



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
MISCELLANEOUS APPLICATION NO 408 OF 2013

ETHICS AND ANTI-CORRUPTION COMMISSION.....APPLICANT

VERSUS

JULIUS MATASYO..... 1ST RESPONDENT

FLORA ATITI MATASYO.....2ND RESPONDENT

ROBERT HYDER NDUBI.....3RD RESPONDENT

RULING

1.The Applicant filed a **Notice of Motion** dated **16th January, 2014** seeking orders *inter alia*, that the Application be certified as urgent; that there be a stay of the order granted by this Court that the Originating Motion dated **19th December, 2013** be transferred to the lower court for hearing and determination and that this Court be pleased to review and/ or set aside the ruling and/ or order delivered on **8th January, 2014** requiring the above transfer.

2. I already dealt with prayers 1 and 2 of the Application on **16th January 2014**, which prayers were granted *ex parte*. This ruling is therefore on prayers 3 and 4.

3. The Application is premised on the grounds that the Court made an error of law and fact by not taking into account the provisions of **Section 56 of the Anti Corruption and Economic Crimes Act** in making its determination to transfer the suit for hearing and determination to the lower court; that it will be in the interest of justice if the said order was reviewed because the applicant and the public at large will suffer irreparable harm if the Respondents continue enjoying the proceeds of irregularly acquired public land.

4. The Application is supported by the affidavit of **Kipsang Sambai**, an investigator with the applicant Commission who reiterates the above grounds and prayers in the Application.

5. In a rejoinder the Respondents filed **Grounds of Opposition** on **11th February, 2014** on the grounds that the application is incompetent, frivolous, vexatious and unmeritorious; that the court properly exercised its jurisdiction in making the order to transfer the application to the lower court for hearing and determination which court has the competent jurisdiction to properly dispose of the matter.

6. The Application was heard on **11th February, 2014**. **Mr Machira**, learned counsel for the Applicant submitted that **Section 56 of the Anti Corruption and Economic Crimes Act** gave the High Court exclusive jurisdiction to make orders on evidence to prohibit the transfer of property acquired through corrupt conduct and that the matter is about jurisdiction, not pecuniary value of the

property. He relied on various authorities which I will refer to later in this ruling. Further, it was his contention that **Rule 12** of the **Chief Justice's Practice Directions** dated **9th November, 2012** as issued in **Gazette Notice No. 16268** excludes matters under **Rule 7** of the same practice directions.

7. **Mr Machira** also submitted that the Environment and Land Court is empowered under **Article 162** of the Constitution and **Section 13 (7)** of its constituent Act to issue preservation orders, and that this particular application under **Section 56 of the Anti Corruption and Economic Crimes Act** is unique to the High Court, and is couched in mandatory terms.

8. **Mr Mongeri** for the Respondents submitted that **Section 56 of the Anti Corruption and Economic Crimes Act** was not mandatory, as the use of the word "may" implies. Furthermore, the court cannot on its own Motion go granting orders guided by **Section 55(3)** which requires that the application be brought by way of Originating Summons, which is not the position in this case. **Mr Mongeri** further submitted that the applicants had admitted to the pecuniary jurisdiction of the lower court, that the matter of preservation had already been dealt with; that **Section 30 of the Environment and Land Court Act** was clear that the Chief Justice's could make rules to help in operation of the court and there would be no constitutional crisis should the matter be heard and determined in the lower court.

9. **Mr Machira** by way of rejoinder reminded the court that this matter was just about preservation and that the court had discretion. He pointed out that **Section 55 (3) of the Anti-Corruption and Economic Crimes Act** only contemplates such an application once investigations are completed and that this application was made on property that is suspect.

10. The question before this court therefore, is whether an application filed under **Section 56 of the Anti Corruption and Economic Crimes Act** can be handled by the subordinate Court.

11. Before I make a determination in this matter, it is important to have a glance at what **Section 56(1) of the Anti Corruption and Economic Crimes Act** states. It provides as follows:

"56 (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"

12. **Section 5 of the Magistrates' Courts Act** provides for the pecuniary jurisdiction of the Magistrate Courts' in civil matters and the fact that the suit property falls within the pecuniary jurisdiction of the Magistrate Courts is indeed admitted by both parties.

13. **Mr Machira** for the Applicant relied on several authorities to support his position. I shall comment on two: the first is **Kenya Anti Corruption Commission v Judith Marilyn Okungu & 2 others (Miscellaneous Application No 186 of 2007)** and the second is **Kenya Anti Corruption Commission v Wilson Gachanja & 4 Others [2007] eKLR (Miscellaneous Application No 42 of 2007)**.

14. In the above two decisions both by **Visram J** (as he then was), he noted that **Section 56** created a new jurisdiction and henceforth new procedure. He also noted that the filing of a suit under **section 7 (h) (i)** (or indeed any other section as was contended by **Mr Mangen**) was not a condition precedent to the success of such application under Section 56. In the case of **Kenya Anti Corruption Commission v Wilson Gachanja & 4 Others [2007] eKLR (Miscellaneous Application No 42 of 2007)**, **Visram J** (as he then was) stated;

"Indeed, it is easy to come to the conclusion that Section 7(h) (i) of the Act requires that a suit for the recovery of property be instituted, before Section 56 is invoked to seek an Order preserving the property sought to be recovered. That is logical. But I must go well beyond the logical analyses presented by Counsel; I must look at the intention of Parliament in enacting this important legislation; I must consider the mischief that this law

intended to address; and I must give it a purposeful interpretation that I believe coincides with the intent of the legislature. In Kenya Anti-Corruption Commission v. Lands Limited (supra) I observed as follows;

"Section 56 (1) empowers this Court to prohibit the transfer or disposal or any dealing with property which "on evidence" was acquired as a result of corrupt conduct. The "application" may be made ex-parte, and the Order of prohibition "shall" have effect for six months. This Section clearly envisages that an application will, in the first instance, be "ex parte", and where the Court is satisfied that there is "evidence" to support the grant of the Orders sought, may make the Orders preserving the property for six months (subject to further extensions). Ordinarily, under the Civil Procedure Rules the Court would grant ex parte restraining Order for only 14 days initially, and direct that the matter be heard inter-partes. Section 56 of the new Act does not envisage an inter-partes hearing but shifts the burden on the aggrieved party to apply to the Court to discharge or vary the Order {Section 56 (4)}. I am satisfied that this Section creates a new jurisdiction, with a new remedy, and a new procedure. And where it deviates from the Civil Procedure Act and Rules, I must apply and follow the Act. In Syedna Mohamed Burhannudin Saheb vs Mohamedally Hassanally Civil Appeal (No 28 of 1980, Nairobi), the Court of Appeal stated:

"In construing an Act as this, the ordinary rule as laid down by Esher, M R in R V Judge of Essex County Court(1887) 18 Q B 704, must be applied i.e. ... In the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms or remedies there prescribed, and no other, must be followed until altered by subsequent legislation."

I reiterate the same here. I am of the view that the Act allows the use of new procedure. This new procedure, of itself, does not in any way prejudice the Respondents. Nor can procedure alone invalidate suits."

15. I wholly agree with the views expressed by the learned Judge in the above two determinations, that **Section 56** creates a novel procedure, whose exercise is to be wielded solely by the High Court, and a suit need not be filed earlier so that such an application may succeed.

16. From the above dicta, it was noted, which fact I shall state very clearly again that this is **NOT** a civil suit, and cannot be subject to the normal dictates and procedures of a civil suit. It is an application made by the Commission for orders seeking the preservation of the suit property, or in the exact words of the statute,

"...prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct." It is clear that the Act provides for such application to be made by the Applicant Commission and the cases referred to buttress that position. It therefore follows that the Subordinate Courts have no jurisdiction to hear and determine such an application, notwithstanding the value of the suit property and consequently its pecuniary jurisdiction.

17. Accordingly, I transfer this application back to the Environment and Land Court for hearing and determination.

Dated at Nakuru this 25th day of July 2014

L N WAITHAKA

JUDGE

In the presence of:

- Mr. Kisila holding brief for Mr. Munai for the Applicant.
- Ms. Kilach holding brief for Mr. Mongeri for the Respondent.
- Court Assistant: Emmanuel Maelo.