



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO. 178 OF 2014

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

VERSUS

JOHNCELE INSURANCE BROKERS LTD.....RESPONDENT

RULING

- 1). On 28-8-2014 during summer vacation the applicant/respondent herein approached by way of certificate of urgency this Honourable court seeking interim orders freezing the applicant's bank account No. 1103742760 at Kenya Commercial Bank Ltd Kisumu Branch. That application dated 27-8-2014 was allowed which then provoked the applicant's appeal dated 15-9-2014.
- 2). The application by the respondent herein seeks to set aside the ex parte orders and order that the aforementioned account be defreezed. It is supported by the affidavit of one Kennedy Ogutu the applicant's manager sworn on the even date. According to the applicant the agreement between it and the Nyamira County Assembly was above board and that all the requisite procedures in terms of procurement were pursued. That the amount of Kshs. 30,000/= deposited in its account were properly done and there was no trace of fraud and or corruption. It averred further that the freezing of the account has adversely affected its other customers or clients who are innocent parties.
- 3). The appellant argues further that in any case the monies has been expended towards the medical insurance cover. The continued freezing of the account shall impact negatively to the applicants business who is likely to incur lawsuits from other third parties.
- 4). The respondent by the replying affidavit of Wycliffe Sirengo has opposed the application. The basic argument is that there is an ongoing investigation by the respondent which seeks to establish how the sum of Kshs. 30 million was transferred to the applicant's account. According to their preliminary findings the same was fraudulently obtained through illegal tendering procedure and that this being public funds there was need to protect the same. In any case the Anti Corruption and Economic Crimes Act, 2003 (hereinafter the Act) clearly demands that in the event of any reasonable suspicion it is the responsibility of the respondent to take such steps so as to protect the interest of the public, in this case the County Assembly of Nyamira.
- 5). Having summarised the facts herein it is noteworthy that the orders granted by the court are essentially interim and that the substantive arguments for now are reserved for the main suit. I have perused the applicnats application together with the annexures thereon. I have also perused the rival affidavits on record by the respondent as well as the authorities cited by both parties.
- 6). The applicant's contention that the ex parte order was issued illegally as the court, namely, the Land and Environment court did not have jurisdiction in my opinion for now is moot question. The parties in

particular the applicant has agreed to entertain the application in this court. Consequently it has acquiesced and if there was any reason to challenge the orders for the reason of jurisdiction then it ought to have approached the said court. I do not see in any case the prejudice to be suffered by the applicant.

7). The substantive issue though is whether the application as it stands ought to be allowed. Does the originating summons by the respondent establish a prima facie case against the applicant? If this question is answered in the affirmative then the applicant's application ought to fail.

8). Section 56 of the Act as it stands empowers the respondent to apply to the High Court for orders prohibiting transfer of property or dealing with property on evidence that the same was acquired through a corrupt conduct. Section 7 thereof defines a "Corrupt Conduct" as:

- a. **Conduct that constitutes corruption or economic crime; or**
- b. **Conduct that took place before this Act came into operation and which;**
 - i. **at the time, constituted an offence.**
 - ii. **If it had taken place after this Act came into operation, would have constituted corruption or economic crime".**

9). For now this court shall basically analyse the affidavit evidence on record to see whether there is any trace of fraud and prima facie may form a "Corrupt Conduct". There are two salient documents which I think ought to be determined. The first document is the correspondences from the County Assembly of Nyamira. According to annexure KO1, to KO 5 of the applicant's affidavit, the said Assembly okayed the transaction. However annexure No. 7 (b) in the replying affidavit of Mr. Sirengo, that is the letter dated 25-7-2014 seemed to

state otherwise. The same states in part:

"From the onset, take exception that the content of the letter are mischievous frivolous and malicious, as it purports that there exist between the County Assembly of Nyamira and Johncele Insurance Brokers Ltd.....".

10). The said letter is signed by one Dvaid Ombego, the Acting clerk. The other interesting correspondence is from UAP Insurance Company to the CID Officer Nyamira County dated 13-5-2014 in respect to the same medical scheme. This also applies to the letter from Jubilee Insurance dated 28-4-2014 to the CID Officer Nyamira. Both letters deny having issues with the provision of Medical Insurance cover for the county.

11). In my opinion therefore, the two correspondences from M/S UAP and Jubilee Insurance goes against the allegation by the applicant. What then would be the effect of allowing the application? The applicant shall of course continue to trade as usual. But shall this serve the interest of the public especially the people of Nyamira County? I do not think so. The essence of establishing the respondent body was to safeguard the interest of the public. For now all that the respondent is doing is to establish if indeed there is any corrupt deal in the provision of medical cover for the Assembly members. Essentially there is nothing wrong with this. However it would be in the interest of the Assembly to know that their medical cover was procured above board.

12). This court is alive to the ongoing issues in the society and that it ought to preserve any property or assets belonging to the society. This was expressed way back in the case of **Shivabhai Nathabhai Patel - VS- Hathibai Patel [1995] EA 907** where the court held that:

"In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the plaintiff succeeds in the suit there might be a barren result ; and that is the duty of the court to try to avoid".

13). It will be superfluous to allow the application, have the amount withdrawn and then after the

application the respondent wins only to find that the success was in vain. However, I think it is worthwhile also to note the argument by the applicant that the amount in that account did not necessarily emanate from the respondent alone. The applicant has attached several correspondences between it and other county governments. I believe it will be onerous for applicant to operate without taking into consideration the difficulty it stands to face from the third parties. I do agree that it risks facing suits from its other clients.

14). To strike a balance therefore I do disallow the application with no order as to costs. I shall however vary the order granted by my brother on 28-8-2014 to the extent that the amount of Kshs. 30,000,000/= in the applicant's account No. 1103742760 at KCB Ltd, Kisumu Branch be frozen and any other amount beyond the 30 million be released to the applicant forthwith. This is informed by the fact that the respondent interest only centred on the sum of Kshs. 30 million. Orders accordingly.

Dated, signed and delivered at Kisumu this 18th day of February, 2015.

H.K. CHEMITEI

JUDGE