



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISCELLANEOUS APPLICATION NO 6 OF 2018

IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003

AND

IN THE MATTER OF: AN APPLICATION BY THE ETHICS AND ANTI-CORRUPTION COMMISSION FOR AN ORDER UNDER SECTION 56 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003 TO PROHIBIT ENTERING, ENCROACHING, FURTHER CONSTRUCTING, DEVELOPING, OCCUPYING, THE TRANSFER, DISPOSAL OF OR OTHER DEALINGS WITH KERICHO L.R. NO. 631/1833

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

VERSUS

REBECCA CHEPNGENO SANG.....1ST RESPONDENT

KENNETH KOMEN.....2ND RESPONDENT

LYNETTE JEBET RONO.....3RD RESPONDENT

RULING

Introduction

1. At the centre of this case is the parcel of land known as L.R. NO 631/1833 hereinafter referred to as the suit land.
2. The application before me is dated 26th June 2018 and it is brought pursuant to Section 56 (4) of the Anti-Corruption and Economic Crimes Act 2003. In the said application the Applicants seek the following orders:
 - i. Spent
 - ii. That the order of preservation issued in respect to the 2nd and 3rd Respondents'/Applicants' land parcel number KERICHO/MUNICIPALITY L.R. NO. 631/1833 be discharged and the application dated 12.6.2018 be dismissed.
 - iii. The costs of the application be borne by the Respondent
3. The Application is supported by the Supporting Affidavit of Kenneth C. Komen dated 26th June 2018 and is premised on the grounds that the application dated 12th June 2018 was brought to court by the Ethics and Anti-Corruption Commission (hereinafter referred to as the EACC) out of malice. Furthermore, that the aim of the EACC was simply to scuttle the development that the Applicants are currently undertaking on the suit land. It is also stated that the root of the Applicants' title, is clear, transparent and not corruptly obtained. Finally, it is argued that if the orders sought are not granted, the Applicants' Constitutional and proprietary right to own and enjoy land shall be greatly curtailed.
4. The Application is opposed by the Respondent (EACC) through the Replying Affidavit of Julius Simotwo (EACC Investigator) sworn on 26th July 2018. In the said affidavit, the Respondent has given a background of the suit land and explained how it was alienated by the Respondents in what he terms as unclear circumstances and urged the court to dismiss the Application with costs.

The application was canvassed by way of written submissions with highlights by both counsel.

Applicants' Submissions

5. Mr. Siele Sigira learned counsel for the Applicant submitted that the Applicant has a valid title and that the Applicant has attached documents to demonstrate how the title was acquired and referred the court to the Applicants Supporting Affidavit.
6. He also alleged that the matter before the court was *res judicata* and referred the court to **Kericho HCCC No. 14 of 2007** which had been mentioned in the Respondent's replying affidavit at paragraph 13 and a letter annexed to the affidavit mentioning the same case. However, the judgment of the said case was not attached.
7. He contended that the ex-parte Orders should only remain in force if the court looks at the evidence of both parties. He urged the court to discharge the ex-parte Orders since they impact the Applicant's investment on the suit land.
8. Counsel submitted that there is no dispute that in the initial Application dated 12th June 2018, the Respondents therein were issued with court orders. However, he complained that the said Application was never served on his clients. He stated that the failure to serve ought to lead to setting aside of the orders dated 12th June 2018.
9. He submitted that the Applicants have proved that all the steps necessary for being allotted and subsequently issued with land title deed number KERICHO/MUNICIPALITY L.R. NO. 631/1833 were followed.
10. He stated that the Applicants did not engage themselves in any corrupt or fraudulent dealings.
11. He stated that in their replying affidavit, the Respondents do not challenge the authenticity of the documents produced by the Applicants.
12. He argued that there is no proof to support the Respondent's allegation of what they term as "Strategic Government Houses".

Respondent's Submissions

13. Ms Christine Natome learned counsel for the Respondent submitted that Section 56 (1) of ACECA requires the Applicant (EACC) to provide reasonable grounds or suspicion that the suit property was acquired through corrupt conduct. She stated that the proof of this alleged corruption was provided when the application was filed.
14. She submitted that the facts provided were based on preliminary investigations by the EACC and argued that that is the reason why the Order should remain in force pending conclusion of the investigations.
15. She stated that the Applicant herein had not demonstrated that they have sufficient proof to warrant discharge of the Orders.
16. She stated that the investigations being conducted by the Respondent are not complete and that once they are completed the appropriate legal action and redress will be sought. She urged the court to let the Respondents conclude their investigations.
17. She argued that the Applicants have not challenged the Respondent's mandate to conduct investigations of alleged corruption. She contended that corruption is an economic crime and if the Orders are discharged, the investigations by the Respondent will be rendered nugatory, hence defeating the interests of justice.
18. Miss Natome submitted that the investigations carried out by the EACC and the subsequent filing of the Application in court which resulted in the issuance of preservation orders on 12th June 2018 is a Constitutional statutory duty vested upon the Respondent mainly for protection of public property.
19. She submitted that the Applicants are not challenging the statutory mandate of the Respondent to investigate the alleged Economic Crimes and that they have failed to demonstrate that these investigations being carried out against them are unconstitutional, abusive or brought mala fides for a purpose other than one envisaged in the statutes.
20. She contended that investigations constitute a legitimate Constitutional purpose of protecting public interest and funds and that the same is only meant to establish the extent of liability for loss of such property.
21. She submitted that the grant of Preservation Orders on 12th June 2018 against the Respondent/Applicants herein was necessary for EACC to carry out its statutory obligations of investigating the allegations of irregular acquisition of public property as well as institute proceedings for the purposes of recovery and protection of the said public property.
22. She submitted that discharging the Preservation Orders would negatively affect the investigations and the subsequent asset recovery proceedings.
23. Counsel submitted that for the court to discharge the Preservation Orders issued, the Applicants had to satisfy the court, on a balance of probabilities, that the suit property was not acquired as a result of corrupt conduct. It was her contention, that the Applicants have not placed any facts to demonstrate that the suit land was available for alienation nor have they shown that they made an application for allocation of the same.
24. She stated that the Applicants have not denied the averments as contained in the Respondent's Replying Affidavit that the suit land

comprised and was part of land reserved for Government House being KERI/HOU/HG 2 and currently in occupation by the Chief Magistrate, Kericho Law Courts.

25. She submitted that from the Replying Affidavit of Julius Simwoto and the annexures thereto there is evidence that the suit land was not available for alienation under the Government Land Act since the land had already been alienated for a public utility (Government Housing) and that any allocation purportedly under the Government Land Act was contrary to the Constitution and therefore a nullity.

26. She submitted that the illegal alienation of public land vested in a public body could not confer any interest to the Applicants because the allocation, transfer and registration in respect to the suit land were null and void *ab initio*.

27. She argued that Section 24 of the Bribery Act 2016 amended Section 56(1) of the Anti-Corruption and Economic Crimes Act 2003 by deleting the words “on evidence” and substituting the same with “If satisfied that there are reasonable grounds to suspect” thus the Respondents, only needed to demonstrate to the court that there are reasonable grounds to suspect that the suit property was acquired as a result of corrupt conduct to be granted the Preservation Order. On the other hand Section 56(5) requires the Applicants to satisfy the court on a balance of probabilities that property which the order is discharged or varied was not acquired as a result of corrupt conduct.

28. Counsel submitted that despite the Applicants’ argument that their Constitutional rights under Article 40 would be curtailed if the Preservation Orders are not discharged, the same Constitution in Article 24 outlines limitations for the rights and fundamental freedoms of individuals. She argued that any hardship occasioned to the Applicants was temporary and entirely justifiable when balanced with public interest. She argued that Article 40(6) does not extend proprietary rights to any property that has been found to have been unlawfully acquired.

29. She submitted that even though the Applicants alleged that the Application seeking Preservation Orders was not served upon them, they admitted that they had been served under paragraph 2 of the supporting affidavit sworn on 26th June 2018. Further, she submitted that under Section 56(4) of the Anti-Corruption and Economic Crimes Act 2003, it is only the Order which ought to have been served upon the applicants.

30. She submitted that the Applicants who are seeking discharge of the Preservation Orders have not proved their case on a balance of probabilities as required by Section 56(5) of the Anti-Corruption and Economic Crimes Act 2003.

31. She contended that it is in the interest of justice and fair play that the Applicants to be called upon to explain how they acquired the suit property and until they do so satisfactorily, the Applicants should not be allowed to alienate, transfer, dispose of or deal with the suit property in any manner.

Issues for Determination

32. Having carefully considered the application brought before the court, the rival affidavits and the submissions presented by both parties’ advocates, the salient issues that arises for determination are:

- i. Whether the Applicants have proved on a balance of probabilities that the suit property was not acquired as a result of corrupt conduct.
- ii. Whether the court should maintain the Preservation Order or discharge the Orders on record

Analysis and Determination

33. This application to discharge the Preservation Order was brought before the court under Section 56 (4) of the Anti-Corruption and Economic Crimes Act which provides:

“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.”

34. The Applicant’s argued that they had not been duly served in the initial application in which the EACC sought preservation orders and therefore, such failure of service ought to lead to dismissal of the orders by the court.

35. The EACC brought an application before the court seeking the preservation orders under Section 56 (1) of the ACECA which provides:

“On an *ex parte* application by the commission, the High Court may make an order prohibiting the transfer disposal of or other dealing with property if satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct”

36. It is trite that an *ex parte* application is granted at the instance and for the benefit of one party only without notice to or contestation by any party adversely interested. In view of this, the EACC were only required to serve the Respondents with the court orders in the application seeking preservation orders. The Applicants contention that failure to serve the application ought to lead to a discharge of the orders is thus a misguided notion.

37. The crux of this application is Section 56 (5) of ACECA which provides as follows:

“The court may discharge or vary an order under subsection (4) only if the court is satisfied, on a 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”

38. This section sets out the threshold which the Applicants should attain to be granted the discharge orders that they are seeking.

39. In his supporting affidavit the 2nd Applicant has attached a letter of allotment issued to the 1st Applicant on 29th August 1998 together with a copy of a Part Development and beacon certificate. He explains that following issuance of the said documents, the survey details were forwarded to the Director of Survey on Nairobi who in turn forwarded them to the District Surveyor, Kericho for processing and sent the approval to the Commissioner of Lands.

40. The Respondent has however challenged this process by stating that at the time the said allotment was made, the property was not available for allotment as it belonged to the Government of Kenya under the Ministry of Housing and had been set aside as a strategic Government house reserved for the use and occupation of senior Government officers in Kericho County since pre-independence days.

41. He further avers that there is nothing to show that Ministry of Housing which had the legal custody of the house approved of its transfer to a private individual. He therefore contends that the purported alienation and transfer of the suit land was irregular, illegal and thus null and void.

42. The applicants did not present any affidavit evidence before this court to controvert the serious allegations of illegality in the manner in which they obtained the suit land in their names.

43. I am not persuaded that the root of the applicants’ title has been sufficiently explained to satisfy the standard set out in section 54 (4) of ACECA. This is a matter that can only be canvassed after the Respondents have completed their investigations.

44. In arriving at my decision I am guided by the case of the **Ethics and Anti -Corruption and Economic Crimes Commission V Fastlane Freight Forwarders Limited & Others (2017) eKLR** where the court, faced with a similar application, held that the applicant had not proved to the court on a balance of probabilities that they deserved the orders of discharging or varying the preservation orders issued to the Commission.

45. I find and hold that the Applicants have failed to prove on a balance of probabilities, that the suit land was not acquired as a result of corrupt conduct. It would therefore be prudent to allow the Respondents to complete their investigations in order to establish whether the suit land was acquired through dubious and corrupt means. The purpose of the investigations will be defeated if the preservation orders are discharged prematurely.

46. The upshot is that the application fails and is dismissed with costs to the Respondent.

Dated, Signed and Delivered, at Kericho this 19th Day of October, 2018.

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J. M. ONYANGO

JUDGE

In the presence of:

1. Mr. Siele Sigira for the Applicants
2. Mrs. Christine Natome for the Respondent
3. Court clerk – Rotich