



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISCELLANEOUS APPLICATION NO. 79 OF 2017

ETHICS & ANTI CORRUPTION COMMISSION.....APPLICANT

VERSUS

JARED PETER ODOYO OLUOCH KWAGA.....1ST RESPONDENT

ERNEST OMONDI OWINO.....2ND RESPONDENT

JORAM OPALA OTIENO.....3RD RESPONDENT

PATROBA OCHANDA OTIENO.....4TH RESPONDENT

JANTO CONSTRUCTION COMPANY LTD.....5TH RESPONDENT

MAROWA STORES LTD.....6TH RESPONDENT

MBINGO ENTERPRISES LTD.....7TH RESPONDENT

HELLEN ADHIAMBO ODIE.....8TH RESPONDENT

BEATRICE AKINYI OGUTU.....9TH RESPONDENT

KENNEDY ODHIAMBO AKELLO.....10TH RESPONDENT

KENNEDY ONYANGO ADONGO.....11TH RESPONDENT

RULING

1. This is the originating motion dated 18th May 2018 and filed under section 56(3) of the Anti Corruption & Economic Crimes Act 2003 (ACECA). It seeks orders that the preservation orders issued on 30th November 2017 prohibiting the respondents from withdrawing, transferring, disposing or in any other way dealing with the funds held in the bank accounts listed below be extended for a further period of six(6) Months:

(i) 1132259770 in Kenya Commercial Bank Ltd, Migori Branch in name of Janto Construction Company Ltd

(ii) 1132461618 in Kenya Commercial Bank Ltd, Migori Branch in name of Marowa stores Ltd

(iii) 1160197689416 in Equity Bank Limited, Migori Branch in the name of Ernest Omondi Owino

(iv) 1160197689416 in Equity Bank Limited, Migori Branch in the name of Ernest Omondi Owino

(v) 1160297749370 in Equity Bank Limited, Migori Branch in the name of Mbingo Enterprises Ltd

(vi) 1430264219161 in Equity Bank Limited, Awendo Branch in the name of Hellen Adhiambo Odie

2. The application is supported by the affidavit of Anne Murigih and the grounds on the face of the application. A further affidavit sworn by Pius Maithya of EACC has also been filed in support of the application. All the respondents save for the 8th respondent filed replying affidavits in opposing the application for extension of the preservation orders.

THE APPLICANT'S CASE

3. The applicant seeks an extension of the preservation orders issued by this court on 30th November 2017, in respect of the properties set out in the application, stating that the immovable properties were acquired between 2013-2017 the period under inquiry. The main ground for the extension sought is that investigations are incomplete. Part of the reason for the slow pace in investigations is that the Migori County offices went ablaze on 25th September 2017 when the county secretary was to provide the original tender documents to the applicant. This followed a notice issued to him under section 27(3) of the ACECA.

4. It is also stated that there is a likelihood that the applicant may require mutual legal assistance to carry out investigations in Australia, Hongkong and China in respect of some international money transfers made by some respondents.

5. In her supporting affidavit Ann Murigih a forensic investigator with the applicant states that she is a member of the team investigating these matters. She has annexed two letters (AM1 & AM2) showing communication between the Applicant and the County Secretary Migori in respect of original tender documents. When there was no response the applicant followed up with phone calls to no avail.

6. A notice under section 27(3) of the ACECA (AM3) was then issued. A few documents were supplied through the deputy director supply chain management on 25th September 2017. The next day i.e. 26th September 2017 the County Secretary Migori reported to the EACC offices saying that a section of the county offices used as storage for stationery procurement documents, receipt among others were burnt on the eve of 25th September 2017. She finds this incident to be quite suspect.

7. Since the issuance of the preservatory orders herein the applicant has managed to record statements of witnesses and also search the homes of the 1st, 2nd, 9th & 10th and others. They have retrieved sale agreements, and title deeds of over 40 additional parcels of land; bank details and statements of over 30 additional bank accounts, motor vehicle ownership documents; LSO's of over Kshs 200 million and payment vouchers of over Kshs 45 Million. She added that investigators are on the ground over all these discoveries.

8. The applicant has issued notices under section 26 of the ACECA to the respondents and others to explain the sources of these monies in the bank accounts and the parcels of land, (AM4). Further that the applicant may require to apply for mutual legal assistance as provided for under cap 75A Laws of Kenya. This follows discoveries of international money transfers in respect of the Migori County Governor's Children and others in Australia, Hong Kong and China.

9. She depones further that the applicant intends to file a suit for recovery of assets under section 55 of the ACECA after the investigations. It's on the basis of the above that the applicant seeks an extension of the preservation orders.

10. A further affidavit in reply to the replying affidavits was sworn and filed by Pius Maithya another investigator with the applicant. He gave details of huge money transfers from the 1st respondent's accounts on 21st August 2014, 23rd October 2015, 18th November 2015 and 23rd August 2016. He annexed copies of the excerpts of bank statements (PM1). He also annexed excerpts of bank statements showing cash transfers from the 1st respondent's A/c No 01109201121700 of Co-op bank of Kenya to several accounts in Hong Kong and China.

11. M/s Kibogi for the applicant in her submissions highlighted the contents of the affidavits in support and the grounds. She said the properties in issue were all acquired in 2015 (CN13) which is within the period of investigation of Migori County. She highlighted the reasons for seeking the extension of the orders to be as follows:

- Notices under section 26 ACECA have been issued, and responses are being awaited.
- The applicant could pursue recovery of assets under section 55 ACECA
- Time is required to compile responses
- Contents will have to be verified and further investigations could follow.

The rest are in the Supporting affidavit.

12. She further explained that following the recent recoveries they needed time to analyze the LPOS and bank accounts; record statements from staff of various banks and the accounts involved are over 100. This she said was the reason for requesting for more time to complete the investigations.

1ST 3RD & 4TH RESPONDENTS' CASE

13. The 1st respondent relied on his supporting affidavit in respect to his application dated 25th April 2018 and the replying affidavit sworn on 25th May 2018. He has averred that the grounds supporting the application dated 18th May 2018 are frivolous, scandalous and vexatious for the reason that the applicant's officers have used the orders of 30th November 2018 to harass him by raiding his home before cameramen, and journalists. Secondly, that there is no element of corruption about him that has succeeded even on a *prima facie* basis.

14. He blames the court for issuing the order when no sufficient material had been adduced. He further depones that the tenders he won were not in any way through corrupt practices. He denies being connected with the fire incident that occurred at the Migori County offices.

15. He deponed that the notice issued to him by the applicant was only issued on 11th May 2018 for purposes of seeking an extension of the preservation orders. As far as the 1st respondent is concerned there is no one who has complained about his winning of tenders at the Migori County. Therefore the investigation is malicious and unjustified.

16. Finally he has deponed that the six (6) months given to the applicant was sufficient time for them to complete the investigation. He therefore opposes the application for extension of the Orders issued on 30th November 2017.

17. The 3rd and 4th respondents filed an affidavit sworn by the 4th respondent in opposing this application. He depones that he owns land LR. Suna East/ Wasweta 1/23387 against which the applicant filed a restriction on 31st July 2017. To his surprise this was never revealed to the court when the first application was made (P00-1). He therefore accuses the applicant of material non disclosure. The rest is similar to what the 1st respondent has deponed.

18. Mr Sagana for the 1st, 3rd and 4th respondents submitted that the reasons for extension cannot be the same as those of the initial application. Secondly that the applicant in the initial application did not disclose that it had restricted all the named parcels of land.

19. Counsel pointed out that only one property valued at Kshs 350,000/- involved the 4th respondent. That the 4th respondent being a businessman could surely afford that. Furthermore this property was not in the list of civil forfeiture. In respect of the 3rd respondent Mr Sagana submitted that the notices served were in respect of properties where he is a director and not his personal properties.

20. It was his submission that the applicant had not shown what it had been doing in the last 11 months. That there was no investigation being carried out against the 3rd and 4th respondents. That further the international transfers were done 2-3 years ago and could not be part of this.

21. He finally submitted that the common ground is about tenders and payments. The payments are from those tenders, and therefore the issue of unexplained assets is neither here nor there. That if the issue is whether the tenders were regularly obtained that falls under the criminal process and not civil forfeiture. He argued that the applicant had not justified the request for extension of the orders when they had been doing nothing.

22. Mr. Nyaanga for the 1st respondent submitted that under section 56 of the ACECA focus is on the property which must be shown to have been acquired through corrupt conduct. That it was not enough for counsel just to say the property was acquired in 2015. He contended that the applicant had not set the standard required for extension. It must also justify the period requested for since the law does not set the number of months to be extended. He argued that the applicant had not raised anything new in the application. He asked the court to consider the interest of the parties.

THE 2ND 5TH 6TH & 7TH RESPONDENTS' CASE

23. Relied on is the replying affidavit of Florence Akinyi Odongo sworn on 25th May 2018. She is a director to the 6th respondent. She averred that the 6th respondent is a limited liability company dealing in the supply of hardware and other building materials. She averred that on 26th January 2015 the 6th respondent was contracted by the Migori County Government on behalf of the Ministry of environment and water management to supply various building materials to Kosege Primary School. The same had not been applied nor tendered for as it was an emergency.

24. The materials were supplied and received (FAO 1-3) and part payment was made leaving a balance of Kshs 56,000/-. That the 6th respondent was never served with the orders being sought to be extended. The deponent states that huge sums of money have been paid to the 6th respondent by the 2nd 5th and 7th respondents in respect of supplies made. She claimed that the application was made out of malice and spite to injure, discredit, intimidate etc. the 6th respondent.

25. The 2nd 5th and 7th respondents relied on the affidavit of Ernest Omondi Owino the 2nd respondent He averred that he had not been asked by the applicant to give his side of the story. Furthermore there has never been any complaint in respect of the tenders he got from the Migori county government.

26. He averred that the 2nd 5th and 7th defendants have worked together well and have won tenders from many other organizations without any problems. He did not see anything wrong with payments being made into his personal account.

27. Mr. Obach submitted that the 6th respondent was served for the first time on 23rd May 2018. That he only had one tender with the county government, and the company has no foreign account. For the rest of the respondents he submitted that the mentioned properties not in issue should not be touched. He wondered how a property acquired in 2010 would fall in what is being claimed to have been acquired on 30/11/17. He contended that an explanation had been given on how the property was acquired by the respondents.

28. He pointed out that no directors of the 5th and 7th respondents had been called to record any statements. It was not denied that the 5th and 7th respondents are companies which have won tenders and received money. He submitted that the documents the applicant's officer got from the raid were sufficient and they did not require six (6) months to complete investigations.

9th & 10TH RESPONDENTS' CASE

29. The 9th Respondent filed a replying affidavit sworn on 28th May 2018. She has deponed that the order of 30th November 2017 was obtained *ex parte* and she was not served. Her properties have also been restricted and she is therefore unable to utilize them. She averred that the applicant armed with a search warrant broke into her residence and business premises and carried away several items including cash (BOA-3).

30. She was later on 16th May 2018 served with a letter by the applicant asking her to explain her transactions in A/c No 1160299473658. She therefore objects to the extension of the preservation orders. The 10th respondent filed a replying affidavit sworn on 28th May 2018 raising similar issues to those of the 9th respondent.

31. Mr Abisai for the 9th and 10th respondents said he was adopting the submissions by his colleagues who had addressed the court before him. He reiterated that the applicant was not deserving of the orders being sought. He argued that the applicant if issued with the said orders would use them to raid the respondents homes.

32. It was his submission that there was absolutely nothing against the two respondents to warrant the issuance of the said orders. Finally he said if any extension was to be granted it should be for a very short time and should never be extended again.

THE APPLICANT'S REJOINDER

33. In a rejoinder M/s Kibogi submitted and relied on the affidavits of Catherine Ngari dated 2/5/18 and 8/5/18. It was her view that at least an extension of one (1) Month had not been objected to. She stated that since the respondents are all linked there was no way the matters would be dealt with separately.

34. She was satisfied that they had set out reasonable grounds to convince the court of the need to extend the orders herein. She pointed out that the restricted titles were annexed to the initial application.

DETERMINATION

35. I have considered the application, affidavits and the submissions by counsel. The application for extension of the preservation orders is sought under section 56(3) of the ACECA which provides 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.

36. The applicant first approached this court on 30th November 2017 under section 56(1) ACECA. The law clearly provides that the application under that Section is brought *ex parte* and there is no provision for an interpartes hearing. The only way it can turn into an interpartes hearing is when a respondent having been served and under section 56(4) ACECA applies to court for discharge or variation of the order. The period within which such an application should be filed is also set by the Act as fifteen (15) days.

37. The applicant moved the court under section 56(3) ACECA and the issue is whether it has explained the need for an extension of the preservatory orders to the satisfaction of the court. The applicant has indicated the grounds supporting its application. The main reason is that in the course of the investigations a lot has been un earthed and the same needs to be investigated.

38. The respondents have on the other hand opposed the application saying there was nothing new that the applicant had brought on board. They are also complaining of interference with what rightly belongs to them when no evidence has been shown to them to challenge the ownership.

39. The issue in contention in this matter concerns money received as payments in respect of various tenders awarded to the respondents by

the Migori county government. There is no denial that such tenders were awarded and payments made. The applicant called for the original documents from the Migori county secretary and they were not forthcoming until a notice under section 27(3) of the ACECA was issued to him to produce. When he finally complied, it was just a few documents that were availed on 25th September 2017. Come 26th September 2017 the Migori county offices which stored various documents including what was being sought were razed down by a fire. It cannot be denied that this had a negative impact on the investigations.

40. A look at the immoveable properties under investigation shows its quite enormous. It is thirty seven (37) parcels of land involved. Contrary to the allegation by some respondents that vital information in respect to these lands was withheld by the applicant, the record shows that copies of all these titles were filed together with the initial application. Secondly the copies of titles filed are shown as having been restricted by the applicant for investigations on 31st July 2017. It is therefore not correct to depone that this information was withheld from the court.

41. The respondents have confirmed that some of them have though belatedly, been served with notices under section 26 ACECA, and they are yet to comply. The notice under section 26 of the ACECA is still part of investigations, and the respondents are expected to supply the information required. It is true that the preservatory orders inhibit one's use of their properties but considering the number of items under investigation it is only prudent that the applicant be given sufficient time to complete the investigation. The outcome could favour the respondents, no one knows.

42. This court through this application does not have the mandate to determine, the weight of the evidence so far gathered. Such will be the task of the court that will hear and determine any proceedings that could be filed under section 55(2) of the ACECA or any other provision of the law.

43. After due consideration of all the material before me I find that this application is merited and is allowed. The applicant is however directed to put more manpower into this investigation and complete it within the time the court is going to allow. The orders issued on 30th November 2017 are extended for a further period of four (4) months.

44. No order as to costs.

Orders accordingly.

Dated signed and delivered this 21st day of June 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE