



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC. CIVIL APPLICATION NO.8 OF 2017

ETHICS AND ANTI CORRUPTION COMMISSION.....APPLICANT

VERSUS

BOB KEPHAS OTIENO..... 1ST RESPONDENT

EVERLYNE AWINO OGUTU T/A

NYANGUME ENTERPRISE.....2ND RESPONDENT

RULING

1. The application dated 1st March 2017 seeks order for preservation, prohibiting the 1st and 2nd Respondents, their agents or any other person from withdrawing, transferring, disposing or in any way dealing with money in account number [...] domiciled at EQUITY BANK OF KENYA, LIMITED in the name of the 2nd Respondent, and that the orders do remain in force for a period of six months.
 2. The application is premised on grounds that the applicant is carrying out investigations into the allegation of corruption and fraud involving to 1st Respondent who is a public official working as a Clerk with the County Assembly of Homa Bay.
 3. The applicant explains that from preliminary investigations there is reasonable suspicion that the respondent has illegally and irregularly acquired wealth whose origin cannot be explained and the monies deposited to the 2nd Respondent's above quoted account, in the name of the 2nd Respondent who is the 1st Respondent's wife.
 4. It is with the objective of protecting the interest of the public and public funds, that these orders are sought.
 5. In an affidavit sworn by **AHMED OSMAN** (the Forensic Investigator with the Ethics and Anti-Corruption Commission (**EACC**) (applicant herein) it is deposed that the **EACC** has received complaints and allegations relating to the corrupt conduct by 1st Respondent where he has used his wife's (2nd Respondent's) account as a conduct for public funds improperly obtained.
 6. The forensic investigator has explained in a further affidavit dated 3rd April 2017 that having obtained search warrants to investigate the improper bank account, his preliminary findings established that there were unexplained transfers of money from the County assembly of Homa Bay to the 2nd Respondent's account, amounting to embezzlement of public funds – a copy of the bank account is annexed.
 7. These transfers raise such suspicion because there are no services or business whatsoever rendered by the 2nd Respondent to warrant any payment from either the County Assembly of Homa Bay or the Homa Bay County Government.
- There is fear that the respondents may dispose of the funds in the account.
8. The application is opposed as purely to meet the threshold proved far in law and amounts to a conviction before trial, therefore an abuse of the court process.
 9. At the hearing of the application, Miss **AMOJONG** submitted on behalf of the applicant that the statements issued from EQUITY BANK in respect of the 2nd Respondent's account demonstrated a suspicious activity involving large amounts of money ranging from 8 months (being Kshs.,4m, Kshs.4m) on the same day to Kshs.1.24 m. She pointed out that all the credits running into matters were from the County Assembly and of significance is the money transferred from 2nd Respondent's account to the 1st Respondent's account.
 10. In opposing the application, MR. OJURO submitted on behalf of the Respondents that the application ought to have been ex parte, and in

any event violated **Section 33 (1)** of the **Economic Crimes act** which by disclosing the identity of the investigator.

11. It is also argued that the application violates the right to privacy which is protected by **Article 31** of the **Constitution of Kenya**, because the same is investigating a family unit. These lament is that since **Article 35** of the **Constitution** allows members of the public to access information filed in court, then there is a risk of such access, to the detriment of the respondents.

12. Counsel also argues that this application amounts to the Respondents being convicted before undergoing the due process of a trial, and there remains a balance of Kshs.600,000/= deposited in the account which does not match the sum claimed to be deposited. He further submits that this application is totally unnecessary since the 2nd Respondent has already recorded a statement with the **EACC**, and this was a private transaction between an individual and a bank, so the issue of public interest does not arise.

13. The 1st Respondent does not deny that he is a public servant working for Homa Bay County Assembly or that the 2nd Respondent who is his wife holds the account as a sole holder with Equity Bank.

14. Although the transaction involved the 2nd Respondent and the bank, there were large sums of money transmitted from the Homa Bay County Assembly, and so far no claims have been made by the Respondents that there were services or business offered by themselves to the County Government. It is therefore fair for the applicants to say they have reasonable grounds to suspect that such transfer was improper and warrants investigation.

15. Is this a violation of **Article 31** of the **Constitution of Kenya**? **Article 31** provides:-

“Every person has the right to privacy, which includes the right not to have –

a) Their person, home or property searched

b) Their possessions seized

c) Information relating to their family or private affairs unnecessarily required or revealed.

16. Yet this right is not absolute or unlimited and does not fall within the category of fundamental rights and forensic which may not be limited as set out by **Article 25** of the **Constitution of Kenya**. I think the operative word under **Article 31** is **“unnecessarily”** – meaning where it is necessary, such intrusion into privacy is permissible.

17. Should the application fail for having been argued inter partes instead of ex parte? I think **Article 159 (2) (d)** of the **Constitution** that courts pay less regard to procedural technicalities and more attention to subsistence – the subsistence here being the work to presume the account so as to ensure sits status is present and public interest protect. **Article 159 2 (d)** states –

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following precepts:-

(d) Justice shall be administered without undue regard to procedural technicalities.”

18. In my view the procedure adopted in coming to court cannot be a reason to decline the prayers sought – the intent and subsistence is well communicated and understood.

19. The respondent also lament that in disclosing the identity of the investigation, the applicant has violated **Section 33 (1) & (2)** of the **Anti Corruption and Economic Crimes Act** – whereas the said section provides as follows:-

(1) No person shall, except with leave of the Director or with other lawful excuse, disclose the details of an investigation under this Act, including the identity of anyone being investigated.

(2) A person who contravenes this section is guilty of an offence and is liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

How does this adversely affect the respondents? It has not been demonstrated how such disclosure causes prejudice to the respondents or even how it jeopardizes the orders sought.

20. That alone would not render this application defective and I find that the applicant has established sufficient grounds to warrant granting of the orders sought and which shall subsist for 6 months from the date hereof.

21. This order applies mutatis mutandis to **HC MISC. APPLICATION NO.10 OF 2017 – EACC –VS- BOB KEPHAS OTIENO.**

Delivered and dated this 28th day of June, 2017 at Homa Bay

H.A. OMONDI

JUDGE