



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

MISCELLANEOUS APPLICATION NO. 26 OF 2017

IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003 (CAP 65) AND ETHICS & 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 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, MALINDI BRANCH, ACCOUNT NUMBER [...].

-AND-

IN THE MATTER OF: SECTION 180 OF THE EVIDENCE ACT (CAP 80) LAWS OF KENYA

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

-VERSUS-

EQUITY BANK KENYA.....1ST RESPONDENT

CAPITAL SOLUTIONS LIMITED.....2ND RESPONDENT

R U L I N G

1. The Applicant filed an ex-parte Originating Motion dated 11th January, 2017 pursuant to the provisions of Section 56 of the Anti-Corruption and Economic Crimes Act, primarily seeking to freeze Bank Account Number [...] in the name of Capital Solutions Limited held at Equity Bank Kenya Limited, Malindi Branch, thereby prohibiting the Respondents, by themselves or through their agents, servants or assigns from transferring, disposing of, wasting or in any other way dealing with the said account including a sum of **Kshs. 885,303.55/=** in the said account for a period of six (6) months.

2. The Originating Motion was supported by a supporting affidavit sworn by Lucy Wanjiru Njeru on 11th January, 2017 and a Supplementary Affidavit sworn by Jacqueline Kimani on 30th January, 2017. The orders were granted ex-parte.

3. The 2nd Respondent has come to court and opposes the Originating Motion vide a Replying Affidavit sworn by Sarah Musyimi on 15th February, 2017. The 1st Respondent did not put in any reply in spite of having been served with the Originating Motion.

4. Director of Public Prosecutions vs Nairobi Chief Magistrate's Court & Another (2016) eKLR and Kenya Anti-Corruption Commission v Lands Limited & 7 others (2008) eKLR, which the Court observed that:

“it is clear to the court that Section 56 was inspired by the identification, tracing, freezing and seizure of property provisions of Articles 31 and 51 to 59 of the UNITED NATIONS CONVENTION ON ANTI-CORRUPTION, since as will shortly be apparent other countries or comparable jurisdictions have enacted almost similar provisions modeled on the convention. It is common ground that the Convention has been duly ratified by Kenya and is also notable that Kenya was among the first signatories on the ratification list!” (Emphasis ours).

5. Mr. Makori urged that the application dated 11th January, 2017 was merited for several reasons. The first reason he gave was that the Applicant is currently investigating allegations of corrupt payment and fraudulent acquisition of public funds by the 2nd Respondent from Kilifi County Government and as such there is pending exhaustive investigations and conclusions. That therefore it would be reasonable to preserve the funds held by the 2nd Respondent Bank Account Number [...] in the name of Capital Solutions Limited held at Equity Bank Kenya Limited, Malindi Branch.

6. Mr. Makori's second reasons was that on 16th January, 2017, the Applicant invited, the 2nd Respondent in writing to provide particulars on the basis of acquisition of public funds from Kilifi County Government amounting to 72,365,156.40/= and the 2nd Respondent was yet to provide the requested information and supporting documents.

7. Mr. Makori's third reason was that the EACC had established reasonable grounds to suspect that the 2nd Respondent had unlawfully, fraudulently and corruptly acquired public funds from Kilifi County Government and that part of the said funds passed through the account No. [...] in the name of Capital Solutions Limited held at Equity Bank Kenya Limited, Malindi Branch.

8. Mr. Makori gave a fourth reason which was that EACC intended to conduct exhaustive investigations and thereafter recover public funds unlawfully acquired by the 2nd Respondent from Kilifi County Government amounting to Kshs. 72,365,156.40/= so long as there existed no satisfactory explanation and justification as to how the 2nd Respondent acquired the said funds from Kilifi County Government.

9. Lastly, Mr. Makori argued that the 2nd Respondent's objection to the Applicant's Originating Motion was legally premature and as such untenable in law, because the EACC had sought preservation orders under **Section 56 (1)** of the AECCA. That the 2nd Respondent's objection could only be made under Section 56 (4) of the ACECA.

10. Mr. Makori urged that it was in the interest of justice and public interest for the 2nd Respondent's bank account number [...] in the name of Capital Solutions Limited held at Equity Bank Kenya Limited, Malindi Branch to be preserved pending the conclusion of the Applicant's exhaustive investigations and conclusion thereof. He urged the Court to allow the Originating Motion dated 11th January, 2017.

2ND RESPONDENT'S SUBMISSIONS

11. Mr. Kimani learned Counsel for the 2nd Respondent submitted that the issue for determination by the court was whether the Applicant had satisfied the threshold for having the Respondent's bank accounts frozen. He addressed the court on the burden of proof under **Sections 107 and 109 of the Evidence Act, and asserted** that in the instant case and according to the foregoing provisions of the law the burden of

proof lies with the Applicant, to prove that public funds in the 2nd Respondent's bank account were irregularly and corruptly paid.

12. Mr. Kimani submitted that under **section 56(1) ACECA** the key words are “on evidence” and therefore in order for the Applicant to get the orders prayed for, they were expected to produce sufficient evidence to support their application. He relied on the decision in **Manfred Walter Schmitt & Another v Republic and Another Criminal Revision No. 569 of 2012** and the provisions of 180 Evidence Act and Section 118 Criminal Procedure Code.

13. Mr. Kimani submitted that the Applicant also sought to rely on **Section 180 of the Evidence Act** which provides that:

“(1) Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker’s book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker’s book, and such warrant shall be sufficient authority for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker’s book.”

Section 118 of the Criminal Procedure Code which provides that;

“Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.”

14. He argued that **Sections 180 Evidence Act** and **Section 118 of the Criminal Procedure Code** allows the court to grant Orders sought if there is reasonable suspicion on the part of the Applicant that the Respondent has property acquired through corruption. Counsel referred to Black's Law Dictionary which defines Reasonable Suspicion as:

“A particularized or objective basis, supported by specified and articulated facts, for suspecting a person of criminal activity.”

15. Mr. Kimani cited the case of **Timothy Isaac Bryant & 2 others v Inspector General of Police & 7 others Misc Criminal Appeal No. 194 of 2014** in which Achode J referred to the cases of **Rondo (2001) 126 A Crim R. 562**, and **Emmanuel Suipanu Siyanga v Republic criminal Appeal No. 124 of 2009 [2013] eKLR** on the question of what amounts to reasonable suspicion;

“...reasonable suspicion involves less than a belief but more than a mere possibility. There must be some factual basis for the suspicion; reasonable suspicion is not arbitrary.”

16. Learned Counsel for the 2nd Respondent contended that Justice Achode in the above cases went on to observe that:

“Therefore, even where the basis for seeking the warrants to inspect and freeze a bank account is reasonable suspicion of commission of a crime, there needs to be a basis upon which the police officer moves to court. This is because a reasonable suspicion is not arbitrary. However, in my view, the test for establishing reasonable suspicion is not a matter of strict evidence, that is, proof beyond reasonable doubt. In this respect, I associate myself with the expressions of the Court in the case of Emmanuel Suipanu Siyanga v Republic Criminal Appeal 124 of 2009 (2013) eKLR

that:

“...and it follows that the factual basis which would make nay suspicion which actually formed a reasonable one must also exist at the material time: a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are no grounds which then made suspicion reasonable, it was not a reasonable suspicion. Whether grounds actually existed at the time is to be tested objectively. Consequently, a suspicion maybe reasonable even though subjectively it was based on unreasonable grounds. To prove reasonable suspicion, it must of necessity be recognised that a reasonable suspicion never involves certainty as to the truth. Where it does, it ceases to be suspicion and becomes fact... There must be a satisfactory account...”

17. Mr. Kimani cited the decision in **Vitu Limited vs The Chief Magistrate Nairobi & 2 Others, Misc. Criminal Application No. 475 of 2004** in which it was stated that:

“A police officer is not legally empowered to apply for or to obtain a warrant to investigate a person’s bank account just because he imagines that that person may commit or has committed an offence. There must be substantial facts and circumstances already available....”

18. Mr. Kimani asserted that in the instant case the main question is whether the affidavits sworn by CIP Adan Alhmed Hassan and the two investigating officers, Lucy Wanjiru Njeru who swore the Supporting Affidavit on 11th January, 2017 and Jacqueline Kimani who swore the Supplementary Affidavit on 30th January, 2017 lay a sound basis to raise reasonable suspicion as to the commission of an offence by the Respondent. The police must demonstrate the existence of a legitimate complaint to warrant the issuance of the orders sought. When such is not demonstrated, it would amount to mere allegations. Such demonstration must be looked at in the context of the impact of the orders on the rights of parties affected.

19. Mr. Kimani answered the above question in the negative stating that the two investigating officers merely gave a narration of events with nothing to back them up. He contended that in the Supplementary Affidavit Jacqueline Kimani made reference to what seemed like bank transactions but no bank statements were annexed to support the said allegations.

20. Mr. Kimani urged that it is evident from the supporting Affidavits that the EACC does not have a factual basis at all to seek the freezing Orders as they had failed to establish any reasonable basis to conclude that the listed transactions in Paragraph 5 of the Supplementary Affidavit were corrupt payments from Kilifi County Government.

21. Counsel contended that **Section 56 of the Anti- Corruption and Economic Crimes Act** empowered the Court to preserve property which had been acquired through corrupt conduct. That the Section also empowered the court to discharge an order preserving the property if satisfied on a balance of probabilities that the property was not acquired as a result of corruption.

22. Counsel argued the 2nd Respondent’s Advocates did attend the meeting called to record his statement but to his dismay the relevant officers were not present and the meeting had to be rescheduled to 1st February 2017. According to Counsel it was clear from the above that the Applicant was not desirous of conducting the investigations as regards the allegations facing the 2nd Respondent.

23. Mr. Kimani further contended that the Applicant in this matter is on a fishing expedition and that the bank account stated herein does not even belong to the 2nd Respondent. That there is no nexus between the 2nd Respondent and the bank **Account Number: [...]** in the name of Charity Mueni Musyimi held at **Equity Bank Kenya Limited, Malindi Branch** and the Applicant has therefore all along been conducting investigation in the wrong bank account.

24. Mr. Kimani therefore prayed that the application dated 11th January, 2017 be dismissed with costs as the Applicant had failed to prove their case against the 2nd Respondent.

ISSUES FOR DETERMINATION

25. Having considered the pleadings, the submissions of the respective parties and the authorities relied on, the main issue emerging for determination is whether the Applicant has establish on a balance of probability, that the funds in the frozen accounts were acquired as a result of corrupt dealings to satisfy the threshold for having the Respondent's bank accounts frozen.

ANALYSIS AND FINDINGS

26. Section 56(1) of the Anti-Corruption and Economic Crimes Act provides that;

“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.”

27. The Applicant was therefore expected to produce sufficient evidence in support of their application to be granted the freezing orders. The Burden of Proof as articulated in Sections 107 and 109 of the Evidence Act Cap 180 in this matter lies with the Applicant to prove that the public funds in the 2nd Respondent's bank account were irregularly and corruptly paid.

28. It is important to note at this point that the Kenya Gazette Supplement No. 197 (Acts No. 47) in 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 therefor the words **“if it is satisfied that there are reasonable grounds to suspect.”**

1. The law therefore stipulates that 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 and not on sufficient evidence as was the position earlier. The court must be shown that there are reasonable grounds to suspect that the property in question was acquired as a result of corrupt conduct? **Section 107 and 109 of the Evidence Act** states as follows:

107“1. Whoever desires the Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

109“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

29. The Applicant submits that they are investigating allegations of corrupt payment and fraudulent acquisition of public funds by the 2nd Respondent and the circumstances and the basis under which the 2nd Respondent received payments from Kilifi County government and as such pending exhaustive investigations and conclusion it would be reasonable to preserve the funds held by the 2nd Respondent Bank Account number [...] in the name of Capital Solutions Limited.

30. The Applicant further submitted that the ongoing investigations have established complex money movement which involves analyzing numerous documents, interviewing and recording statements from suspects and witnesses. That it would therefore be in the interest of justice that the application to freeze the bank account be allowed for purposes of recovery of public funds corruptly acquired by the 2nd

Respondent through the said bank account.

31. The 2nd Respondent on the other hand charged that the affidavits sworn by the investigating officers herein do not lay a sound basis to raise reasonable suspicion as to the commission of an offence by the Respondent. The court was told that the two investigating officers merely gave a narration of events with nothing to back them up and that in the Supplementary Affidavit Jacqueline Kimani made reference to what seemed like bank transactions but no bank statements were annexed to support these allegations. Further that the EACC had no factual basis at all to seek the freezing orders, nor had they established any reasonable basis to conclude that the listed transactions in paragraph 5 of the Supplementary Affidavit were corrupt payments from Kilifi County government.

32. The 2nd Respondent, besides opposing the application, has not provided to the court any reasonable explanation, or any evidence regarding the allegations of corrupt payment and fraudulent acquisition of public funds from Kilifi County government by the Applicant. He has not demonstrated that indeed the funds received from Kilifi county government were lawfully acquired in any capacity.

33. The 2nd Respondent had the opportunity to rebut on a balance of probabilities, the allegations of corruption and fraudulent acquisition of public funds by providing to the investigators or the court, any evidence or documentation proving that the Applicant's contention regarding the said funds received from Kilifi County government was baseless but they failed to do so. They have not provided any reasonable explanation on how or why the funds were received into the account.

34. It is the responsibility of the court to uphold the public interest and where in doubt to always strive to strike a reasonable balance between the individual interest and the public interest. In the Manfred Walter Schmitt case to which the court was referred by Mr. Kimani, **Majanja J**, observed thus:

“.....The Court is not a conveyor belt for issuing warrants when an application is made nor must the court issue warrants of search and seizure as a matter of course. When an application is made, the Court is required to address itself to the facts of the case and determine, in accordance with the statutory provisions, whether a reasonable case has been made to limit a person's rights and fundamental freedoms. On the other hand, the duty of the state and its agencies, in investigating and prosecuting crime, is to furnish the Court with facts upon which the Court can conclude that there is a reasonable evidence of commission of a crime by the person it seeks to implicate by the application for search and seizure.”

35. **Section 75 (6) (vii)** of the **Constitution** makes an exception where a law (such as **ACECA**) provides for the limitation of the constitutional rights of individuals if it is necessary for examination, investigation, trial or inquiry. Such limitation is justifiable in a democratic society and the hardship caused to the applicant at this stage by the ex-parte order is temporary and is entirely justified when balanced with the public interest. It is not out of proportion with the objectives of the Act or the Constitution.

36. In the case of **Director of Public Prosecutions vs Nairobi Chief Magistrate's Court & Another (2016) eKLR** Lenaola J (as he then was), stated that the fight against corruption, including being tried for corruption related acts such as bribery is a public interest issue and prosecution of those investigated for corruption and economic crimes is undeniably a matter concerning the administration of justice.

37. Provided that there are some evidential facts at the ex-parte stage to enable the court exercise its discretion, there are no other valid preconditions to the grant of the ex-parte order. At the ex-parte stage the evidential facts need not answer the description of any specific offences of corrupt conduct provided they point to that possibility.

38. The 2nd Respondent in their Replying Affidavit dated 20th February 2017 sworn by Sarah Musyimi also contended that the application was legally defective, draconian, oppressive and thus ought to be struck out as it was a total abuse of the court process and that the EACC misled the court to grant the

freezing Orders dated 13th January 2017 on allegations of fraudulent payment of public funds from the Kilifi county government, when in fact and in the truth the 2nd Respondent had not engaged in any corrupt business dealings with the Kilifi county government.

39. The application complained of is enabled by the law. **Sections 11(d) and (j), 13(2)(c) of the Ethics and Anti-Corruption Commission Act 2011** and Section 23 of the Anti-Corruption and Economic Crimes Act, 2003 mandates the Applicant herein to investigate corruption and economic crimes and to freeze or confiscate proceeds of corruption.

40. Additionally as submitted by Mr. Makori the Commission is mandated by **Article 252 of the Constitution** to conduct its own investigations in relation to Economic Crimes. The grant of Order(s) sought in the application before the court against the 2nd Respondent would therefore be necessary as the EACC is statutorily obligated to investigate any allegations of corruption as well as to institute and conduct proceedings for the purposes of the recovery or protection of public property.

41. The averments by the 2nd Respondent in their supplementary affidavit that the Applicant was malicious and acted in bad faith in seeking the freezing order is not founded on any facts and is therefore without basis. The Applicant submitted that on 16th January, 2017 they invited the 2nd Respondent in writing to provide particulars on the circumstances in which they acquired public funds from Kilifi county government amounting to 72,365,156.40/= and the 2nd Respondent was yet to provide the requested information and supporting documents to the Applicant.

42. The 2nd Respondent in reply to this argued that their advocates did attend the meeting as was scheduled and the relevant officers from the EACC were not present and the meeting was rescheduled to 1st February, 2017. Further that it was clear from the foregoing that the Applicants were not desirous of conducting the investigations into the allegations against them. The 2nd Respondent ought to have seized the opportunity to avail the evidence that would provide a reasonable basis for the acquisition of public funds from Kilifi county government, to either the Applicant or to the court.

43. The 2nd Respondent complained that the Applicant was on a fishing expedition as the bank account stated herein does not belong to the 2nd Respondent and there is no nexus between the 2nd Respondent and the bank account number **0450194515735** which is in the name of **Charity Mueni Musyimi** held at Equity Bank Kenya Limited, Malindi Branch. The 2nd Respondent postulates that the Applicant has all along been conducting investigation on the wrong bank account.

44. The 2nd Respondent's contention as stated above is not only baffling but is also misguided for the reason that the account under investigation by the Applicant is No. **0450294080735** in the name of **Capital Solutions Limited** held at Equity Bank Kenya Limited, Malindi Branch and not the account they have referred to throughout their submissions.

45. If indeed the account that has been frozen by the order of the court bears a different account name and number and has nothing to do with the 2nd Respondent it is not clear why in their Replying Affidavit the 2nd Respondent avers that they have suffered irreparable loss and damage by reason of the said orders; that they could not access funds in the subject account; and that the orders resulted in total paralysis of their activities and operations as they lacked funds to run their business.

46. The Court's findings on this matter therefore is that the 2nd Respondent has not provided sufficient material to controvert the material placed before the High Court at Mombasa and which led to the orders that froze the account in question. In the absence of any reasonable explanation by the 2nd Respondents there cannot be any good ground for the court to interfere with the preservative orders issued by the court at Mombasa.

47. Section 56 has inbuilt safeguards. First, it provides for a hearing on merit at the earliest opportunity.

Second, the Court has the power to vary or discharge the *ex-parte* orders in deserving situations. Third, the freezing orders do not operate in perpetuity. A suspect who cannot therefore provide prima facie evidence of how he acquired the property which is the subject matter of the litigation gives the court no basis on which to make a finding that there are reasonable grounds to discharge the *ex-parte* orders. The sufficiency of the evidence is a matter for the Court to consider during the hearing of the main application.

48. In the end, I find that the Respondent's application for variation lacks merit and is therefore dismissed.

There are no orders as to costs.

SIGNED DATED and **DELIVERED** in open court this 27th day of **April 2017**.

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L. A. ACHODE

JUDGE