



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 6 OF 2016

ETHICS & ANTI-CORRUPTION COMMISSIONS APPLICANTS

VERSUS

DIAMOND TRUST BANK LTD 1ST RESPONDENT

TECHNO CURE SOLUTIONS 2ND RESPONDENT

RULING

The originating motion dated 19.2.2016 seeks the following orders: -

1. Spent
2. **The Honourable Court be pleased to issue a warrant to the Ethics and Anti-Corruption Commission or any of its investigators duly appointed by the applicant to investigate, inspect and lift originals of records, application forms, mandate cards, instructions notes, bankers books, statements of accounts and any other relevant documents to investigate account number 0038174001 in the name of Techno Cure Solutions held at Diamond Trust Bank, Kilifi branch.**
3. **A further order do issue to freeze account numbers 0038174001 in the name of Techno Cure Solutions held at Diamond Trust Bank, Kilifi 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 accounts for a period of six (6) months.**
4. **There be no order as to costs.**

The application is supported by two affidavits of **Omar Kofa Komora** sworn on 19.2.2016 and 14.4.2016 respectively. The 2nd respondent filed an application dated 17.3.2016 seeking to have the ex-parte orders set aside or discharged. The application is supported by the affidavit of **Davis Katana** sworn on 17.3.2016. The two applications were heard together.

Miss Olivia, counsel for the applicant, submitted that the applicant is seeking to freeze the 2nd respondent's account for a period of six months. After the interim orders were granted, the applicant accessed the 2nd respondent's account. The investigations are based on allegations of overpayment and payment for undelivered goods.

Counsel submitted that several documents were collected. There is a payment voucher for Kshs.1,801,724.10 for internet connection. Three companies invited for quotations belong to the same person. The amounts in the quotation forms are different from what is indicated in the supporting

minutes. The minutes are faulty. An advice was given not to pay the voucher but it was paid. The chairman of the tender committee has recorded a statement with the applicant.

With regard to the application by the 2nd respondent, counsel maintains that the further affidavit has annexed several documents in support of the application. Part of the payments to the 2nd respondent are not supported by any documents. The payments total over Kshs.50 million. There is prospective loss to the Kilifi County Government. Davis Katana is the owner of the 2nd respondent. Investigations are ongoing. The tender issued to the 2nd respondent was tailor-made specifically for the 2nd respondent. Although there was no bid for Kshs.1.5 million the minutes indicate that the tender was awarded to the lowest bidder for Kshs.1.5 million.

Mr. Mugambi, counsel for the 2nd respondent in opposition to the applicant's motion submit that the application is vague and lacks substance. The applicant did not bring any probable cause to warrant the freezing of the account. The freezing order infringes on the 2nd respondent's right to privacy. There is admission that the 2nd respondent renders services lawfully to the Kilifi County Government. The documents provided by the applicant in the further affidavit have a diagonal cancellation line and should not be relied upon.

The respondent's counsel maintains that the alledged minutes for the tender for internet connection do not tally in their pagination. These are not the full minutes. The amount of tender by the 2nd respondent was Kshs.1.9 million and it was constant. The 2nd respondent's account is for business purposes and there are other clients. Counsel contend that only the first page of the bank statement is certified by the bank. The 2nd respondent is a business name and not a limited liability company and therefore could not be directly sued.

I have read the two affidavits by Mr. Omar Kofa Komora in support of the application. Basically, the first affidavit of 19.2.2016 was for purposes of obtaining the interim orders. It has no annexures. The further affidavit formed the basis of Miss Olivia's submissions in support of the application. There are several annexures to the affidavit.

On the other hand, Davis Katana, the proprietor of the 2nd respondent, has annexed several documents in support of the application to discharge the freezing orders. The 2nd respondent maintains that it was prequalified by the Kilifi County Government to provide services. Such services include cleaning of Kilifi Hospital at a monthly rate of Kshs.350,000/=, supply of some medical equipment, supply of computers and installation of Local Area Network. The 2nd respondent has tabulated some of the services provided to the Kilifi County government and the amounts paid.

The main issue for the court's determination is whether the account of the 2nd respondent should continue to be frozen for a period of upto six (6) months or whether the freezing orders should be vacated. The application is grounded on the provisions of Section 56 of the Anti-Corruption and Economic Crimes Act (Cap 65). Section 56 provides for circumstances under which orders can be issued by the court preserving suspected property. A person aggrieved by the court's order can apply to the court to have it varied or set aside. Section 56 (5) sets the standard of proof for the discharge or variation of the order as that of balance of probabilities.

Apart from the general contention that the 2nd respondent was paid for undelivered goods or overpaid, the applicant has placed emphasis on a payment of Kshs.1,801,724.00 for network services. I have gone through the documents provided by the applicant relating to this particular service. The 2nd respondent's bundle of documents at page 390 (B) provides a list of some of the payments from Kilifi County Government. It is shown that there were three separate payments of Kshs.1.9 million for networking services. The accompanying invoices show that the services were provided to three separate departments or ministries of the Kilifi County Government. The document indicating that payment was stopped dated 1.12.2015 relates to payment of V.A.T to the Kenya Revenue Authority. There is no document indicating

that the 2nd respondent's payment was stopped.

I have gone through the bank statement of the 2nd respondent. I do take the statement to be the correct statement of the 2nd respondent even if the other pages were not certified by the bank. The 2nd respondent does not deny that the statement is not theirs. The statement shows that apart from various cash deposits, all the payments are largely from the Kilifi County Government.

With regard to the particular payment of Kshs.1,801,724.10, there is evidence that the County Government requested for quotations for that particular service of Local Area Network at the agriculture Department offices. The 2nd respondent's quotation is for Kshs.1.9 million. Mats massive markets quoted Kshs.1,950,000/= while Eity Consult Ltd quoted Kshs.1,980,000/=. There are minutes of the tender committee of 5.8.2015. The minutes gives different figures for the other two companies as Kshs.2.2 million and 2,147,000/= respectively. The request for quotation was placed on 31.7.2015. I do agree that the minutes do not tally as the number of pages range from 1, 61, 62 and 74. The minutes also are having a diagonal line and it is not clear whether that denotes cancellation.

The particular payment voucher for Kshs.1,801,724.10 show that it was payment of Kshs.1.9 million for the LAN Services. The voucher was examined on 26.10.2015 and subsequently paid on 7.12.2015. The money was reflected on the 2nd respondent's account on 9.12.2015. The sequence of events appear to me to be proper. Further, the 2nd respondent's bank account reflect other large payments such as Kshs.16,972,241.40 on 17.4.2015 and Kshs.23,517,241.40 on 18.6.2015 all from Kilifi County Government. The account also has cash deposits varying from one million to five millions. The payment of Kshs.1.8 million should not raise any eyebrows.

On a balance of probabilities, I do find that the 2nd respondent has been doing business with the Kilifi County government. The final account balance as on 29.2.2016 when the account was frozen is Kshs.342,105.68. To continue freezing that account does not assist the applicant's investigation. The applicant can still continue with its investigations upto completion and decides on the next step. Freezing this particular account will not help the investigations. The account has continue to be frozen from 22.2.2016 to date. This is a period of over three months. Although Section 56 of Cap 65 provides for six (6) months, that does not mean that freezing of a suspected account must last for six months. The applicants have had ample time to carry out its investigations.

In the end, the ex-parte orders issued on 22.2.2016 are hereby discharged. The notice of motion by the 2nd respondent dated 17.3.2016 is allowed as prayed. There shall be no order as to costs.

Dated and delivered in Malindi this 26th day of May, 2016.

S. J. CHITEMBWE

JUDGE