



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISC.APPLICATION NUMBER 23 OF 2017

ETHICS AND ANTI-CORRUPTION.....APPLICANT/RESPONDENT

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED...1ST RESPONDENT/APPLICANT

LULU COMPANY LIMITED.....2ND RESPONDENT/APPLICANT

RULING

BACKGROUND

1. The Application pending for ruling before this Honourable Court is the Chamber Summons dated 29th December 2017 filed by the 2nd respondent. The 2nd respondent seeks to have the Orders issued on 17th October 2017 lifted. The applicant/respondent also filed an application dated 23rd January 2018 seeking to have orders that the court preserves and freezes account number xxxxxx Co-op Bank Nkurumah branch in the name of the second respondent. The court directed that both applications be heard simultaneously.

2. The applicant/respondent had approached this court by way of a Miscellaneous Application dated 27th February, 2017 seeking orders under Section 56 of the Anti-Corruption & Economic Crimes Act (ACECA) to prohibit the transfer, disposal of or other dealings in the aforesaid account. The application was heard exparte and the orders granted. They were to last for six (6) months.

3. After the lapse of the six (6) months, the 2nd respondent sought to have the orders lifted vide an originating summons dated 13th September, 2017 filed under Section 56 (3) of ACECA. At the same time, the applicant/respondent filed a fresh exparte originating motion dated 19th September 2017 seeking orders to have the said account belonging to the 2nd respondent preserved as investigations were on going. Parties filed their responses and the court directed that both applications be argued together.

4. The parties were heard and the court after considering all the arguments, found that there was need to allow the applicant/respondent an opportunity to complete its investigations. This is all contained in the court's ruling dated 17th October, 2017. The period of extension was four (4) months from the date of the lapse of the initial six (6) months.

5. The four (4) months lapsed on 27th December, 2017. The 2nd respondent/applicant then filed the

current application dated 29th December, 2017. The said application is similar to its application dated 13th September, 2017. Similarly, the applicant/respondent's application dated 23rd January, 2018 is similar to its application dated 19th September, 2017

APPLICANT'S CASE

6. The applicant in its application dated 29th December, 2017 sought the following order:

“That the honourable court be pleased to issue orders directed at the 1st respondent to allow the 2nd respondent unrestricted access to bank A/c No. xxxxxxxxxxxx held at Co-op bank of Kenya, Nkurumbah branch following the expiry of the orders issued on 17th October, 2017.”

7. The application is supported by the grounds and affidavit of Beatrice Tabu Charo one of the directors of the 2nd respondent/applicant. The main ground is that the applicant/respondent has had more than sufficient time to complete its investigations. Further, that continued preservation of the said account is causing unnecessary hardships to the 2nd respondent.

8. **Mr. Odoyo** for the 2nd respondent/applicant submitted that the order being sought was justified since the 1st respondent had denied the 2nd respondents directors access to the subject account yet the orders of 17th October, 2017 had lapsed. He further submitted that there was no justifiable reason to warrant the freezing of the accounts or connecting the 2nd respondent's bank account with corrupt dealings. On the application dated 23rd January, 2018 by the applicant/respondent, he submitted that the same was an abuse of the court process.

9. He relied on a number of authorities namely;

1. Maria Lwande & Others –vs- Registered Trustees of Teleposta Pension Scheme [2015] eKLR Nairobi E&L No. 1321 of 2013

2. Kenya Anti-Corruption Commission –vs- John Joel Ria & 17 Others [2012] eKLR

3. Ethics & Anti-Corruption Commission -vs- Oregonia Supplies Services & Another [2016] eKLR, Malindi High Court, Misc. Civil Application No. 77 of 2016

4. Ethics & Anti-Corruption Commission –vs- Co-operative Bank Ltd. & Another [2016] eKLR, Malindi High Court Misc. Civil Application No. 77 of 2016

5. Ethics & Anti-Corruption Commission –vs- Ministry of Medical Services & Another [2012] eKLR Nairobi High Court Misc. Civil Application No. 174 of 2012

6. Kenya Revenue Authority –vs- Jimmy Mutuku Kiamba [2015] eKLR, Nairobi High Court Misc. Suit No. 285 of 2015

7. Republic –vs- Anti-Corruption Commission & Another Ex-parte Jennifer Karimi Njagi [2017] eKLR, Misc. Application No. 19 of 2016.

8. Ethics & Anti-Corruption Commission –vs- Equity Bank & Another ACEC Misc. Civil Application No. 41 of 2017

9. Ethics & Anti-Corruption Commission –vs- Jamal bare Mohamed [2017] eKLR, Misc. Application No. 31 of 2016

10. Ethics & Anti-Corruption Commission –vs- M/s Nyandoro and Company Advocate & Another [2017] eKLR ACEC Misc. Application NO. 38 of 2017

RESPONDENTS' CASE

10. The applicant/respondent opposed the application by the 2nd respondent/applicant and relied on the replying affidavit of Lamek Okun a forensic investigator with the applicant/respondent sworn on 23rd January, 2018. In it, he requests for time to complete its investigation.

11. The applicant/respondent in its Originating Motion of 23rd January, 2018 which is supported by an affidavit by Lamek Okun sworn on the same date, seeks to have the subject account belonging to the 2nd respondent/applicant frozen. The reasoning being that the account had been used to deposit and transfer monies from proceeds of corruption. He deponed that the applicant/respondent is still pursuing more evidence and the same has not been easily forthcoming. A letter dated 30th November, 2017 seeking further and better particulars regarding the wealth declaration forms for Beatrice Tabu Charo who is the subject of the investigations was annexed.

12. The applicant/respondent had requested for her forms from the time of her employment to date. The Kenya Revenue Authority (KRA) responded vide their letter dated 8th January, 2018 and forwarded the wealth declaration forms. From the communication, it is clear that wealth declaration forms for the period between 1st November, 2011 to 31st October, 2013; 1st November, 2014 to 31st October, 2015 and 1st November, 2016 to 31st October, 2017 had been supplied to the applicant/respondent.

13. In his submissions, Mr. Opondo for the applicant/respondent told the court that investigations were not yet complete and he wholly relied on the affidavit of Lamek Okun. He contended that the application was not an afterthought and their request to freeze the account was to enable them complete investigations. Mr. Lamek Okun in his affidavit has averred that the investigations into Beatrice Tabu Charo's issue have faced a brick wall frustrating attempts to secure information.

14. In the affidavit, was annexed a letter dated 8th January, 2018 from KRA reverting to them an information regarding Betty Tabu Charo's wealth declaration forms as well as an explanation that the delay in them reverting was occasioned by the process of obtaining information from the public service commission. Mr. Okun avers that the only issue left is on the company's alleged receipt of commissions as mentioned by its director. He therefore pleaded for more time to complete investigations.

DETERMINATION

15. From the two applications before the Honourable court, the issue to be determined is whether the preservation orders issued on two occasions freezing the 2nd respondent's account no. 01148446670800 should be issued afresh or whether they should be lifted.

16. Section 56 of the Anti-Corruption and Economic Crimes Act states as follows:

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

(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.

(3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission.

(4) 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 the application.

(5) 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.

(6) A person who is served with an order under this section and who contravenes it is guilty of an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.

(7) In this section, “corrupt conduct” means—

(a) conduct that constitutes corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which—

(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime

17. In the instant case, the sole basis of the application to freeze the accounts of the 2nd respondent was for investigations to be conducted into how the funds deposited in the subject account were acquired. From the inception of the case to date a period of eleven (11) months has lapsed. The applicant/respondent has indicated that they have carried out investigations by requesting for declaration of wealth forms for Betty Tabu Charo in two instances. The letters were dated 20th July 2017 and 28th August 2017 respectively before the application for fresh orders was made on 19th September 2017. Orders extending the initial orders of 27th February, 2017 were issued on 17th October 2017 on the subject account for a period of 4 months. The next letter showing that investigations were being carried out is dated 30th November 2017. The 2nd respondent filed the application to lift the orders freezing the accounts on 29th December 2017 under certificate of urgency.

18. In the case of *Kenya Anti-Corruption Commission Versus John Joel Ria and 17 Others* [2012] eKLR the learned Judge stated:

“...The right of the applicant to prevent and detect economic crime must be balanced with the fundamental rights of the respondents not to be deprived of any interest in property...”

The director of the 2nd respondent company has fundamental freedoms that she ought to enjoy as per the Constitution. **Article 47(1)** of the **Constitution of Kenya** provides that:

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

From the subject application, Betty Tabu Charo has been the subject of investigations for a period of 11 months. Can the court extend the period freezing the accounts without prejudicing the 2nd respondent/applicant?

19. As it stands the only piece of evidence that the Commission needs is that of the current wealth declaration forms to be provided by the Kenya Revenue Authority. However, from their letter dated 30th November 2017 they requested for the wealth declaration forms of Beatrice Tabu Charo from the date of employment to date (in their previous letter dated 28/8/2017) From the response by the KRA dated 8th January 2018 the subsequent forms provided were till the 31st October 2017. The investigating officer in his supporting affidavit stated that they were still yet to be supplied with the current wealth declaration forms.

Section 26 (1) of the Public Officers Ethics Act provides as follows:

“1. Every public officer shall, once every two years as prescribed by [section 27](#), submit to the responsible Commission for the public officer a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependent children under the age of 18 years.

2. The declaration shall be in the form set out in the Schedule and shall include the information required by the form.”

Section 27 (1) When declarations must be made

1. The declaration shall be submitted in December of every second year.

2. The statement date of a declaration under subsection (1) shall be the first day of November of the year in which the declaration is required.

3. Within thirty days after becoming a public officer, the public officer shall submit an initial declaration

(4) The statement date of an initial declaration under subsection (3) shall be the date the public officer became a public officer

(5) Within thirty days after ceasing to be a public officer, the former public officer shall submit a final declaration

(6) The statement date of a final declaration under subsection (5) shall be the date the public officer ceased to be a public officer

(7) The following shall apply with respect to a person who is a public officer on the day the administrative procedures relevant to that public officer are first published under [section 33](#)—

(a) the public officer shall submit an initial declaration within sixty days after the administrative procedures are published; and

(b) the statement date of an initial declaration under paragraph (a) shall be the date the administrative procedures are published

CONCLUSION.

20. The above provisions clearly set out what is expected to be done in wealth declarations by public officers. The last declaration that was made by the said officer was for the period ending on 30th November 2017. The next declaration shall be made on 30th November 2019. The information that the investigator purports to be seeking, and making the only reason as to why the investigations are still pending, is that they have not been supplied with current wealth declaration forms by the director of the 2nd Respondent Company. KRA in their letter dated 8th January 2018 indicated that they had supplied the requested forms including that which ended on 30th November 2017. From the period of declaration of income and assets as per Section 27 of the Public Officers Ethics Act, all declaration forms made by the said Beatrice Charo Tabu have been supplied to the applicant/respondent.

21. The money that is the subject of the investigation was deposited on the subject account on 21st November 2016 which is within the period of the wealth declaration forms supplied to the commission. The only reason advanced for the delay in investigations is not good enough. I find that the applicant has had enough time to conduct investigations on the frozen account for any purported corrupt dealings by the director of the 2nd respondent and it should not continue to enjoy the said orders.

22. Secondly, it appears that the moment the applicant/respondent is granted preservation orders it forgets its assignment and goes to slumber land. This happened when the first order of 27th February, 2017 lapsed and same to the orders of 17th October, 2017. The applicant/respondent only wakes up when the 2nd respondent/applicant files an application seeking the lifting of the preservation orders. In the last instant, the orders lapsed on 27th December, 2017 and the 2nd respondent/respondent filed its application on 29th December, 2017. It was not until the 23rd January 2018 that the applicant/respondent filed its application seeking fresh preservation orders.

If the applicant/respondent was indeed investigating this case as is expected, the expiry of preservative orders would never escape the mind of the very Lamek Okun who is the investigating officer. I would have expected him to approach the court before the expiry of the orders to seek for an extension. He did not.

23. The conduct of the investigator is quite telling and is an open abuse of the process where an officer takes the issuance and extending of preservation orders as a matter of course. This Court will not allow such an abuse of its process. The refusal to issue fresh preservation orders (as there is none to extend) does not in any way mean that the investigations should collapse. I find no merit in the application dated 23rd January, 2018 which I dismiss. I allow the application dated 29th December, 2017.

24. Accordingly the preservation order placed upon A/c No. xxxxxx Co-op Bank Nkurumah Branch on 27th February, 2017 is hereby lifted and the 2nd respondent/applicant is allowed to access the said account.

25. There shall be no order as to costs.

Orders accordingly.

Signed, dated and delivered this 13th day of February, 2018 in open court at Nairobi.

HEDWIG I. ONG'UDI

HIGH COURT JUDGE