REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION 174 OF 2012

ETHICS & ANTI CORRUPTION COMMISSION.....APPLICANT

VERSUS

1. MINISTRY OF MEDICAL SERVICES

2. CO-OPERATIVE BANK OF KENYA LTD ….……RESPONDENTS

R U L I N G

By an Originating Summons dated 19th March 2012, expressed to be principally brought under section 56 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003, the applicant herein sought the following orders:

1. At the first instance this application be admitted to hearing ex-parte due to urgency and as envisaged under Section 56 of the Anti-Corruption and Economic Crimes Act, No 3 of 2003 (ACECA).

2. The Court be pleased to prohibit the withdrawal, transfer, or disposal of or other dealings howsoever described with the sum of Ksh. 60,090,290.10 in account number 01240000023705 held in the Credits Outstanding Suspense Account Credit Operation Unit of the Cooperative bank of Kenya Limited, and sum of Kshs. 32,209,000.00 in Collateral Account Numbers 012460019778 and 012450019778 the Co-operative bank, Co-op House Branch Nairobi for a period of six (6) months from the date of the order on the grounds that the funds are public funds which were illegally transferred into the said account.

3. There be no order as to costs.

The relevant subsections of Section 56 of the said Act provides 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 was not acquired as a result of corrupt conduct.

On 21st March 2012, **Mr Nzioki** learned counsel for the applicant appeared ex parte before **Hon. Justice Waweru** and upon hearing counsel, the learned Judge being satisfied that a prima facie case that the money in question was acquired as a result of corrupt conduct, granted the orders in terms of prayer 2 of the Originating Motion, subject to the respondent's right to apply under section 56(4) of the Act.

As was expected, the 2nd respondent (hereinafter referred to as the Bank) vide its application dated 16th April 2012, applied that it be granted leave to file the application out of time and at the same time sought orders for setting aside the orders made on 21st March 2012 aforesaid. The said application was supported by an affidavit sworn by one **Dorcas Mugambi**, a Trade Sales Manager of the 2nd respondent. In the said affidavit, the deponent admitted that the Bank holds the sum of Kshs. 19,793,000/- and Kshs. 32,209,000/- as collateral security in respect of letters of credit issued by the Bank at the request of the 1st Respondent in favour of Total Hospital Solutions Ltd and Northwest Medical Ltd. The deponent, however, denied that the Bank holds a sum of Kshs. 60,090,290.00 as alleged by the applicant. The deponent states that since 2004, the Ministry of Medical Services has had an arrangement with the Bank to provide letters of credit on its behalf to various suppliers as and when it requires and in respect of which the Ministry has maintained a collateral account with the Bank. According to the deponent the arrangement is that every time the Ministry wants the Bank to issue a letter of credit, it would instruct The Central Bank of Kenya to remit the money to the Bank which money is credited in the said collateral account pending the instructions from the Ministry. In order for the Bank to issue a letter of credit to the supplier, the Ministry has to furnish the Bank with a Local Purchase Order of the goods, a pro-forma invoice from the supplier and a letter authorising the Bank to apply the funds in its collateral account as collateral security in satisfaction of the Letter of Credit upon performance contract. It is further deposed that the Bank does not hold the said sum of Kshs. 60,090,290.10. To the contrary, the said sum has been picked from the Statement of the Collateral Account and comprises of the two Letters of Credit aforesaid amounting to Kshs. 55,090.10 plus a further sum of Kshs. 5,000,000/- which was returned to CBL unutilised after the last financial year which sum was meant for Kakamega District Hospital but as the beneficiary account was not provided the funds was remitted back. The sum of Kshs. 19,793,000/= according to the deponent was remitted to the Bank on 30th June 2011 in respect of supply and delivery of cold-room machines to the 1st respondent while the sum of Kshs. 32,209,000.00 was remitted on 29th June 2011 in respect of supply and delivery of washing machines and dryers to the 1st respondent by Total Hospital Solutions Ltd and Northwest Medical Ltd respectively and that the same were based on applications by the 1st respondent in favour of the said entities. The Bank was authorised to apply the said sum towards the obligations of the Letters of Credit in favour of the said entities. To support that authority, it is deposed that the Bank was furnished with Local Purchase Order from the said entities in respect of the aforesaid machines. Similarly the respective pro-forma invoices were supplied. It is deposed that on 23rd December 2011, the Bank, on instructions of Total Hospital Solutions Ltd, the beneficiary of the Letter of Credit of Kshs. 19,793,000.00 issued a letter of credit to **Ceabis, Vezzani Spa-Via M. Tito 3 Montecavolo, 42020 Quarrto Castella,** in Italy for 84,500 Euros which, according to the deponent was equivalent to Kshs. 11,323,000/- for the supply of the said goods which have already been shipped. In similar circumstances Northwest Medicals Ltd, the beneficiary of the Letter of Credit of Kshs. 32,209,000.00 requested for the issuance of a letter of credit to **Danube Intl Parc D'activites De Sologne 19-41600 Lamonte Beuvron,** in France for 76,293 Euros which the deponent contends was equivalent to Kshs. 10,223,262/- for the supply of the said goods which have already been shipped. According to the information received by the deponent Northwest's goods docked on 13th April 2012 while Total's goods were due to dock on 16th April 2012 and the process of paying the necessary customs import duty and port charges was in progress. Accordingly, it is submitted that the sum frozen by the order which includes the above sums has already been committed to third parties and the Bank is legally

bound to honour its obligations pertaining to the aid letters of credit hence the Bank risks a legal suit for breach of contract. According to the deponent the orders were obtained on misrepresentations since contrary to the allegations that the two entities do not exist and that the goods are unlikely to be delivered, the documents show otherwise. It is accordingly submitted that the applicant's application was brought too late in the day after the Bank had committed itself and was legally bound. Accordingly, the orders should be discharged and/or varied and the applicant's application be dismissed.

With respect to the limb for extension of time it is deposed that though the order was served on 21st March 2012 the Bank's legal office in the Bank's legal department was not able to get the necessary information and documents relating to the matter in question within the fifteen days stipulated by the Act. Without the documents the Bank would not have been in a position to present the present application. This was compounded by an intervening Easter Holiday. Accordingly, it is deposed that the Bank's delay was not deliberate and intentional hence the extension of time sought. On the advice of counsel the deponent believes that the Court has powers under sections 1A, 1B and 3A of the Civil Procedure Act as well as Article 159 (2)(d) of the Constitution to extend time since no injustice and/or hardship will be occasioned.

The applicant opposed the application by way of a replying affidavit sworn by **Kipsang Sambai**, on 26th April 2012. The first notable feature of the said affidavit is that the deponent does not even bother to disclose the capacity in which the said affidavit is sworn. However, since the issue was not raised, I will say no more on it. The deponent in the aid affidavit outlines the requirements for the two tenders for the supply, installation and commissioning of the mortuary cold-room machineries and the laundry equipment and avers that Kshs. 60,090,290.10 was committed to accounts held at the Bank. According to the deponent the said sum was made up of the sums of Kshs. 32,209,000.00, Kshs. 19,793,000.00 and Kshs. 5,000,000.00 plus an unexplained difference of Kshs. 3,088,290.10. He, however, admits that the sum of Kshs. 5,000,000.00 was 'erroneously' credited to the Co-operative Bank and apparently rewired to the Ministry of Medical Services and since he had no explanation where this sum was it formed part of the misappropriated funds according to the deponent. According to the deponent, the Letters of Credit dated 22nd September 2011 made provision that the Payment of the Letters of Credit would only be done on receipt of the goods at the Ministry headquarters, inspection and acceptance thereof and on confirmation by a letter executed by the ministry. According to the deponent both these two tenders have not been completed. That the entities involved in both tenders share common addresses physical and postal, telephone and fax numbers but do not operate from the indicated offices is telling, so states the deponent. A visit to the indicated physical location of the said entities, according to the deponent, reveals no trace of the said entities. The deponent states that to lie in a tender is a fraudulent act which vitiates the express provisions of the tender. The performance bonds, on the other hand, expired in September 2011. From the documents relied upon by the 2nd respondent, it is deposed, the cold room machinery has not been delivered. According to the deponent the funds held by the 2nd respondent remain the property of the Ministry of Medical Services and the cargo is public funds hence the procurement procedures must be adhered to. Since there were conditions attached to the letters of credit, the 2nd respondent's contention that unless the amount is paid the equipment will not leave the port is, in the deponent's view, a continuation of the grand scheme to pilfer public funds. Since the ministry has already prepared documents for release of the funds before the goods are delivered contrary to the conditions in the letters of credit, the deponent states that this confirms the applicant's apprehensions. It is further deposed that the two entities are owned by the same person and that the manner in which the funds herein have been handled is in breach of the Public Procurement and Disposal Act as well as the Financial Management Act and the irregularities revealed justify the withholding of the funds until further orders of the Court to safeguard the public interest.

Dorcas Mugambi swore a supplementary affidavit on 9th May 2012 in which she reiterated the contents of the supporting affidavit. In the said affidavit it is deposed that the 2nd respondent's role in the transaction was limited to issuance of the letters of credit to successful tenderers at the 1st respondent's request as a guarantee of payment to the suppliers upon delivery of the goods. Therefore upon the giving of the said Letters of Credit, the bank became legally bound to honour the Letters of Credit. It is deposed that since the 1st respondent has since 2004 maintained a Collateral Account with the Bank for purposes

of issuing letters of credit to its various suppliers, the mere fact that the 1st respondent requested for letters of credit to be opened in favour of Northwest Medicals Ltd and Total Hospital Solutions does not turn the transactions fraudulent. According to the deponent some of the goods are in the process of being installed and Commissioned while others have been installed and awaiting inspection. It is further contended that the allegation that the two companies are not in operation is untrue since they are located at Corner House, 1st Floor. According to the deponent the sums in question are nolonger public funds since they are being held by the Bank as Collateral security. While admitting that the averments in paragraphs 32 and 33 of the replying affidavit with respect to conditions to be satisfied before payments could be made, the deponent contends that should the order not be lifted and/or vacated, the Bank may be unable to honour its obligations once performance of the tender is completed hence this application is meant to safeguard the Bank's position once the tenders are fully performed. It further deposed that the two companies involved in the transaction are separate entities which are distinct from its shareholders.

There was also a replying affidavit sworn by **Mary Ngari,** the Permanent Secretary in the Ministry of Medical Services on 15th June 2012. At the end of the affidavit in paragraph 21 the deponent states that this "replying affidavit" is in support of the 2nd respondent's application. It is not in doubt that the 1st respondent is not the applicant in these proceedings. Under Order 51 rule 14, the 1st respondent could only file a replying affidavit if it wished to oppose the application. It, however, could not strictly file a supporting affidavit disguised as a replying affidavit as it attempted to do in this case. In other words, a respondent (and this in my view refers to any other party to the application other than the applicant) cannot hijack an application filed by another party in the case as a forum to advance its case and obtain orders favourable to it without filing its own application just as a defendant cannot expect the court to make orders favourable to him unless there is a counterclaim for it, or perhaps, where it is merely the negative of a declaration claimed in the plaint. See **Abdul Rehman vs. R H Gudka Civil Appeal No. 35 of 1956 [1957] EA 4.** For this reason it has been held that even in cases where there are more defendants than one and an application for striking out is made by only one defendant the only orders that the court may grant are orders with respect to the applicant and not generally.

In the said so called replying affidavit, the deponent avers that the replying affidavit by **Kipsang Sambai** is false and based on mistaken understanding regarding different types of procuring methods and the time when the restrictive tender are used compared to other tenders. Due to financial limitations, the 1st respondent which is tasked with ensuring that hospitals are well equipped only budgets for selected hospitals within a given year and Tigoni District Hospital and Wajir, Kitale Spinal Injury Hospitals were among the selected hospitals. The procurement of these equipment according to the deponent necessitated a request for the use of a restricted tendering method. Thereafter all the requisite procedures for the award of tenders were followed and tenders awarded to Northwest Medical Limited and Total Hospital Solution Limited as the lowest responsive bidders, which entities according to the deponent, do exist. According to the deponent the orders granted herein should be varied and/or set aside for the bank to honour its obligation which it is legally bound to and to avoid the possibility of getting sued for breach of contract.

The application was prosecuted by way of written submissions which were highlighted by counsel for the respective parties.

The 2nd respondent reiterates the position taken in the two affidavits filed in support of the application and states that it only holds Kshs. 19,793,000/- and Kshs. 32,209,000/- in collateral account in respect of collateral security in respect of letters of credit issued by the Bank at the request of the 1st respondent in favour of Total Hospital Solutions Ltd and Northwest Medical Ltd respectively. It is submitted that the existence of the two companies is supported by their respective Certificates of incorporation annexed to the supporting affidavit. It is further submitted that at the time the applicant filed this matter, the subject goods were on the High Seas destined to the port of Mombasa from Italy and France respectively and that by the time the Bank made its application the goods had already docked at the port of Mombasa and were awaiting clearance. The goods destined for Tigoni Hospital are now in the process of being installed while the other goods have been delivered. It is on this basis that the applicant's application was founded on misrepresentation of material facts contrary to the documents exhibited. It is further submitted that on the terms of the contract, once the goods have been delivered, installed and inspected to the satisfaction of

the 1st respondent, the Bank is legally bound to honour the terms of the letters of credit by effecting payment to the beneficiaries and it cannot legally escape from its obligation. Pursuant to the foregoing the Bank made commitments to the manufacturers of the goods in question at the request of the two companies involved in the subject transaction. Unless the orders of 21st March 2012 are lifted, it is submitted the Bank risks being sued for breach of contract. The allegation that the Bank is a party to the scheme to embezzle public funds is similarly denied and it is reiterated that the sole aim of the Bank making the present application is to protect its legal position and integrity as a Banking Institution.

With regard to the extension of time to file the application, it is submitted the reason advanced for failing to so file the application justify the extension sought. The Court is urged to invoke the provisions of sections 1A, 1B and 3A of the Civil Procedure Act as well as Article 159(2)(d) of the Constitution and extend the time since no prejudice will be suffered by the applicant. In support of its case, the 2nd respondent relies on **Kenya Anti-Corruption Commission vs. Lands Ltd & Others [2007] eKLR** and **Microsoft Corporation vs. Mitsumi Computer Garage [2001] 1 EA 127**. In his oral address to Court **Mr Kimondo**, learned counsel for the 2nd respondent reiterates that the facts relied upon by the 2nd respondent as excusing the delay in filing the application have not been challenged and therefore the limb of the application seeking extension of time is not opposed. In the authority cited, it submitted the delay was for 2 months while in the present case the delay is only for 9 days which delay has been explained. According to learned counsel, the only delay that requires explanation is the delay after the last date on which the application should have been made. Pursuant to the provisions of Civil Procedure Act and the Constitution cited above, it is submitted that justice should be done without the Court being tied to procedural technicalities since procedural technicalities have been outlawed and emphasis should be laid on haring matters on their merits. It is further reiterates that the orders sought to be set aside were obtained on the grounds that the procedures were not followed and that the goods ordered were not likely to be delivered both allegations which have been proved to be incorrect based on the material on record disclosed in the affidavit in support of the application and the replying affidavit sworn by **Mary Ngare**. Had these facts been brought to the attention of the Court, counsel submits, the order in issue would not have been granted. The contention that the 2nd respondent is intent in stopping investigations cannot, in counsel's view be correct, taking into account the fact that three months have lapsed since the contentious orders were granted and the applicant has not shown how far it has gone on with the investigations. It was further submitted that in order to disclose the extent of investigations the only requirement was for leave of the Director to be sought.

On their part, the applicant submit that a sum of Kshs. 60 million was committed by officials of the 1st respondent into a Credits Outstanding Suspense account in the Credit Operations Unit of the 2nd respondent unaccompanied by any instructions and was moved to collateral account in unclear circumstances. According to the 2nd respondent these funds are public funds. According to the 2nd respondent, since the present application was not made within the time stipulated and there is no explanation given for the delay, the 2nd respondent is guilty of laches and cites **Gerfas Alpjhonse Odhiambo vs. Felix Adiego [2006] Eklr** that the period of delay, however short, must go in tandem with the explanation for it. It is further submitted, based on **Ratnam vs. Cumarasamy and Another [1964] 3 All ER 933** that the rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedures requires to be taken, there must be some material on which the court can exercise its discretion. In view of the woeful lack of explanation, it is submitted that the motion offends against section 56(4) of the Anti Corruption and Economic Crimes Act No. 3 of 2003. It is further submitted that there is no evidence in support of the alleged payments and that the supply and installation by the suppliers of the 1st respondent is neither complete nor confirmed as stipulated in the letters of credit hence the 2nd respondent should not be keen to make the payment. It is further submitted that the applicant is execution its mandate under the said Act and cannot be stopped from doing so which would be the effect of granting the orders sought herein. Reliance is placed on **Neptune Credit Management Ltd & Another vs. Chief Magistrate's Court & 2 others [2005] eKLR** and **Republic vs. Kenya Anti-Corruption Commission & 4 Others ex parte Jackson Gichohi Mwangi & 5 Others [2010] eKLR**.

It is submitted that the preservation of the public funds by way of the order granted is proper and legal. It is submitted that the Court has a role to protect public interest such as the sustenance of on-going investigation and preservation of public funds and reliance is placed on **Kenya National Examinations Council vs. Republic ex parte Kemunto Regina Ouru Civil Appeal No. 127 of 2009** and **Republic vs. Commissioner of Lands ex parte Somken Petroleum Co. Ltd [2005] eKLR**. Since payment could only be made after satisfactory installation and commissioning of the procured items, it is submitted that the payment vouchers whose import were to facilitate the transfer of Government money before the goods were accepted by the Ministerial Acceptance Committee is an act of fraud which on the authority of **Mcfoy vs. United Africa Co. Ltd [1961] 3 All ER 1169** vitiates the transaction and renders it null and void. Relying on **National Bank of Kenya Ltd vs. Wilson Ndolo Ayah Civil Appeal No. 119 of 2002**, **Milankumar Shah & 2 Others vs. City Council of Nairobi & Another High Court Miscellaneous Civil Suit No. 1024 of 2005 (OS)** and **Scott vs. Brown [1892] 2 QB 724** at **1128**, it is submitted that it is a public policy that courts should not aid in the perpetuation of illegalities. It is submitted that in the present case public interest far outweighs the private interest and based on **Peter Bogonko vs. National Environment Management Authority (NEMA) [2006] Eklr**, the Court is urged not to allow the application since the effect of so doing would be to stop the investigations by ordering the release of the funds thus emboldening wrongdoers to seek release of funds which may be dissipated and unavailable once investigations are complete.

In his oral address to the Court, **Mr Muriuki**, learned counsel for the applicant submitted that section 32 of the Act bars the officers of the applicant from disclosing the details of the investigations. According to counsel the affidavit of **Mary Ngari** confirms that the 1st respondent has no proper documents but has chosen to rely on the documents from the Bank. Since the lifespan of the said order is 6 months out of which 3 months have lapsed, it is submitted that another three months will not unduly prejudice the 2nd respondent since the money will be available.

I have considered the foregoing and having done so, this is the view I form of the matter.

With respect to the application for extension of time it is not correct to contend that no explanation has been given. I agree with **Mr Kimondo** that there is an explanation proffered. There must be a distinction between cases where no explanation is offered and where the explanation offered by the applicant is not satisfactory. It has not been alleged that the explanation is not satisfactory. I further agree that in computing the period of delay the time to be taken into account is the period outside the time within which the application should have been made. My view is reinforced by the decision of **Omolo, JA** in **Jackson Mutuku Ndetei vs. A. O. Bayusuf & Sons Ltd. Civil Application No. Nai. 231 of 2002** where the learned Judge expressed himself as follows:

"Although it is true that a party who decides to wait until the very last day or a few days before presenting a record of appeal runs the risk that time may expire for him before complying with the directions of a registrar, an intending Appellant is given sixty days within which to lodge a record of appeal and the only day that is to be explained is the delay falling outside the sixty days and it does not matter that an appeal is lodged on the very last day because the law allows sixty days and there must have been a valid reason for giving that period of time".

Therefore the relevant period for the purposes of extension of time is the period after the 15 days provided by the Act which is not disputed to be 9 days. Whereas I agree that the law is that a delay, however short, must be explained, to expect a party to explain what happened on each day thereafter would be the vainest pedantry. The delay has been explained on the fact that documents had to be collated and in between there were Easter holidays. In my view, the explanation proffered is not so unreasonable to disentitle the 2nd respondent to favourable exercise of discretion. Accordingly, I extend the time within which the application was made with such period as to validate the same.

With respect to the second limb of the application, section 56 of the Act provides 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 was not acquired as a result of corrupt conduct.

It is therefore clear that the Court can only grant an order prohibiting the transfer or disposal of or other dealing with property if there is evidence that the property ***was acquired*** as a result of corrupt conduct. If I heard **Mr Kimondo** correctly, his submission was that the property was nolonger under the classification of public funds. That being the position the sum in dispute would fall under property which has been acquired. Had the argument been that the money was still the property of the Government, in which case there was not as yet acquisition, the applicant would have been hard put to justify the continued existence of the said orders because in my view it is only property that has been acquired that fall within section 56 (1) aforesaid.

Under subsection (2) an order may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property. The 2nd respondent's case is that it was not involved in or has subsequently acquired the property since it is simply holding the funds for the third parties. That may be so. However the above provision does not limit the category of persons against whom the order can be made.

However, it is my view that for the Court to grant the orders under section 56 (1) a *prima facie* case must be presented before court that the property in question has been the subject of some corrupt dealings. It is not enough for the Commission to simply walk into Court with a request and expect the said orders to be granted. Where the said orders are granted and it turns out that either the Court was misled or no *prima facie* case existed that the property was acquired as a result of corrupt conduct, the Court would be perfectly entitled to vacate the orders. It is therefore not correct for the Commission to submit that by granting the orders sought by the 2nd respondent herein, the Court will be stopping the Commission from conducting investigation. The Commission is free to conduct its investigations but in a lawful manner. If the conduct of the investigations infringes upon the rights of an individual, the individual is entitled to complain and if the complaint is valid the Court is empowered to bar the Commission from improper use of the powers vested in the Commission. The Commission's power is meant for the good of the public and not for the purposes, for example, of settling personal scores. As what is sought by the 2nd respondent herein is not to stop investigations, the authorities relied upon but the Commission are not, with due respect, relevant.

In this case the Commission contends that the manner in which the money was sought to be paid manifested some corrupt transactions. It is the Commission's view that the beneficiaries of the funds were/are suspicious; that the two entities shared the same physical and postal address; that the two entities were owned by the same individuals. Yet the Commission contends that the two entities cannot be traced at their physical address. These allegations have only been seriously controverted by the 2nd respondent. That the addresses are the same is borne out by the certificate. That there is a common shareholder in both companies who owns more than 90% of the shares in one company with half of the shares in the other company is similarly borne out by the documents. The 2nd respondent has, however, not disclosed how it has been able to verify the physical existence of the two entities save for the fact that they are

incorporated bodies.

The other allegation is that the 2nd respondent is very keen in disbursing the funds even before the conditions necessary for the said disbursements have not been fully fulfilled. That the payment of the funds has not matured is not disputed. The 2nd respondent's position is that it wants the orders out of the way so that as soon as the conditions are fulfilled it would be in a position to meet its contractual obligations and hence avoid the risk of being sued under its commitments under the Letters of Credit. Whereas this is an attractive argument, it is arguable whether in cases where a party is disabled from fulfilling their contractual obligations due to a lawful court order, the party would still be liable. That, however, is not a matter that can be conclusively decided in these proceedings. What is, however, clear is that the machines have not been installed, inspected and approved by the authorities concerned for the sums in question to be released.

The other issue that was raised by the applicant was that the procurement procedures were not adhered to by the 1st respondent. The 1st respondent has filed an affidavit disputing those allegations and has contended that the 1st respondent was entitled in the circumstances to resort to restricted tendering. At this stage the court does not have sufficient material to decide and is not entitled to decide conclusively whether that was the case.

Having considered the concerns raised by the Commission more particularly the existence of the beneficiaries of the funds who have opted to stay in the background of this whole saga as well as the fact that the funds in question are not due for disbursement as yet, I am not satisfied that this is a proper case for the Court to set aside the orders made herein on 21st March 2012. Under the foregoing provisions 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 was not acquired as a result of corrupt conduct. From the wording of the said provision it seems that once an order is made under section 56(1) of the Act the burden shifts to the person against whom it is made to prove, albeit on a balance of probabilities, that the property was not acquired as a result of corrupt conduct.

Taking into account the circumstances of this case I am unable to find on a balance of probabilities that the property in question was not acquired as a result of corrupt conduct. There exist loose ends in this matter which need to be tied before that conclusion can be arrived at.

Accordingly the application dated 16th April 2012 does not, in my view, meet the threshold in section 56 (5) and is accordingly dismissed with costs to the Commission/Applicant.

Ruling read, signed and delivered in Court this 26th day of July 2012

G.V. ODUNGA
JUDGE

In the presence of:

Mr. Chege for Mr. Kimondo for the applicant
Mr. Omondi for Mr. Nzioki for the respondent