



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC PETITION NO. 19 OF 2017**

**IN THE MATTER OF: ARTICLES 2, 10, 20, 21, 22, 23, 28, 31, 40, 47, 48 & 259 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF: ETHICS AND ANTI CORRUPTION COMMISSION ACT NO 22 OF 2011**

**BETWEEN**

**SOSTENAH OGERO TARACHA.....PETITIONER/APPLICANT**

**AND**

**ETHICS AND ANTI CORRUPTION COMMISSION.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petitioner/Applicant filed the Notice of Motion dated 2<sup>nd</sup> May 2018 seeking the following orders:

(1) That the 1<sup>st</sup> Respondent be ordered to immediately and unconditionally release the Applicant's funds totaling to Kenya Shillings Seventeen Million Nine Hundred and Forty Thousand (Kshs 17,940,000/- that was seized on the 4<sup>th</sup> May, 2017 from Applicant's House Number H.B. 24 situate within Harambee Estate Buruburu within the City County of Nairobi by the officers and/or agents of the 1<sup>st</sup> Respondent and which funds were in the following denominations.

- a. One Thousand (1,000) notes of Kenya Shillings one Thousand (Kshs. 1,000/-) each
- b. One Thousand Six Hundred and eighty Nine (1,689) notes of one Hundred United States dollars ( USD 100) each
- c. Two(2) notes of Fifty United States Dollars ( USD50) each.

2. That pending the hearing and determination of this application inter parties an interim injunction and/or conservatory order be granted restraining the 1<sup>st</sup> respondent, its servants or agents from undertaking any further attachment of the applicant's properties or interfering with the applicant in any way howsoever or in any manner whatsoever.

3. That the cost of this Application be provided for.

2. The background to this application is that the Applicant filed a Constitutional Petition dated 3<sup>rd</sup> August 2017 seeking orders of mandatory injunction, mandamus, general and aggravated damages and a declaration. The Petition was dismissed with an order that the 1<sup>st</sup> respondent completes its investigations within three (3) Months w.e.f 6<sup>th</sup> December 2017.

3. It is the Petitioner/Applicant's case that the 1<sup>st</sup> Respondent seized money Kshs 17,940,000/- from his home being house no. H.B. 24 situate within Harambee Estate Buruburu within the Nairobi County. That this money was his, from the various businesses he runs. Referring to paragraph 44 of the judgment of 6<sup>th</sup> December 2017, the Applicant claims that the 1<sup>st</sup> Respondent did not complete investigations within the 3 months it was given, and has refused to release the seized funds to the Petitioner/Applicant.

4. Mr Thuku in his submissions told the court that the gist of the application seeks reinforcement of the order of 6<sup>th</sup> December 2017. He urged that the 1<sup>st</sup> Respondent is in contempt of this court's orders. Having violated the court's orders it should not be allowed any extension of the orders, without a formal application.

5. He further submitted that this court is *functus officio* in as far as this petition is concerned. That the only way to attack the merits of the judgment is either through an appeal or review. Referring to the replying affidavit he said the 1<sup>st</sup> Respondent is seeking for enlargement of time in other words asking this court to sit on appeal of its own judgment. On this he referred to the case of **Raila Odinga & 2 others v IEBC petition No. 4 of 2013 [2013] eKLR**

6. He urged that the replying affidavit brings a litany of allegations against the applicant's daughter. The said lady is not a party to these proceedings he argued. Further that if she lied on oath it is perjury which is criminal. In brief he is opposed to enlargement of time for the 1<sup>st</sup> respondent. He wound up saying that the Applicant's right to property under Article 40 should be upheld. He contended that articles 2(1), 10(1) & (2); 19(3) (c), 20(2) (3) (4) 159 (2), 259(1) apply to this matter.

7. The 1<sup>st</sup> Respondent filed a replying affidavit through Nancy Chepcheng an investigator with the 1<sup>st</sup> Respondent. She has averred that the Commission believes that the Kshs 17,940,000 the subject of these proceedings belongs to Dr. Salome Ludyeni Munubi who is purported to be the Applicant's wife. That the seizure of the money in issue was vide a court order obtained in the Chief Magistrate's court Misc. Criminal Application No 1466 of 2017. She referred to paragraph 44 of the judgment herein saying the applicant was directed by the court to avail his daughter to the 1<sup>st</sup> Respondent for purposes of recording a statement following his claim that she is the one who had advanced him the Kshs 17,940,000/- as he waited for a loan from Co-operative Bank.

8. She further deposed that a statement was recorded from the alleged daughter one Priscilla Nyambura Kamande I.D no 23670817. The 1<sup>st</sup> Respondent has doubted the connection between the Applicant and the said Priscilla Nyambura Kamande alias Risper Bwari. Its communication with the National Registration Bureau and Directorate of Immigration and Registration of Persons lead them to the conclusion that the said Priscilla was lying. The Commission also believes that the Kshs 17,940,000 is connected with Dr. Salome Ludyeni Munubi who has been issued with a notice under sections 26 and 55(2) of the ACECA for her to explain the sources of her wealth including the money in issue.

9. M/s Kibogi for the 1<sup>st</sup> respondent in her submissions and referring to paragraph 44 of this court's judgment contended that there was no order for release of the property. That the detention of the property is pursuant to an order by the Chief magistrate's court. The said order permitted them to detain the money until conclusion of the case or investigations. She argued that the crux of the investigation is the source of the money in issue. That it kept on mutating between the parties herein.

10. She submitted that all the allegations in respect to the source of this money must be exhausted. A Notice under section 26 ACECA has been issued and is likely to lead to a suit. It was her submission that the Applicant has not demonstrated any real prejudice he will suffer if the money is not released. On this he referred to the case of **Bruce Robert Sanderson v The Attorney General Eastern Cape case CCT 10/97.**

11. M/s Kibogi argued that this court having been moved by the Applicant as a Constitutional Court cannot determine the issue of ownership of the money. To do so the court will have to be moved under section 55 of the ACECA she said. Further she contended that the issue of ownership was not determined. To this she referred to the case of **Joshua Chelelgo Kulei v Republic & 9 Others Petition No. 66 of 2012 [2014] eKLR.**

Finally she submitted that the replying affidavit explains what has so far been done. She added that article 40(6) of the Constitution excludes unlawful activities.

12. In a rejoinder Mr. Thuku submitted that the source of the money is clearly explained in their affidavits. He referred to article 24 of the Constitution and paragraph 44 of the Judgment and submitted that the application is properly before this court. He however admitted that this court did not order for release of the money.

### **Determination**

13. I have read through the Application, further replying affidavits, annexures, written submissions and authorities. Both Counsel also made oral submissions which I have taken note of. The clear issue that stands out for determination is whether or not this court should order for release of the sum of Kshs 17,940,000/- seized by the 1<sup>st</sup> Respondent's officers from the house of Dr. Salome Ludyeni Munubi whom the Applicant says is his wife.

14. The Applicant has raised so many issues about violation of his rights, referring to articles 24, 40, 159, and 259. This court heard the Constitutional petition filed by the Applicant and rendered a decision on the same on 6<sup>th</sup> December 2017 dismissing the claims on violation of his rights. The court is not going to revisit those issues through this application. Referred to and which forms the basis of the application is paragraph 44 of the judgment which states:

**“The petitioner is asked to support the 1<sup>st</sup> respondent by availing the individual for statement recording as requested as soon**

**as possible. Otherwise, the 1<sup>st</sup> respondent is directed to conduct and conclude its investigations within the next three(3) months from today's date"**

15. It is the Applicant's case that failure by the 1<sup>st</sup> Respondent to complete investigations within 3 month as ordered should lead to the release of the seized Kshs 17,940,000/-. This has been opposed by the 1<sup>st</sup> Respondent. The said Paragraph 44 of the Judgment does not make any mention of the release of Kshs 17,940,000/- if there is non-compliance of the said order.

16. Secondly the search warrant and seizure order were issued by a court with competent jurisdiction vide Chief Magistrate's court Misc. Criminal Application No 1466 of 2017. The said orders have not been reviewed and/or set aside by that court or any other court. The money is being held on the basis of those orders. What the Applicant wants this court to do is to re write its judgment to expand on issues already determined.

17. After due consideration of the matters placed before me I find no merit in the application dated 2<sup>nd</sup> May 2018 and I dismiss it with costs to the 1<sup>st</sup> Respondent.

Orders accordingly.

**Dated signed and delivered this 31<sup>st</sup> day of July 2018 in open court at Nairobi.**

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**HEDWIG I. ONG'UDI**

**JUDGE**