



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

MISCELLANEOUS APPLICATION NO. 67 OF 2017

IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT [CAP 65] AND THE ETHICS & ANTI-CORRUPTION COMMISSION ACT [CAP 65A] LAWS OF KENYA

-AND-

IN THE MATTER OF: AN APPLICATION BY THE ETHICS & ANTI CORRUPTION COMMISSION FOR AN ORDER UNDER SECTION 56 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003 AND SECTION 11(1)(J) OF THE ETHICS AND ANTI CORRUPTION COMMISSION ACT NO 22 OF 2011 TO PROHIBIT THE TRANSFER OR DISPOSAL OF OR OTHER DEALINGS (HOWSOEVER DESCRIBED) WITH ACCOUNT NUMBERS 0941419119 AND 0941419127 HELD AT BARCLAYS BANK OF KENYA LIMITED QUEENSWAY HOUSE BRANCH IN THE NAME OF ERA TWO THOUSAND ENTERPRISES AND BIG SALE SUPERSTORES/BIG SALE CHEMICALS RESPECTIVELY.

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

VERSUS

EVANSON THUO WAWERU.....1ST RESPONDENT/APPLICANT

EVANSON THUO WAWERU T/A ERA TWO THOUSAND ENTERPRISES.....2ND RESPONDENT

EVANSON THUO WAWERU T/A BIG SALE

SUPERSTORE/BIG SALE CHEMICALS.....3RD RESPONDENT

R U L I N G

1. By a Notice of Motion dated 5th October, 2017, brought under **Section 56(4)** of the **Anti-Corruption and Economic Crimes Act 2010**, the Respondents/Applicants sought the following orders:

a. THAT this Honourable Court be pleased to discharge and/or vary the orders issued on the 14th of September, 2017 prohibiting the Respondents/Applicants jointly and severally, their agents,

servants or any other person from withdrawing, transferring, disposing or in any other way dealing with the funds held in the bank accounts No. **0941419119** held in Barclays Bank of Kenya Limited, Queens Way House Branch in the name Era Two thousand Enterprises and bank account No. **0941419127** held in Barclays Bank of Kenya Limited in the name of Big Sale Superstore/Big Sale Chemicals.

b. THAT this Honourable Court be pleased to strike out with costs the Applicant/Respondents Originating Notice of Motion dated 13th September, 2017.

c. THAT the Applicant be allowed unimpeded access to bank accounts No. **0941419119** and **0941419127** held at Barclays Bank of Kenya Limited, Queensway House Branch and be at liberty to withdraw funds deposited therein.

d. THAT the order be served upon the Branch Manager Barclays Bank of Kenya Limited, Queensway House Branch.

e. THAT the HC be pleased to issue any other orders that it may deem just and fit in the circumstances.

f. THAT costs of the application be granted.

2. The application is premised on grounds that the orders obtained by the Applicant Commission *ex parte* on 14th September, 2017 were erroneously issued as the Applicant had failed to present any reasonable grounds to suspect that the property held in the 2nd and 3rd Respondents bank accounts was acquired as a result of corrupt conduct as per the mandatory provisions of **Section 56(1)** of the **Anti-Corruption & Economic Crimes Act**.

The Respondent/Applicants Case

3. The Application is supported by the Affidavit of Evanson Thuo Waweru (herein the 1st Respondent) sworn on the 5th of October, 2017 who deponed that he is the sole proprietor of the 2nd and 3rd Respondent companies. The 1st Respondent contended that he was not accorded the opportunity to explain and/or clarify any issues raising suspicion regarding the funds in the subject bank accounts prior to the Applicant obtaining the orders.

4. It was also the 1st Respondent's contention that the Applicant has failed to specify the exact amount of money it intends to preserve and has instead sought a blanket order to freeze all the funds in the subject accounts including funds acquired before and after the period under suspicion. The 1st Respondent averred that his livelihood and that of his family relies solely on his business income, therefore preserving his accounts on suspicion and inferences by the Applicant will occasion him, his family and the business great suffering and loss.

5. The 1st Respondent averred that according to the annexed Tenders, Purchase Orders, Delivery Notes and invoices for goods supplied, the Respondents had conducted legitimate business with the Ministry of Interior and State Departments of Planning and Statistics, and that the Applicant's assertions based on mere suspicion do not meet the threshold contemplated in **Section 56(1)** of **Anti Corruption and Economic Crimes Act**.

6. The Respondents cited the case of **Ethics & Anti-Corruption Commission v Joseph Chege Gikonyo & Giche Misc. App no 98 of 2016 – Nairobi**. They submitted that the Applicant was not deserving of the preservation orders as it had failed to place before the Court evidence demonstrating how the funds held in the subject bank accounts were acquired as a result of corrupt conduct.

7. Learned Counsel for the Respondents, Mr. Kimaru, challenged a letter by the Principal Secretary of the

State Department of Planning and Statistics dated 13th September, 2017 which purported to indicate that the State Department has had no dealings with the 2nd Respondent. He argued that the Applicant had erroneously relied upon this letter and contended that the tenders for supply of foodstuffs and garments with the said Ministry were evidence of dealings between the Respondents and the said Ministry.

8. To cement his arguments Counsel relied on the **Joseph Chege Gikonyo & Giche Ltd** case (supra) where the court held as follows:

“E.A.C.C has not displaced the averments made by the Respondents nor has E.A.C.C. tendered credible evidence to demonstrate, specify and particularise the allegations of corruption against the 1st Respondent. In other words there is no serious attempt on the part of the Applicant/Respondent to carry out investigations to link the Respondents with the act of corruption. It is clear from the pleadings and the submissions that the Applicant/Respondent is heavily relying on inferences to form the opinion that the 1st Respondent acquired and developed the properties mentioned herein by corrupt conduct. In my view, though these proceedings are civil in nature, the allegation levelled against the 1st Respondent is the commission of corruption, which is a serious offence. The threshold is therefore high and the Applicant/Respondent cannot solely rely on inferences to establish such an offence.”

9. It was the Respondent’s submission that the Applicant has not demonstrated on a balance of probabilities that it is indeed conducting any investigation touching on the Respondents. Counsel for the Respondents argued that the Applicant had prematurely approached this court and sought for orders to preserve the subject bank accounts without having called the Respondent for an interview or to record its statement as regards the allegations raised.

10. Counsel cited the case of **Ethics & Anti-Corruption and Economic Crimes Act v Fastlane Freight Forwarders Limited & 8 others [2017] eKLR** and submitted that they had, on a balance of probabilities, demonstrated that the monies in the subject bank accounts were not acquired as a result of corrupt conduct or economic crimes.

11. He also cited the case of **Ethics & Anti-Corruption Commission v Oregonia Supplies Services & Another Misc. Application No. 77 of 2015 – Nairobi** where the court held as follows:

“The applicant has had ample time to investigate the allegations that the 1st respondent received payment for questionable tenders. So far no document has been produced to tie the deposits with any form of payment from the Kilifi County Government. There is no law stopping a citizen from depositing money in his/her own account. The applicants have not established that the money is proceeds of economic crimes. Under Section 56 (5) the court may discharge the freezing orders if on a balance of probabilities, the property in issue was not acquired as a result of corrupt conduct.”

12. Counsel urged that the continued freezing of the bank accounts of the Respondents was contrary to **Article 40** of the **Constitution of Kenya, 2010**. He argued that it is unfair and unjust to deny the Respondents their constitutional right to acquire and own property in the absence of evidence by the Applicant establishing that the same was acquired as proceeds of corruption and economic crimes.

Applicant/Respondent’s Case

13. Learned Counsel for the Applicant, M/s. Ndungu relied on the Replying Affidavits of James Kamau Kariuki sworn on 10th October, 2017 and Geoffrey Kimutai Langat sworn on 13th September, 2017, and the submissions dated 31st October, 2017 in addressing the question whether the orders the Applicant had obtained were contrary to the provisions of **Section 56(1)** of the **Anti-Corruption and Economic Act**.

14. In its submissions, the Applicant referred the Court to the case of **Ethics & Anti-Corruption Commission v National Bank of Kenya & another [2017] eKLR** on the standard of proof.

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

29. The law 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”

15. The Applicant submitted that the threshold upon which the court grants preservation orders under **Section 56** is on “reasonable grounds to suspect”. M/s. Ndungu argued that the Applicant had reasonable grounds to suspect the Respondents based on the Kshs. 1,173,234,004 that the 2nd and 3rd Respondents had irregularly acquired from the State Department of Planning and Statistics, Youth Affairs and Interior in the period between 1st January, 2016 and 31st August, 2016.

16. The Applicant’s submissions made reference to the bank statements annexed in the Affidavit of Geoffrey Kimutai Langat sworn on 13th September, 2017, wherein Mr. Kimutai deponed that the Applicant had received information to the effect that some of the payments into the subject bank accounts belonging to the 2nd and 3rd Respondents were made several times in a day to realize the Kshs. 1,173,234,004.

17. It was the Applicant’s submission that vide the letter dated 29th August, 2017 it requested the Principal Secretary, State Department of Planning and Statistics to furnish it with payment vouchers and tender documents regarding dealings with the 2nd Respondent. In a letter dated 31st August, 2017 the Principal Secretary responded indicating that the State Department of Planning and Statistics had never dealt with the 2nd Respondent.

18. In response to the Respondents’ contention that their constitutional rights under **Article 40** of the **Constitution of Kenya** had been infringed, the Applicant submitted that **Article 24** of the **Constitution** provides for limitations such as the one provided for under **Section 56(1)** of the **Anti-Corruption and Economic Crimes Act**, so as to facilitate inquiry, investigations and trial. Any hardship occasioned to the Respondent is temporary and entirely justified when balanced with the public interest. The Applicant cited the case of **Ethics & Anti-Corruption Commission v Fastlane Forwarders Limited & Others [2017]** on the standard of proof.

19. M/s. Ndungu submitted that the burden of proof articulated under **Section 56(5)** of the **Anti-Corruption and Economic Crimes Act** lies with the party seeking to discharge preservation orders. She argued that the Respondents had not discharged the burden of proof. She cited the case of **Ethics & Anti-Corruption Commission v Njage Makanga & 2 Others [2017]eKLR** in support of this submission.

20. Counsel challenged the contract agreement which the Respondents relied upon and argued that it was not relevant to the period under investigation as it is not a dated document. The Applicant’s submissions further challenged the said contract document as it made reference to Tender No. SB/27/2013-2014 which is different from Tender No. SB/P/4/70 which is the subject of the Letter of Acceptance referred to in the Replying Affidavit sworn by the 1st Respondent on 25th September, 2017.

21. Counsel cited the case of **Ethics & Anti-Corruption Commission v National Bank of Kenya & another [2017] eKLR** which alluded to the exercise of court’s discretion this:

“Provided that there are some evidential facts at the ex-parte stage to enable the court in the exercise of its discretion, to find that reasonable grounds have been established 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 probability.”

22. The Applicant submitted that it has made remarkable progress into the investigation process including recording the statement of the 1st Respondent at the EACC’s headquarters on 29th September, 2017. Discharging the preservation orders would thus negatively affect the investigations and the subsequent asset recovery proceedings.

Disposition

23. Having considered the pleadings, together with the submissions and authorities relied on by the parties, the issues emerging for determination are:

- a. What the extent of the freezing orders should be.
- b. Whether the Respondent/Applicants had proved to the required standard that the property subject of the preservation order was not acquired as a result of corrupt conduct.

24. The Respondents have moved this court under **Section 56 (4)** of the **Anti-Corruption and Economic Crimes Act** which states that:

“A person 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.”

The criteria to be satisfied for the court to discharge or vary an order made under **Section 56 (4)** is provided for under **Section 56(5)**. The said Section states that the court must be 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.

25. The provisions of **Sections 56(4) and (5)** of the **Anti-Corruption and Economic Crimes Act** should be read together with Sections 107, 108 and 109 of the Evidence Act which state that:

Section 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.

Section 108 **“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

Section 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.”**

26. The 1st Respondent avers that the funds in the preserved bank accounts of the 2nd and 3rd Respondent were not acquired in an irregular, peculiar and unlawful manner. That the said funds are proceeds from business dealings between the Respondents and the Ministry of Interior and State Departments of Planning and Statistics. The 1st Respondent has averred that as evidenced by the annexed Tenders, Purchase Orders and invoices, the subject funds were paid out in respect of valid purchase orders issued to the 2nd Respondent for deliveries to the ministry as per their contract.

27. The Applicant has challenged the evidence put forth by the Respondents as the contract agreement is

not dated. The contract document has made reference to Tender No. SB/27/2013-2014 which is different from Tender No. SB/P/4/70 which is the subject of the Letter of Acceptance referred to in the Replying Affidavit sworn by the 1st Respondent on 25th September, 2017. The letter by the Principal Secretary of the State Department of Planning and Statistics dated 13th September, 2017 further indicates that the State Department has had no dealings with the 2nd Respondent.

28. Indeed, as articulated in the case of **Ethics & Anti-Corruption Commission v Fastlane Forwarders Limited & Others [2017]** on the standard of proof:

“The law merely requires the High Court to satisfy itself that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct for it to make an order prohibiting the transfer or disposal of or other dealing with the property. That is the basis upon which the court herein was moved based on the evidence that was placed before it.”

29. Under **Section 56(1) of the Anti-Corruption and Economic Crimes Act, 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.**

30. This court observes that no specific allegation of corrupt conduct has been made against the Respondents in this case. However, it is not disputed that the 2nd and 3rd Respondents received colossal sums of monies from the Ministry of Interior and State Department of Planning and Statistics. The manner of receiving the monies several times a day also raised suspicion.

31. The Applicant moved to court to obtain the preservation order to allow it to conclude investigations into the allegations of corruption between the said Ministry, State Department and the 1st Respondent and also preserve the property to avoid dissipation of public funds, should the allegations be found to have basis. What are before the court are allegations that require further investigations by the Applicant.

32. From the foregoing it is my finding that the Applicant/Respondents have not proved to the court, on a balance of probabilities that they deserve the orders they seek to discharge the preservation orders issued to the Applicant. A person who cannot provide *prima facie* evidence of how he acquired the property which is the subject matter under investigation gives the court no basis on which to make a finding that there are reasonable grounds to discharge the ex-parte orders. Furthermore, the freezing orders do not operate in perpetuity.

33. In the circumstances, I dismiss the application dated 5th October, 2017 and direct the Applicant/Respondent to expedite its investigations.

DATED and DELIVERED at NAIROBI this 19th day of December, 2017

L. A. ACHODE

JUDGE