Further reference was made to the decision in the case of **Judicial Service Commission vs Mbalu Mutara and Another (2014) eKLR** where the court emphasized on the right to Fair Administrative Action and where action taken by the administration affects or threatens individuals, the procedures followed must comply with the constitutional standards of administrative justice.

28. Lastly, counsel referred the court to the recent decision in the case of **Director of Public Prosecutions vs Tom Ojienda T/A Proff. Tom Ojienda and Associates Advocates and 3 others (2019) eKLR** in which the court held that:

**“therefore all the powers and functions given to EACC by the Constitution and the specific provisions contained in ACECA**

**which give life to its parameters and control are subject to being administered lawfully, reasonably and in a manner that is procedurally fair. It follows that argument that investigations are not administrative action has no feet to stand and therefore falls”.**

### **Respondent’s/Applicants’ Case (Commission)**

29. The respondent filed its submissions on 19<sup>th</sup> July 2019 contending that it had met the necessary threshold for grant of ex parte orders for preservation of the property suspected to have been purchased through fraudulent means. The submissions herein are a replica of the averments contained in the affidavit in reply and originally in support of their application.

30. It is the respondent’s submission that the procurement process was flawed in substance on grounds that; there was no budget for acquisition of the motor vehicles for the Executive Officer of County Government; 26 million was drawn from another department; tender bond was a forgery; supplier had no prior experience and documents submitted were forged; that out of Kshs.26 million supposed to be paid, only 14 million was paid and 12 million suspiciously delivered to a 3<sup>rd</sup> party and without the supply of the said motor vehicle.

31. Counsel contended that, the above quoted anomalies form sufficient basis for reasonable suspicion that there were illegalities committed and therefore a prima facie case established to warrant the issuance of the impugned orders.

32. To support this position, counsel referred to the decision in the case of **Kenya Anti-Corruption Commission vs Lands Ltd and 7 others (2008) eKLR** where the court stated that:

**“provided that there are some evidential facts at the ex parte stage for the court to exercise its discretion, there are no other valid preconditions to the grant of the ex parte order. At the ex parte stage the evidential facts need not answer the description of any specific offences of corrupt conduct provided they point to that possibility”**

33. On the delay to serve the preservation orders in time, the respondent submitted it was due to logistical challenges in accessing Wajir to effect service hence no prejudice. Referring to the decision in Tom Ojienda case quoted by the applicant on Fair Administrative Action, Mr. Kagucia stated that the decision is a subject of appeal before the Supreme Court and that no right under Article 47 of the Constitution was violated.

### **Analysis and Determination**

34. I have considered the application and the response thereto. I have also considered the rival submissions by both counsel. The issues that arises are:

**(a) Whether delay in filing the application herein renders it invalid.**

**(b) Whether the ex parte orders issued on 11<sup>th</sup> February 2019 meet the necessary threshold set out under Section 56 (1) of ACECA.**

**(c) Whether there are good grounds to discharge the freezing orders.**

**(d) Whether the ex parte orders offends the applicant’s constitutional right to a Fair Administrative Action**

### **Whether the delayed filing of the application herein outside the stipulated period renders it invalid**

35. Under Section 56 (4) of ACECA, upon being served with ex parte orders obtained under Section 56(1), the aggrieved party is bound to file an application within 15 days challenging the orders. In this case the ex parte orders were served a bit late almost six weeks after they were obtained. The delay was said to have been occasioned by logistical challenges in effecting service in Wajir. On the other hand the applicants were unable to file their response within 15 days as required under Section 56 (4) of the ACECA and that the delay of seven days was occasioned by the distance as their client was out of the country. However, leave to extend time was not contested as each party was guilty. In the interest of substantive justice, I do not find a delay of 7 days prejudicial. Accordingly leave to extend time is granted.

### **Whether the ex parte orders issued on 11<sup>th</sup> February 2019 met the threshold and whether they should be discharged**

36. The impugned orders were issued pursuant to Section 56 (1) and (2) of ACECA. Section 56 (1) provides that:

**“on an ex parte application by the commission, the High Court may make an order prohibiting 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 – goes on to add as follows:

**“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. Upon being served with an *ex parte* order the respondent is given an opportunity to challenge the orders and seek to discharge them. That right is provided under Section 56 (4) of ACECA which provides that:

**“A person served with such an order under 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”.**

38. Pursuant to Section 56 (5) of ACECA, such orders can only be varied or discharged 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.

39. The only statutory duty imposed upon the commission is to show and prove within a reasonable degree that based on the complaint, investigation and material before, there is sufficient cause to believe that the property the subject of investigation may have been obtained through corrupt conduct. In other words, before an *ex parte* order issues, the court must in exercise of its unfettered discretion be satisfied that there is a *prima facie* case established.

40. Courts do not issue *ex parte* order as a matter of course or as a formality. However, once a court issues an order of this nature, the burden of proof that the property was obtained by legitimate means shifts to the person in possession of the property or who participated in its acquisition. What has faced challenges over time when issuing such orders is, what actually constitutes reasonable suspicion? The word reasonable suspicion has been defined in the black law dictionary 10<sup>th</sup> edition as; 1 – fair, proper or moderate under the circumstances – sensible 2: according to reason 3: having the faculty of reason 4: Human.

41. The word reasonable suspicion is therefore relative and it depends on the circumstances and merits of each case. However, there must be a factual foundation or basis given a set of facts available to be able to make a balanced conclusion that such and such property may have been obtained through illegitimate means.

42. In the case of **Emmanuel Suipenu Siyanga vs R (supra)** the court while addressing its mind on what constitute reasonable suspicion held 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”.**

43. It is incumbent upon the applicant to satisfy the court that the orders were obtained illegally and un procedurally without any supporting evidence (**See Ethics and Anti-Corruption Commission vs National Bank and Another (2017) eKLR**).

44. From the evidence placed before court, the commission is alleging that there was no budget plan to buy the two motor vehicles the subject of the suit herein. They went further to state that the 1<sup>st</sup> applicant won the tender through fraudulent means by producing forged letters from Kitui and Kisii County governments as proof that he had experience in supplying such motor vehicles. Those letters were discounted by the named counties by writing letters denying authorship. Secondly, the security bid bond from KCB was also forged. Lastly, the payment was made in full for two vehicles without supply of one motor vehicle. Save for the budget plan then, all those allegations were not denied.

45. According to the applicants, the tender was properly advertised which is not denied. There is sufficient evidence that the same was subjected to competitive bidding which is the spirit in procurement laws. However, the 1<sup>st</sup> applicant is said to have fraudulently and through trickery won the tender through the back door. Such tricks were suspicious of a forged security bid bond and letter of experience from Kitui and Kisii County governments.

46. I have perused the letter dated 31<sup>st</sup> January 2019 (Ex12) from Kisii County in reference to M/s Daayo Construction Company in which they are confirming that the 1<sup>st</sup> applicant had never transacted any business in supply of motor vehicles worth Kshs.148,013,925 with them, that the letter head and seal used do not belong to Kisii County and that the name of Hussein and Ali and title of County Procurement Manager did not exist.

47. Equally by a letter dated 25<sup>th</sup> October 2018 (EO11) Kitui County Government denied ever awarding a contract to the 1<sup>st</sup> applicant, their office does not have a procurement officer by the name of Mwenda Kitili and the tender reference No. CGK/1/07/2016 – 2017 did not exist. By a letter dated 14<sup>th</sup> November 2018, the Manager Eastleigh KCB denied that the Bid Bond was from their office.

48. Unfortunately, the applicants have studiously kept quiet over those allegations which are serious and criminal in nature. What is the implication of these criminal acts to the legality and regularity of the tender in question? The natural and reasonable conclusion is that, the tender was won through trickery and fraudulent means thus shutting out genuine and deserving bidders from winning the contract. The tender exercise was therefore tainted with corrupt tendencies and the award was not lawfully won and made. Since nobody bothered to do due diligence by even confirming from the bank whether such bid bond was indeed guaranteed, some level of collusion by those in charge of the award can be implied.

49. The second item is that the 2<sup>nd</sup> motor vehicle was never supplied and a sum of 12 million was paid to the 3<sup>rd</sup> applicant/respondent a stranger to the tender. Obviously and in normal procurement procedure, payment is only made to a bidder who supplies goods and the certificate duly prepared. What will happen like in this case where the supplier fails to supply the goods? The government and by extension the public loses and then start incurring costs in litigation.

50. Why would payment in a contract be paid to a 3<sup>rd</sup> party instead of the bidder? In my opinion, unless by a court order by way of garnishee

proceedings, a contract sum is only payable to the contractor or supplier who will then sort his or her debts later.

51. Putting all these circumstances together, the respondent/applicant has established a prima facie case and there is reasonable suspicion to conclude that the tender and subsequent supply of one motor vehicle instead of two was intended to embezzle public funds from the county government of Wajir. The applicants have failed to prove that the orders were improperly issued and that there is good ground to discharge them.

52. It is trite law that he who alleges must prove the facts upon which he or she intends to rely on to prove a fact and for the court to believe in him. The applicants have not on a balance of probability discharged their burden to the required degree.

### **Whether the orders granted offends the Constitution and in particular Article 50 and 47 of the Constitution**

53. The applicants have raised a very crucial and pertinent issue challenging the constitutionality of Section 56 in so far as issuance of ex parte orders is concerned. Mr. Waudo argued that ex parte orders under Section 56 (1) are not interim in nature but final orders as there is no provision for inter partes hearing. In his view, the ex parte orders amounts to gross violation of Article 50 (2) of the constitution on the right to a fair hearing before being condemned. Secondly, that it offends Article 47 of the Constitution on the right to Fair Administrative Action that is expeditious, lawful, reasonable and procedurally fair.

54. Unlike an injunction under Order 40 of the Civil Procedures rules, preservation orders under Section 56 have a life span of six months unless challenged by the affected party. Section 56 has no provision for inter partes hearing although technically it permits an aggrieved party to challenge the orders if necessary. One cannot therefore claim that he or she is totally shut out of the proceedings nor are the orders final.

55. It is trite that there is a rebuttable presumption that all statutes are constitutional unless and until declared unconstitutional. Before me is not a petition challenging the constitutionality of Article 56 of the Constitution. There is no prayer for such declaration. In my view a court cannot declare a section of a statute or a whole statute unconstitutional based on an ordinary application without any prayer for such declaration.

56. However, even assuming that the applicants are right that this court can find Section 56 of ACECA unconstitutional, they must prove with precision that that particular provision has been violated and the extent of the violation (**See Anarita Karimi vs R (1979) ,No. 1 KAR 154 – 156.**

57. The right to be heard under Article 50 must go hand in hand with the right to fair hearing which is unlimited under Article 24 of the Constitution. According to Waudo, his client was condemned unheard. However, Section 56 (4) has created a window for a party who is affected by ex parte orders under Section 56 (1) to challenge the same. In my view, with this opportunity, one cannot claim to be condemned unheard because the court can upon being satisfied that such orders were improperly obtained and without factual basis vacate or discharge them.

58. Preservation of property is not the same as deprivation or forfeiture of property. It is a precursor to recovery, forfeiture or compensation proceedings which cannot be undertaken without being invited to participate. In my view, the mechanisms in place under Section 56 are sufficient and the right to fair hearing is safeguarded.

59. I do associate myself with the holding of Justice Nyamu in the case of **Kenya Anti-Corruption Commission vs Lands Limited and 7 Others (2008) eKLR** where he held in the 3<sup>rd</sup> holding that

**“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 advances other constitutional objectives and public interest concerns that are at the heart of the nation.....”.**

**4<sup>th</sup> holding, “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 .....”.**

**Holding 5 – “Section 56 is a tool against corruption and economic crimes and this is an observation embraced by all known democracies.....”.**

60. In view of the mechanisms for redress provided under Section 56 (4) of ACECA , one cannot be heard to complain that he or she has been condemned unheard. In any event, the orders are in the interim subject to challenge. Parliament in its wisdom had the wider interest of society at heart. Section 56 was not in any way intended to frustrate or deny any person the right to fair hearing. It was intended to cure any mischief that may accrue in hiding or concealing ill gotten property the subject of forfeiture before institution of forfeiture proceedings. There is legitimate expectation by society that property suspected to be obtained through corrupt conduct must be preserved until a proper explanation is rendered. That cannot be said to be unconstitutional. It is a tool to enhance transparency and accountability especially when it concerns public property. This effort must be supported by all and sundry in any democratic society.

61. Does the order offend Article 47 of the Constitution? Article 47 underpins the right to Fair Administrative Action which is expeditious, efficient, lawful, reasonable and procedurally fair. The argument is the same as that advanced in respect to the right to fair hearing.

62. When the orders were issued, it was brought to the notice of all parties. Mr. Waudo submitted that in a similar scenario, criminal investigations were declared unconstitutional by the court of appeal in a recent decision in the case of the **Director of Public Prosecutions**

**vs Tom Ojienda t/a Proff. Tom Ojienda (Supra).**

63. From the onset, the decision in Proff. Tom Ojienda only declared unconstitutional acts of issuing ex parte search warrants, inspection and freezing of accounts through ex parte orders issued by Magistrate's courts under Section 180 of the Evidence Act and Section 118 of the Criminal Procedure Code. It is my understanding that the court of appeal was addressing the mischief in not issuing notice in relation to investigations bordering on intended criminal proceedings as envisaged under Section 23 of ACECA.

64. The issues in that case are distinct and clearly distinguishable. What is before me and the ex parte orders herein are of civil nature with a provision to challenge them. This is contrary to orders issued under Section 180 of the Evidence Act and Section 118 of the CPC where there is no room for further hearing and quite often the orders are indefinite. I do not think that Proff. Tom Ojienda case has any nexus to Section 56 of ACECA in so far as issuance of notice under sections 23,26,27 and 28 of ACECA is concerned.

65. In the instant case, sufficient notice is deemed to have been issued through an ex parte application and the attendant orders. Ex parte orders issued under section 56 cannot be said to offend Article 47 nor the Fair Administrative Action Act in any way. To associate and apply Proff. Tom Ojienda's court of Appeal decision to civil proceedings undertaken under Section 56 will technically forestall and dismantle every effort put in place to fight corruption an epidemic currently affecting our society.

66. In a nutshell, and without dwelling on the merits of any intended substantive suit that may follow for forfeiture or recovery of the lost property, it is my holding that the applicant has not proved on a balance of probability that this court ought to discharge the orders. It is only fair that the M/v in question be held and preserved pending investigations. Equally, funds in the account held at KCB in the names of the applicants should be preserved in the same spirit. Accordingly, it is my finding that the application is not merited and the same is dismissed with costs to the Commission.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF AUGUST, 2019.**

**J.N. ONYIEGO**

**JUDGE**