



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMICS CRIME DIVISION

ACEC MISC. APPLICATION NO. 55 OF 2017

IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC

CRIMES ACT NO. 3 OF 2003 [CAP 65] AND ETHICS AND

ANTI-CORRUPTION ACT [CAP 65A] LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION BY ETHICS & ANTI-CORRUPTION

COMMISSION FOR AN ORDER UNDER SECTION 56 (3) OF THE

ANTI-CORRUPTION AND ECONOMIC CRIMES ACT [CAP 65]

LAWS OF KENYA; SECTION 11 (1) (J) OF THE ETHICS &

ANTI-CORRUPTION COMMISSION ACT [CAP 65A]

LAWS OF KENYA, TO PROHIBIT THE TRANSFER OR

DISPOSAL OF OR OTHER DEALINGS CONNECTED

AND/OR INCIDENTAL TO EQUITY BANK KENYA

LIMITED, MOMBASA BRANCH, ACCOUNT

NO. [Particulars Withheld]

AND

IN THE MATTER OF: SECTION 180 OF THE EVIDENCE ACT [CAP 80] LAWS OF KENYA

AND

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

VERSUS

EQUITY BANK OF KENYA.....1ST RESPONDENT

DAVID KISOI NDUNDA t/a DANKIS AGENCIES...2nd RESPONDENT

RULING

1. By an application dated 11th December, 2017 the applicant (Ethics & Anti-Corruption Commission (EACC)) sought orders for the extension of preservative orders issued on 11th July 2017 for a further period of six (6) months. The application was made under Section 56 (3) of the Anti-Corruption & Economic Crimes Act (ACECA); Section 11 (1) (ii) of the Ethics & Anti-Corruption Commission Act, 2011 (EACC Act).
2. The preservative order was to prohibit the respondents by themselves or through their agents, servants or assigns from transferring disposing of wasting or in any way dealing with funds held in bank account number [particulars withheld] in the name of Dankis Agencies held at Equity Bank Kenya Ltd., Mombasa branch.
3. The applicant also sought an order freezing the same account with similar details as in paragraph No. 2
4. The application is supported by grounds on its face and a supporting affidavit by **Taku Lwanga** an investigator with the EACC. The affidavit was sworn on 11th December, 2017 and the supplementary affidavit of Lucy Njeru sworn on 13th February, 2018. The main ground in this application is that the applicant has undertaken investigation into allegations of fraudulent acquisition of monetary assets including public funds in millions of shillings.
5. Mr. Tabu Lwanga has in paragraph 6 of his affidavit listed **110** transactions in the suspect account which it's investigating. He avers that the said transactions are complex and entail obtaining numerous documents and recording several witness statements which has not been finalized.
6. He states that on 16th November, 2017 the applicant invited the 2nd respondent to record a statement over issues and allegations of corrupt acquisition of assets including public funds from persons and entities which he has named. However, the 2nd respondent is yet to provide the EACC with the requested information neither has he recorded any statement. Annexed is a copy of a letter to that effect – **TL 3** dated 16th November, 2017.
7. The applicant's fear is that if the mentioned account is not frozen and the amounts preserved further, the respondents may initiate withdrawal or transfer or in any other way, dispose of funds deposited in the said bank account. The result would be financial detriment and adverse prejudice of the State, the general public and the applicant in discharge of its statutory and constitutional mandate in the fight against corruption and economic crimes.
8. Lucy Njeru in her supplementary affidavit rebutted the 2nd respondent's averments in paragraph 5 of his replying affidavit. She averred that the 2nd respondent was promptly served with the court orders and he failed to disclose to the court the date he allegedly visited the bank. She deponed that since the issuance of the orders of 11th July, 2017 the commission had carried out further investigations and established the involvement of the 2nd respondent and others in the scam the subject of this investigation. She has set out all this in paragraph 6 (i) – 6 (xiii) of her supplementary affidavit.
9. She has in paragraph 10 (i) – 10 (viii) of her supplementary affidavit set out all the amounts of money the 2nd respondent is expected to account for which he has however not done. That as at the 13th February, 2018 the 2nd respondent had not provided the required information and/or recorded a statement.
10. It was her prayer that this court extends the life of the preservation orders in order for them to conclude investigations to establish the various issues raised under paragraph 15 (i) – 15(x) of her supplementary affidavit.
11. **Mr. Mbaka** for the applicant in submission stated that the main reason for their seeking the extension of the preservation orders is that the investigations have not been concluded. He added that the 1st respondent had promised to give to them more documents but had not indicated when that would be.
12. He explained that the orders issued on 11th July, 2017 had expired on 11th January, 2018. Further that the investigations being carried out were massive and involved a number of companies which had deposited money into the 2nd respondent's account. The details of the transactions are listed at paragraph 6 of the supporting affidavit.
13. In seeking these prayers, counsel relied on the following authorities;
 - (i) ***Ethics & Anti-Corruption Commission –vs- National Bank of Kenya & Another [2017] eKLR***
 - (ii) ***Kenya Anti-Corruption Commission –vs- Lands Ltd. & 7 Others [2008] eKLR***
 - (iii) ***EACC Act –vs- Fastlane Freight Forwarders Ltd. & 8 Others [2017] eKLR***
14. The 2nd respondent filed a replying affidavit sworn on 2nd February, 2018. He has deponed that he was never served with the court orders issued on 11th July, 2017. Secondly, that the application dated 11th July, 2017 has never been prosecuted and instead a new application with fresh allegations was filed. He averred that the new application dated 11th December, 2017 is full of generalities and did not show any probable or reasonable cause for issuance of the orders sought.

15. He contends that the applicant has failed to show to the court the extent of its investigations, in the six (6) months. He denies having been summoned to the applicant's offices as alleged.

16. It's his contention that since the application has failed to link him to the county government of Kilifi, the court should not extend the orders as sought. He states that the application is malicious, mischievous, frivolous, vexatious and an abuse of the court process. Further that the issuance of the orders sought will cause him continued suffering and prejudice at the hands of the applicant.

17. In his submissions, **Mr. Midenga** for the respondents said there were two application on the file i.e. the one dated 11th July, 2017 and that dated 11th December, 2017. He submitted that the application of 11th December, 2017 was afresh application disguised as one seeking extension of orders and it offends Section 55 (2) (b) of ACECA.

18. He contends that the 2nd respondent was never given any opportunity to explain the assets complained of. He wondered what the applicant was investigating since July 2017 and what documents they were still looking for. Relying on the case of **Prof. Tom Ojienda SC /a Prof. Tom Ojienda & Associates –vs- Ethics and Anti-Corruption Commission & 5 Others Petition No. 122 of 2015**, he submitted that suspicion was not sufficient without evidence.

19. He distinguished this case from the first 2 cases cited by the applicant saying the 2nd respondent was never served with the orders unlike the first authority where the respondent had been served. He dismissed the 2nd authority as dealing with something totally different from what was before the court. He finally, submitted that the order sought to be extended has been extended severally and should not be extended again.

20. In a rejoinder, Mr. Mbaka submitted that the applicant has been following up on the case and had received some bank statements in the course of the investigations and they needed to be looked at. Further, that the 2nd respondent was served with the initial orders and there was reason to believe that he was involved in corruption.

21. Counsel contended that there is evidence to show that the 2nd respondent had been given an opportunity to explain his assets, and that he was served with the orders of the court.

DETERMINATION

22. I have considered the application, affidavits, annexures and submissions by both parties. There is no dispute that an ex parte application dated 11th July, 2017 was filed in this matter. It was filed under Section 56 (1) of the ACECA and Section 11 (1) (i) of EACC Act 2011.

Section 56 (1) ACECA provides;

“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 on evidence that the property was acquired as a result of corrupt conduct.”

Section 11 (1) (i) EACC Act 2011 provides;

“(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—

(i) Subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices.”

23. Such application is heard ex parte in the first instance and may only be heard inter partes if a party served applies for discharge of the orders under Section 56 (4) of the ACECA which provides;

“(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.”

24. The 2nd respondent has alleged that he was never served with the order issued on 11th July, 2017. He however, depones that he only learnt of the existence of the said order when he visited his bank to transact therefrom. I am sure the bank (1st respondent) declined to serve him in terms of the order of preservation which had been served on it.

25. The 2nd respondent has conveniently avoided to state on which date he learnt of the existence of this order. If he was never served and was negatively affected by the existence of the order which he was now aware of, what action did he take? He never came to the court to challenge the order as provided for under Section 56 (4) of the ACECA. He cannot therefore be taken seriously when he claims that he was never served with the said order and yet chose to do nothing about it after being notified by the bank. The truth of the matter is that he was served with the order of the court.

26. The said order having not been challenged under Section 56 (4) of the ACECA remained in force for six (6) months as directed by the court and as provided for under Section 56 (3) of the ACECA. The applicant could not therefore move the court to have the application heard as there is no such provision for it under the ACECA. The argument that there are two applications pending is therefore misplaced.

27. The application for hearing is the one dated 11th December, 2017 seeking an extension of the orders issued on 11th July, 2017. The application has been brought under Section 56 (3) ACECA and Section 11 (1) (j) EACC Act.

Section 56 (3) ACECA provides;

“(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.”

28. The respondents, in particular the 2nd respondent has opposed the application saying the applicant has done nothing for the period the order has been in force. Secondly, that he has never been called to explain the source of the assets.

29. The applicant has clearly set out in the affidavits of **Tabu Lwanga** and **Lucy Njeru** the steps the applicant has taken since the issuance of the order of 11th July 2017 and the nature of the investigations undertaken. I will not outline it here because it all amounts to evidence gathered and will be presented at the opportune time. It’s all found at paragraph 6 of Lwanga’s affidavit at paragraphs 6 (i) – 6 (xiii); paragraphs 10 (i) – (viii); and paragraphs 15 (i) – (x) of Lucy Njeru’s affidavit.

30. It cannot therefore be argued that the applicant has just been idling and sitting on the order issued to it on 11th July, 2017 without carrying out any investigations. The applicant has presented to this court annexures “TL-3” reference EACC MLD.6/15/1 (326) dated 16th November, 2017. It is a letter to the 2nd respondent asking him to avail documents related to the acquisition of the payments enumerated under **110** transactions with the 1st respondent’s bank. The same letter also invites him for an interview with the applicant in Malindi.

31. The 2nd respondent in his response, denies having been afforded an opportunity to explain the assets. He however makes no reference to the letter dated 16th November, 2017 “TL-3”. The averment by Tabu Lwanga remains uncontroverted and is taken to represent the correct position. The position being that the 2nd respondent was given an opportunity to explain his assets which were outlined for him in the said letter. He should have grabbed that chance and complied with the request to explain the sources of the assets without any problem.

32. I have considered the authorities cited by both parties. The matter before this court is an investigation and not a hearing on the findings by the EACC. The findings will be dealt with and the matter heard at a different forum. The 2nd respondent still has an opportunity to explain the source of the assets outlined by EACC in “TL-3”, so that the investigations are brought to a conclusion. I am persuaded by the findings by **Nyamu J. in KACC –vs- Lands Ltd. & 7 Others (supra)**.

33. Having considered the volume of the items under investigation, I find it fair that the EACC be given more time to complete its investigations into this matter. The 1st respondent must also avail the documents requested for by the applicant so that the investigation is fast tracked.

34. I do appreciate that the orders lapsed on 11th January, 2018 while the applicant’s application dated 11th December, 2017 which had been filed in good time was pending. The delay in hearing this application in good time can be explained very well. Both judges of this division were involved in the hearing of several election petitions which had been given preference over all other matters.

35. I have also taken into account that investigations in this matter have continued due to the temporary reliefs given by the court from time to time.

36. In view of all the above, I shall allow the application dated 11th December, 2017 and issue the following orders;

- (i) The orders issued on 11th July, 2017 are extended by **ONLY** four (4) months with effect from today’s date.
- (ii) The 1st respondent to serve the applicant with all the documents sought for from the said bank. This should be complied with on or before 4th May, 2018. Failure to comply will have consequences.
- (iii) The applicant is called upon to expedite its investigations as there shall be no more extensions of the preservation orders.
- (iv) No order as to costs.

Orders accordingly.

Delivered, signed and dated this 17th day of April 2018 at Nairobi.

.....

HEDWIG I. ONG’UDI

HIGH COURT JUDGE