



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 14 OF 2016

ETHICS & ANTI-CORRUPTION COMMISSION APPLICANT

VERSUS

CO-OPERATIVE BANK LTD 1ST RESPONDENT

BIJOSE INVESTMENTS LTD 2ND RESPONDENT

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The application 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 01136250890400 in the name of Bijose Investments Limited held at Co-operative Bank Limited, Mariakani branch.
3. A further order do issue to freeze account numbers 01136250890400 in the name of Bijose Investments Limited held at Co-operative Bank Limited, Mariakani 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.

The application is supported by two affidavits sworn by Omar Komora on 19.2.2016 and 11.4.2016 respectively. The 2nd respondent filed grounds of opposition and replying affidavit by Daniel Beja Ria sworn on 4.4.2015.

Miss Olivia Mureith, counsel for the applicant relied on the application and the supporting affidavits. Counsel submitted that an internal audit was done at Kilifi County Government. The audit found that there were double payments to some suppliers while other suppliers were paid for goods that were not delivered. The 2nd respondent was included in the list. The 2nd respondent was paid through a voucher dated 19.10.2015 a sum of Kshs.8,702,870. There are no supporting documents for that voucher. The tender was advertised on 17.10.2014 and payment was effected in the same month. There is a clear mishap of dates. Counsel further contends that there were double payments made on 22.1.2016 for Kshs.330,000/=. The applicant is still investigating the matter and needs more time.

According to the counsel for the applicant, the 2nd respondent was paid some money for alleged

supply of items for floods victims. The items supplied are quite few and are utilities for hospitals. The investigations involve procurement issues which are quite complicated. The items supplied for the floods victims could not even cater for fifty (50) people. Some tenders were awarded by the former County Council and the payment rate was changed. It is not clear when the rates were changed by the Kilifi County government.

Mr. Kenga, counsel for the 2nd respondent opposed the application. Counsel maintains that the allegations of double payments have not been proved. The services provided include hiring of lorries for garbage collection. The amount claimed is similar but the services were provided in different days. A sum of Kshs.355,000/= was claimed for garbage collection lorries at Majengo yet a similar amount was paid for a different service order. The 2nd respondent also provided garbage collection services at Mtwapa.

Counsel further submitted that delay on payments is an issue involving the Kilifi County Government. Payments cannot be made on the same day of the request. Delay in payment is not the 2nd respondent's problem.

According to Mr. Kenga, the applicant's documents do confirm that tenders were made. Even if there were irregularities in the tender process, deliveries were made. The 2nd respondent's account was frozen on allegations that no supplies were made. The respondent started dealing with the former County Council of Kilifi even before the Kilifi County Government came in. The 2nd respondent's right on his account cannot be violated by having it frozen because of suspicion of other suppliers.

The application herein is brought under Section 56 of the Anti-Corruption and Economic Crimes act (Cap 65) and Section 11 of the Ethics and Anti-Corruption Commission act, Cap 65A Laws of Kenya. The application was made on the grounds that preliminary investigations disclose that the 2nd respondent has received funds from the Kilifi County Government being payment for undelivered goods. The applicant requested the court to freeze the 2nd respondent's account with the 1st respondent pending the conclusion of investigations. The court granted interim orders and the 2nd respondent's account remains frozen todate.

The main issue for determination is whether the 2nd respondent's account should remain frozen for a period of six (6) months from the date an application for freezing orders was made on 19.2.2016. Over three (3) months have now lapsed and investigations are still on-going.

Counsel for the applicant dwelt on two main areas. Firstly, the issue of double payment and secondly, the issue relating to supply of materials for floods victim. There is also the general issue of the 2nd respondent's dealing with the Kilifi County Government. With regard to double payments, counsel picked two payments for a sum of Kshs.330,000/= made on 26.1.2016. The 2nd respondent's account shows that the two payments of similar amount were made on the same date. Counsel further submit that a payment voucher for Kshs.8,702,870/= was made without supporting documents.

Section 56 of Cap 65, Laws of Kenya states as follows: -

- 1. 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 on evidence that the property was acquired as a result of corrupt conduct.**
- 2. 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.**
- 3. An order under this section shall have effect for six months and may be extended by the court on the application of the commission.**
- 4. 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 and the court may, after hearing the parties, discharge or vary the order or dismiss the application.**

5. 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 as not acquired as a result of corrupt conduct.

The above provision empowers the court to preserve property which has been acquired through corrupt conduct. The court can also discharge an order preserving the property if satisfied on a balance of probabilities that the property was not acquired as a result of corrupt conduct.

The documents herein show that the 2nd respondent used to do business with the former County Council of Kilifi. Minutes of meetings of the former County Council awarding tenders to general suppliers including the 2nd respondent were annexed. These include minutes of 11.2.2009 chaired by the Deputy Town Clerk, Saidi M. Unda.

The 2nd respondent's explanation on the issue of double payments is that the services were similar and for different days. I do find that the 2nd respondent was providing services and supplying materials to the Kilifi County government. At times the amount requested in different invoices was similar. A case in point is a letter dated 24.10.2013, (page 56 of replying affidavit) which indicate that the same amount of Kshs.104,200/= was being requested in three separate invoices dated 30.7.2012, 2.9.2013 and 30.9.2013 respectively. I have seen the separate invoices for similar amount. There is also a local service order for Kshs.355,000/= for 9.6.2014 and another service order of the same amount dated 17.12.2014. The claim is for provision of garbage collection services.

It is therefore possible for there to be payments of similar amounts. Payment was not being effected immediately. It cannot be concluded with finality that indeed the sum of Kshs.330,000/= paid twice on 26.1.2016 to the 2nd respondent – amounts to double payment.

Counsel for the applicant raised the issue of a payment voucher for Kshs.8,702,870/=. The 2nd respondent's bank statement indicate that that amount was paid on 2.12.2015. The further affidavit by Omar Kofa Komora annexed a letter dated 6.8.2015 from the County executive member for finance and Economic Planning addressed to the chief officer, Finance and Economic Planning. The letter refers to deadly clashes at Kanagoni in Magarini sub-County where some people were killed. A request to commit Kshs.11 million was being made.

The payment voucher annexed as "OKK1" is for local service order No. 2528759 and relates to the 2nd respondent's invoice No.73. The invoice is annexed to Mr. Komora's affidavit and is dated 16.10.2015. The amount in the invoice is for Kshs.9,177,572/=. The items supplied are indicated in the invoice. The invoice indicate that its payment for the supply of satchets chlorine, blankets etc, this is in line with invoice number 073. The payment voucher was processed and the "paid" stamp is dated 1.12.2015. Money was credited in the 2nd respondent's account on 2.12.2015. I believe the claim was subjected to certain deductions such as V.A.T and withholding tax. I do find that there is mishap of dates relating to this particular payment.

I have gone through the 2nd respondent's account with the Co-operative Bank. Apart from payments from the Kilifi County Government, there are other payments from the Kenya Ports Authority (K.P.A.). On 4.12.2015 Kshs.3,943,588/= was received from the K.P.A. On 19.2.2016, a sum of Kshs.183,531/= was also received from the K.P.A. Kshs.91,540/= was received from K.P.A. on 17.2.2016. From 1.8.2015 to 24.2.2016, Kshs.22,512,580/= was deposited in the account. The outstanding balance as at 24.2.2016 is Kshs.4,657,752. The payment proceeds are clearly stated in the Bank statement.

The application was made as a result of suspicion that the 2nd respondent received funds from the Kilifi County Government for undelivered goods. The documentation show that the 2nd respondent delivered goods that were requested by the Kilifi County Government. On a balance of probabilities the payments to the 2nd respondent were not made for underlived goods. The suspicion was well

founded but the documentation clears the same.

The applicant is empowered to undertake investigations on economic crimes. Freezing of suspected accounts enables the applicant to carry out further investigations. The 2nd respondent's account was frozen on 22.2.2016. Three months have lapsed. I believe that is ample time to conduct investigations. Investigations can still go on even if the account is unfrozen. The sum of Kshs.4.6 million in the 2nd respondent's account cannot be the reason to stop investigations if it is unfrozen. The 2nd respondent's payments were processed by staff of the Kilifi County Government. No single staff has sworn an affidavit indicating that the payments were irregular.

In the end, I do find that continuous freezing of the 2nd respondent's account is not proper. The application by the applicant dated 19.2.2016 to have the account frozen for upto six (6) months is disallowed. The ex-parte orders granted on 22.2.2016 are hereby vacated. There shall be no orders as to costs.

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

S.J. CHITEMBWE

JUDGE