



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION & ECONOMICS CRIME DIVISION**

**ACECA MIS. CIVIL APPLICATION NO. 23 OF 2017**

**IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT CAP. 65  
AND ETHICS AND ANTI-CORRUPTION COMMISSION ACT CAP 65A LAWS OF KENYA**

**AND**

**IN THE MATTER OF: AN APPLICATION BY ETHICS AND**

**ANTI-CORRUPTION COMMISSION FOR AN ORDER UNDER SECTION 56 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT (CAP 65A) TO PROHIBIT THE TRANSFER OR DISPOSAL OF OR OTHER DEALINGS (HOWSOEVER DESCRIBED) WITH ACCOUNT NO. 01148446670800 HELD BY LULU COMPANY AT CO-OPERATIVE BANK OF KENYA NKURUMA BRANCH.**

**ETHICS & ANTI-CORRUPTION COMMISSION.....APPLICANT**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA.....1<sup>ST</sup> RESPONDENT**

**LULU COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 2<sup>nd</sup> respondent moved the court vide an originating summons dated 13<sup>th</sup> September 2017 under section 56(3) of the Anti-corruption & Economics Crimes Act for the following orders:-

**1. THAT this application be and is hereby certified urgent to be heard ex-parte in the first instance.**

**2. That the Honourable court be pleased to direct that the orders issued on 27<sup>th</sup> February 2017 freezing the 2<sup>nd</sup> Respondent's Bank account number [particulars withheld] held at Co-operative Bank of Kenya, Nkuruma Branch have since expired.**

**3. That the Honourable court be pleased to issue orders directed at the 1<sup>st</sup> Respondent to allow the 2<sup>nd</sup> Respondent to access Bank account Number [particulars withheld] held at Co-operative Bank of Kenya, Nkuruma Branch.**

#### **4. THAT costs of this application be provided for.**

2. The application is supported by the grounds on its face plus the supporting affidavit of Beatrice Tabu Charo sworn on 13<sup>th</sup> September 2017.
3. The applicant opposed the application vide a replying affidavit by Lamek Okun a forensic investigator with the applicant which was sworn on 26<sup>th</sup> September 2017.
4. The applicant further filed another ex-parte originating motion dated 19<sup>th</sup> September, 2017 seeking the following orders

**1. That this application is heard on priority basis due to its urgency and service be dispensed with as envisaged under section 56 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.**

**2. That this Honourable Court be pleased to issue preservation orders to freeze account number [particulars withheld] in the name of LULU Company Limited held at Co-Operative Bank of Kenya Limited, Nkurumah Road Branch Mombasa to prohibit 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 accounts for a period of six (6) months.**

**3. That there be no order as to costs.**

The application was brought under Article 159(2) (d) of the Constitution of Kenya, section 56(3) of the Anti-Corruption & Economic Crimes Act; Civil Procedure Act and Civil Procedure Rules 2010)

5. The application by the applicant was opposed by the 2<sup>nd</sup> respondent- vide the replying affidavit sworn on 5<sup>th</sup> October 2017 by Beatrice Tabu Charo.
6. The court directed that both applications be argued together.

#### **The 2<sup>nd</sup> respondent's/applicant's case**

7. The 2<sup>nd</sup> respondent's case is that the preservation orders issued on 27<sup>th</sup> February 2017 were to last for six (6) months and had lapsed on 26<sup>th</sup> August 2017. In its supporting affidavit the 2<sup>nd</sup> respondent argued that the applicant had had more than sufficient time to conduct its investigations over the matter. That there was therefore no justification of the continued freezing of the 2<sup>nd</sup> respondent's account. In response to the originating motion dated 19<sup>th</sup> September 2017, the 2<sup>nd</sup> respondent averred that the said application was similar to the applicant's application of 27<sup>th</sup> February 2017, whose orders expired on 26<sup>th</sup> August 2017. That its intention was to reinstate the lapsed order, thus frustrating the 2<sup>nd</sup> respondent by preventing it from accessing its bank account.

8. The 2<sup>nd</sup> respondent contends that the applicant had not tabled any evidence before the court to support its averments. It's the 2<sup>nd</sup> respondent's case that investigations must come to an end and that there were no justifiable grounds to warrant issuance of the orders sought.

9. Mr. Odoyo for the 2<sup>nd</sup> respondent submitted that the orders issued on 27<sup>th</sup> February 2017 expired by operation of the law. He referred to several cases from High Court where interim orders of injunction and preservation were never extended and the court found them to have expired. Among them are: **(i)EACC Vs Oregonia Supplies Services & another Malindi High Court Misc. Civil Application No. 77 of 2016.(ii) EACC Vs. Ministry of Medical Services & another [2012] eKLR Nairobi High Court Misc. Civil Application No. 174 of 2012. (iii) Kenya Revenue Authority Vs Jimmy Mutuku Kiamba [2015] Eklr Nairobi High Court Misc. Suit No. 285 of 2015. (v) KACC Vs. John Joel Ria & 17 others [2012] eKLR. (v) Musa Kipkorir & 3 others Vs. Kimutai Sitienei & Another 2014 eKLR. Eldoret**

**Environment & Land No. 878 of 2012.** He submitted that the applicant could not hide under Article 159 of the Constitution in seeking the orders prayed for.

10. On the application by the applicant counsel submitted that the said application was an afterthought. That the 2<sup>nd</sup> respondent relied wholly on the replying affidavit by Beatrice Charo. He argued that the application did not meet the threshold required as no corrupt acts had been shown to exist. It was his submission that the applicant had been given sufficient time to carry out and complete its investigations. He urged the court to allow the 2<sup>nd</sup> respondent's application and dismiss that of the applicant.

### **The Applicant's/Respondent's case**

11. A summary of the applicant's case is found in the replying affidavit of Lamek Okun, who depones that the investigations were on going though at a slow pace. That the applicant had received some documents from Kenya Revenue Authority (KRA) on 13<sup>th</sup> September 2017 and they still expected more information. It's the applicant's case that the investigations had revealed that **Beatrice Tabu Charo** together with **Dama Williams** had opened the account the subject of these proceedings and had admitted receiving through it commissions from companies as tokens for referring clients to them.

12. Further that the investigations were being carried out in Mombasa while the matter was being handled in Nairobi and there had been miscommunication between the two offices. He deponed that the applicant was at the tail end of investigations and lifting the freezing order of 27<sup>th</sup> February 2017 would be disastrous and against public interest. He therefore requested for more time to complete the investigations.

13. On the applicant's own originating motion Mr. Lameck Okun swore a supporting affidavit dated 18<sup>th</sup> September 2017. It reiterates his replying affidavit sworn on 26<sup>th</sup> September 2017. Mr. Opondo counsel for the applicant in his submission told the court that its failure to seek for extension of the orders of 27<sup>th</sup> February 2017 was inadvertent, as explained by Mr. Lamek Okun in his replying affidavit.

14. Referring to the case of **Giant Holdings Ltd. V. Kenya Airports Authority [2004] eKLR Civil Case No. 694 of 2003** he submitted that failure to extend the orders was a procedural technicality, and the court could make any orders to meet the ends of justice. He also asked the court to consider the element of public interest *vis-a-vis* a procedural flaw as was held by Justice Achode in the Case of **Ogolla Mujera advocates V. Banking Fraud Investigation Unit & others Nairobi ACEC Misc. Application Nos. 20,21 & 22 of 2016**. He stated that the same position had been held in the case of **KACC Vs Wilson Gachanja Misc. Application No. 42 of 2007** when Visram J. (as he then was) held that public interest prevails over private interest.

15. He finally submitted that there was no inordinate delay in filing their application, and that no prejudice would be caused to the 2<sup>nd</sup> respondent if the orders were to be extended. He referred the court to the case of **EACC Vs. Nkirote & others 2017 eKLR ACEC Misc. Application No. 43 of 2016** to support his submission.

16. On the 2<sup>nd</sup> respondent's application Mr. Opondo stated that the applicant relied on the affidavit of Mr. Lameck and the further affidavit of Wako J. Galgalo. He submitted that through the said affidavits the applicant had shown that it was still requesting for information from KRA and the said application should be dismissed.

17. In his reply Mr. Odoyo stated that there was no procedural flaw, technicality, extended orders, nor any public interest to be protected in this matter. He stated that the bank statement showed that the deposit of Shs.10 Million was by an individual.

### **DETERMINATION**

18. I have read and considered the application, affidavits, annexures, authorities and the rival arguments

by the parties. I find one main issue for determination to be:

**“Whether fresh orders of preservation should issue or whether the orders freezing the 2<sup>nd</sup> respondent’s A/C. No. [particulars withheld] CO-OP Bank Nkuruma road branch should be lifted”**

19. Section 56 of ACECA provides

**i. 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.**

**ii. 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.**

**iii. An order under this section shall have effect for six months and may be extended by the court on the application of the Commission (emphasis provided)**

**iv. 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 or dismiss the application.**

**v. 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.**

**vi. ....**

20. The orders issued on 27<sup>th</sup> February, 2017 lapsed by operation of the law on 26<sup>th</sup> August 2017. Should the 1<sup>st</sup> respondent then be compelled to allow the 2<sup>nd</sup> respondent to access the money in the subject bank account? My view is that in answering this question the court should consider the following:-

(i) The purpose for which the said orders were issued.

(ii) The steps taken by the applicant regarding the orders issued

(iii) Whether the 2<sup>nd</sup> respondent will suffer any prejudice if the freezing order is not lifted.

21. The basis of the investigation against the operators of the subject account was a complaint against one of the A/C holders by name Beatrice Tabu Charo an official at KRA. The complaint related to the use and transfer of money from proceeds of crime via the subject account which is in the name of the said Beatrice Tabu Charo & another. In granting the preservation & freeze orders on 27<sup>th</sup> February 2017 the court stated as follows;

**“.....it would be in the interest of justice to have the said funds preserved as the applicant conducts investigations.”**

22. The issue then, is whether in the six (6) months preservation period the applicant has conducted any meaningful investigations. The response by the applicant is found in the replying affidavit by Lameck Okun sworn on 26<sup>th</sup> September 2017 and the further affidavit by Wako Jattani Galgallo sworn on 6<sup>th</sup> October 2017 together with the annexures. These explain the progress of the investigations. It has been shown that investigations have been on, and are carried out in Mombasa. It is however noted that the pace has been slow.

23. The applicant being aware that the orders of 27<sup>th</sup> February 2017 had lapsed and that there was nothing

to extend, filed a fresh application seeking similar orders to those issued on 27<sup>th</sup> February 2017. The application is opposed by the 2<sup>nd</sup> respondent, who states that there was no public interest expressed in the matter, as the funds in the frozen account are family funds regularly obtained and deposited. The 2<sup>nd</sup> respondent has not however expressed any prejudice that will be suffered if the orders sought by it are not granted.

24. I am alive to all the authorities cited by the 2<sup>nd</sup> respondent where orders for extension of preservation orders were declined. My take is that each case should be considered on its own merits. For example in a case where preservation orders are given but no investigation or only minimal investigations are conducted, there would be no need for extension of preservation orders in such a case.

25. My finding is that though the orders of 27<sup>th</sup> February 2017 have lapsed, the applicant has explained that the failure to apply for extension was not intentional and/or deliberate. The same is excusable. It is also in the 2<sup>nd</sup> respondent's interest that investigations are carried out to the full conclusion. Who knows, the conclusion may exonerate the 2<sup>nd</sup> respondent from blame? I will therefore disallow the 2<sup>nd</sup> respondent's application on the ground that the applicant has offered a satisfactory explanation for the delay to conduct and conclude its investigations.

26. On the application dated 19<sup>th</sup> September 2017 the applicant has explained the need to be allowed to complete the investigation. It is clear from the nature of investigations that there is a public interest in the matter even if the deposits were made by individuals. In question is the source of the deposits in the subject account. The 2<sup>nd</sup> respondent has not shown any undue hardship that has been caused to it which outweighs the risk of the subject money being concealed or transferred.

27. Given the public interest in the 2<sup>nd</sup> respondent's funds held in the 1<sup>st</sup> respondent's account and the advanced stage of the investigations, I find that it is in the interest of justice to allow the application. In allowing the application I have considered the fact that the applicant has had six (6) months to conduct and conclude its investigations, and the 6 months expired on 26<sup>th</sup> August, 2017.

28. I therefore grant preservation orders in terms of prayer No. 2 of the application dated 19<sup>th</sup> September 2017. The said orders will be valid for only four (4) months from 27<sup>th</sup> August, 2017.

Orders accordingly.

Dated, signed and delivered this 17<sup>th</sup> day of October 2017 in open court at Nairobi.

.....

**H.I. ONG'UDI**

**JUDGE**