



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI (NAIROBI LAW COURTS)

MISC CIVIL APPLI 587 OF 2006

KENYA ANTI-CORRUPTION COMMISSION.....APPLICANT

VERSUS

LANDS LIMITED

KIMONDA LIMITED

BERNADETTE MUTHIRA GITARI

MAJOR GENERAL (RTD) DEDAN NJUGUNA GICHURU

REBECCA NJERI KARANJA

PHILIP NJUGUNA GACHUKI

KURIA GREENS LIMITED

RENEGE PROJECT LIMITED.....RESPONDENTS

RULING

On 28/7/2006 my learned brother Hon Mr Justice Visram made a preservation order under section 56 of the Anti Corruption and Economic. Crimes Act (**ACECA**) against land parcels registered as LR 505/2 and LR 164/4 and any subdivisions created there from.

Under section 56 (1) a preservatory order can only be issued or made on the force of evidence that the property the subject of the application was acquired as a result of corrupt conduct and it may issue against the person involved in the corrupt conduct or any other person not guilty of corrupt conduct and who has subsequently acquired the property. Under section 56 (7) corrupt conduct is defined as:-

(a) Conduct that constitutes corruption or economic crime.

Or

(b) Conduct that took place before the Act came into operation and which

- **at the time constituted an offence and**
- **If it had taken place after this Act came into operation would have constituted corruption**

or economic crime.

Pursuant to the provision of the section the court is enjoined to discharge or vary the order made *ex parte*, under the subsection on presentation of sufficient material in an application by a party served with the prohibitory or preservative order made under the section. The section places the onus on the aggrieved party to show that the exercise of discretion by the court in the first instance was erroneous or not in accordance with the prescribed rule of law and an applicant must have made a formal application to court within the prescribed period.

By an application dated 10th August 2006 the applicant/Respondent **KURIA GREENS LTD** prayed for the following orders:-

(a) An order to discharge or set aside the order of court made on 28th July 2006.

(b) An order to strike out the Originating Notice of Motion dated 25th July 2006.

The applicant/respondent relied on the following grounds:-

(1) That the applicant (KACC) has not satisfied the requirement of section 56 of ACECA.

(2) That the provision of section 56 is inconsistent with section 75 (1) and section 76 (1) of the Constitution of Kenya.

(3) That the provision of section 56 of ACECA undermines the principle of natural justice and equity.

(4) That the provision of section 56 is oppressive, as an order made there under can remain in force in perpetuity.

(5) That the provision of section 56 is not reasonably justifiable in a democratic society.

(6) That the application is incompetent, frivolous and misconceived.

(7) That there is no evidence that the land the subject matter of the application was acquired through corrupt conduct.

All parties have filed written submissions and have also provided lists of authorities and bundles of the authorities relied on. The court has considered the submissions and authorities cited by the parties.

I intend to deal with the grounds touching on constitutional provisions first and thereafter deal with the other grounds in the order set out above.

Whether Section 56 of the Anti corruption and Economic crimes Act is inconsistent with section 75 (1) and 76 (1) of the Constitution and whether the section impedes effective access to the court and is oppressive to the extent that an order of preservation can remain in force in perpetuity and whether the section is not reasonably justifiable in a democratic society.

The court regards this ground as the principal ground in that if it were to succeed, section 56 on which all the challenged actions of **KACC** are based, would not survive and the section would have to be declared unconstitutional and void to the extent of the inconsistency. It is also clear to the court that all the other grounds do not stem or arise directly from the Constitution.

I am in full agreement with the learned counsel of **KACC** Mr Kimani that even in Kenya there is rebuttable presumption of the constitutionality of every enactment of Parliament. For the applicant to prove unconstitutionality against the fundamental rights provisions of the Constitution, they should have

filed a petition pursuant to section 84 of the Constitution and the rules made pursuant to section 84 (6) of the Constitution namely LN6/2006. In addition as the applicants/Respondents have not denied that they have separately filed a petition raising the same grounds, the current application is incompetent and an abuse of the court process and the same ought and should be struck out on this ground alone. Also see the cases of **HON LADY JUSTICE NAMBUYE v THE HON THE CHIEF JUSTICE** where although the principal grounds relied on were based on constitutional provisions a judicial review application was held to be incompetent. Similar position prevailed in **KARIA v COMMISSIONER OF POLICE**. At the other end of the pendulum, is the **HON GEORGE SAITOTI** case where the principal grounds were an attack on a Judicial Commission of Inquiry Report into the Goldenberg Scandal, which Report had in turn been found inter-alia, not to have complied with the Commissions of Inquiry Act, as regards Hon Saitoti, and as a result the Court held inter-alia that the findings were biased, arbitrary and oppressive and an abuse of power and further that a fair trial was not possible in the circumstances. The court further held that it had inherent powers to stop its process from being abused and that there was no need of the institution on a separate constitutional application by the Applicant. An applicant could not attack the Inquiry report under the Constitution although the issue of a fair trial was also a constitutional issue and also fell under the inherent powers of the Court to stop its process from being used oppressively or abused.

In addition since **ACECA** had provided a new remedy without stating the manner of approaching the court an Originating Notice of Motion or a Notice of Motion would have been the appropriate approach to the court instead of filing a Chamber Summons, seeking such drastic remedies such as constitutional declarations and orders. Moreover since at the second stage of the process under section 56 a party seeks final orders, the proceedings are by nature highly contentious and cannot properly be canvassed in a Chamber Summons. I would therefore strike out the application on this ground as well.

However, in case I am wrong, concerning the need for a Constitutional application, or how to approach the court, I consider it proper to deal with the grounds raised in the application. The additional reasons for the approach I have adopted is the novelty of the situation. The court was informed that this was perhaps the first application under section 56 of the **ACECA** and that similar applications which have been filed now await this ruling by way of a test case.

(1) THE ORIGIN OF SECTION 56 OF ACECA

It is clear to the court that section 56 was inspired by the identification, tracing, freezing and seizure of property provisions of Articles 31 and 51 to 59 of the **UNITED NATIONS CONVENTION ON ANTI CORRUPTION**, since as will shortly be apparent other countries or comparable jurisdictions have enacted almost similar provisions modeled on the Convention. It is common ground that the Convention has been duly ratified by Kenya and is also notable that Kenya was among the first signatories on the ratification list! For this reason I take the view that this court should interpret the section in accordance with the international instruments unless the section is inconsistent with the Constitution. In this regard and with respect to the Applicant's Counsel, I find no contravention of section 75 of the Constitution. There is clearly no taking away of property without compensation and the same provision has made it possible to contest in the High Court the *ex parte* preservation orders on merit. As regards the second constitutional provision, it has also not been shown how section 76 (1) has been violated or likely to be violated. In other words as held in the case of **ANARITA KARIMI NJERU VERSUS REPUBLIC since (199) No1) KAR 154-156** no particulars of the contravention have been set out by the Applicant/Respondent or at all. It has not also been sufficiently demonstrated how the right of access to the court has been impeded in the face of the right of hearing on merit contemplated under s 56(4) and (5) of **ACECA**. On the contrary the provisions provide for a direct challenge by an aggrieved party of the *ex parte* order in court. It is also significant to note that the challenge is in the High Court which is the foremost guardian of the Constitution.

It has not also, been sufficiently shown that the enforcement of s 56 is not a practice acceptable in other democratic countries. On the contrary at this time and age, corruption and economic crimes have taken the centre stage in many democratic countries because of their potential to ruin the societies by siphoning off resources for economic development of the countries and their people.

(2) PUBLIC INTEREST AND A SENCE OF BALANCE

It is the responsibility of the court to uphold the public interest and where in doubt to always strive to strike a reasonable balance between the individual interest and those of the public.

Thus, although I have already held that there is no taking away of property under section 75 of the Constitution even if one was to hold that there was any such taking away or any violation or contravention, the Constitution does take care of it.

Section 75 (6) (vii) makes an exception where a law (such as **ACECA**) provides for the limitation of the constitutional right for as long as is necessary for examination, investigation trial or inquiry. Any such limitation is in my view justifiable in a democratic society. I find that the hardship caused to the applicant at the stage of making of the ex-parte order is temporary and is entirely justified when balanced with the public interest and is not out of proportion with the objectives of the Act or the Constitution.

As regards limitation of fundamental rights for purposes of investigations, s 75 (6) of the Constitution does cover investigations as a public interest capable of limiting the substantive right. The requirements for limitation are:

(1) Limitation must be defined by law (this is called the principle of legality). The law in question is ACECA.

(2) Be imposed for one or more specific legitimate purposes e.g., public order, public safety purposes, public morality, etc). Investigations as a limitation, are set out in S 75(6) as a public interest.

(3) Be necessary for one or more of these purposes in a democratic society - in other words satisfy the criteria of a proportionality. Investigations relating to Corruption and Economic crimes are a necessary and justifiable objectives in nearly all democratic countries.

Section 56 of **ACECA** does satisfy the above requirements as follows:

a. The enactment of ACECA does satisfy the principal of legality.

b. The section was imposed to satisfy the public interest of investigations as captured by s 75 (6) of the Constitution and investigation constitutes a legitimate constitutional purpose.

c. Investigations are necessary and justifiable in a democratic country such as Kenya.

Crime detection, prevention and control must in today's world constitute one of the principal objectives of modern states. The objectives of democratic states are intended to be uniform and of general application except where there is a recognized margin of appreciation reserved to an individual state due to its special circumstances. While the objective of crime detection, prevention and control might not be explicit under Chapter 5 provisions of the Constitution except as a limitation under s 75(6), I hold that these objectives are clearly embraced in section 1 A of the Constitution which states: "***the Republic of Kenya shall be a multiparty democratic state.***"

Our Constitution is not a planet moving at its pace, speed and on its own axis and in the prevailing circumstances of the early 1960's, when it came into force. It was intended to be a living and dynamic document to meet the evolving needs of this nation in order to safeguard her democracy and freedom. Take for example the emergency of terrorism as a topic affecting all democratic states. Over two decades ago, its importance was perhaps confined to a few states which were fighting fundamentalism and factionalism. It has since reared its head and has propelled itself to the top of the World as one of the most important concerns of all modern nations. It has changed world travel and security more than anything else known in modern times and the World appears to literally turn on its axis because it has spread like a hydra affecting nearly every sphere of modern life.

It follows that any constitutional interpretation that overlooks the need to effectively tackle terrorism would be irrelevant, misguided and utopian.

Just as terrorism has forced itself to the top, everywhere, the anti corruption and economic crimes agenda occupies a central place as an objective in the emerging nations in particular.

It must be fought with all available tools known to law and the instrument of law as a vehicle of social change must be at the heart of that fight, hence the challenge it poses to the relevance of Constitutional law as an instrument of change in many societies, ours included. Granted that the law makers have a major role in their endeavour to expressly bring anticorruption supporting provisions within the Constitutional frame, as one of the ever emerging needs of our society the current frame of the Constitution cannot be said to be irrelevant to some of the current and emerging needs. While the rigid nature of the Constitution has a role, so is a broad and purposeful approach to the interpretation of the Constitution in order to meet and satisfy the changing circumstances and the pressing social needs. There is nothing extra-ordinary in this approach since even nature has its examples. Some trees though straight and strong, do bend to meet the challenges of their situations at any given time. As a human being the best service one can give to his fellow human beings is to bow to their needs. In the same way the Constitutions though straight and strong, must bend towards meeting and fulfilling the changing public interest concerns or pressing social needs.

As regards property rights such as those concerning this matter, s 75 has defined the rights and specifically set out specific limitations based on the public interest.

In contrast, the tree of liberty never bends except to accommodate the pressing social needs expressly set out - see this Court's judgment in the *DEEPAK KAMANI CASE Petition No. 199 of 2007*. It follows that unless the lawmakers move swiftly to incorporate anti terrorism measures as one of the pressing social needs set out specifically in the liberty provisions of the Constitution, the executive's legal basis for taking extra ordinary measures to curb liberty in order to safeguard the common good, would be a missing link in the chain of safeguarding our freedom and democracy. Even the broadest interpretation would not accommodate such a situation, because even trees cannot bend to ground zero without losing their strength and vitality at the risk of being trampled upon. The Constitution as one judge said is not a vessel to be filled by the Courts with everything they might hold to be a pressing social need. Section 1A reproduced above, in my view, only permits the courts the latitude to imply values, principles and practices practiced by democratic countries but this does not absolve the Legislature from defining by Constitutional incorporation the pressing social needs. Where the provisions of the Constitution are unambiguous our fidelity to the letter of the Constitution, is final.

Section 75(6) vii does in my view also contemplate situations such as the one before the Court in that while a property owner may be temporarily inconvenienced in the use of property by exparte orders, in corruption and economic crime matters, the Constitution provides that such deprivation may be made "for so long as may be necessary for the purposes of an examination or the investigations." We cannot as a proud democratic state fail the democratic audit of other democratic states in terms of the practical objectives and purposes shared by all democratic states. Thus, the granting of the orders must strictly be as a result of due process and the deprivation must be within a reasonable time or justifiable, taking into account all relevant considerations including the property rights of the owners.

In terms of articulating this vision for Kenya as a democratic state as stated in section 1A of the Constitution, I wish to endorse fully and adopt the description of the presumption of constitutionality as was powerfully expressed by the Supreme court of India in the *HAMDARDDA WAKHANA UNION OF INDIA AIR (1960) 554* where the respected court stated separately in the same decision as under:-

(1) "in examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted. Presumption is therefore in favour of the constitutionality.

(2) “ That in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, the history of the times and may assume every state of facts which can be conceived as existing, at the time of legislation.”

It is the finding of this court that section 56 recognizes the need to strike a careful balance between private property rights and the need to ensure that the state has the tools to protect society by tackling crime effectively.

The necessary safeguards that the section has made are:-

- (i). The Commission (KACC) must adduce before court evidential facts, which may be said to constitute corrupt conduct whether or not they disclose specific offences.**
- (ii). The court makes an order upon being satisfied that the subject property was acquired as a result of corrupt conduct.**
- (iii). The court cannot make orders not provided for under section 56 of ACECA.**
- (iv). The court can reverse or discharge its orders upon production of evidence that the property the subject matter of the proceedings was not acquired through corrupt conduct.**

Section 56 is also beyond challenge for providing the following additional safeguards touching on the due process.

- (a) Limitation of the life of the ex parte order (six months subject to the right to apply to extension)**
- (b) Requirement as to prompt service of the ex parte orders.**
- (c) The right of an aggrieved party to apply to discharge or vary the order within the given time frame.**
- (d) Recognition of the discretion of the court to grant or deny an order at the hearing (inter-parties).**
- (e) Requirement on the part of the Commission to make full disclosure at the ex parte stage.**

It follows therefore the Applicant/Respondent’s contention that the order can stay in perpetuity is not properly grounded in the face of the above safeguards.

ALLEGED CONTRAVENTION OF THE RIGHT OF HEARING AND BURDEN OF PROOF UNDER SECTION 56 OF ACECA.

I find that contrary to a popular belief with some practitioners of law in this country, the Constitution does not anywhere prevent the legislature from placing the burden of proof of some specific facts on a suspect. Thus, section 112 of the Evidence Act provides.

“In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him.”

This section is not inconsistent with any provision of the Constitution. When a party has the knowledge in question there is no real burden which has been placed on him by the section. Section 56 proceedings are civil in nature and therefore section 112 of the Evidence Act does apply.

It follows therefore that if a party were to be given notice, they are likely to obstruct or frustrate the ex parte application and therefore subvert the public interest by either conveying or moving the asset in issue

or convert it into untraceable form. In this regard, I find that any notice would subvert the objective of the *ACECA* and the greater public interest of recovering property which has been corruptly acquired and also subvert the role of investigations as set out in the Constitution.

I adopt as good law a similar finding on this point in the case of *DIRECTOR OF SERIOUS FRAUD OFFICE v A [2007] EWCA Crim 1927* - para 5.

It is also quite rational to expect the person served with the ex-parte order to be in a better position than *KACC* to explain the circumstances under which the property was acquired as the facts of acquisition are within his knowledge. Placing the burden on property owners is clearly permissible under s 112 of the Evidence Act. A party who fails to mount a challenge is impliedly accepting that the manner of acquisition is not straight or above board and he cannot have a valid reason for complaining that the ex-parte order will remain in force in perpetuity. There are provisions for vesting orders being made in certain defined situations. The Court discharges or varies the order or dismisses the application on a balance of probabilities. Surely a proud owner of property can very easily discharge this burden which has been equated to that prevailing in civil matters. Our Constitution does assume the existence of the fundamental laws including the Evidence Act.

Provided that there are some evidential facts at the ex-parte stage for the court to exercise its discretion, there are no other valid preconditions to the grant of the ex-parte order. At the ex-parte stage the evidential facts need not answer the description of any specific offences of corrupt conduct provided they point to that possibility.

The challenge on the alleged breach of rules of natural justice and equity, is clearly met by the subsequent hearing on merit under S 56(4) and (5).

Finally the issue of access to court by any aggrieved party is specifically provided for in the section and therefore the challenge based on impeded access to court is patently misconceived.

The court has in line with the common objectives of the UN Convention On Corruption, noted with appreciation the comparable provisions cited by the learned Counsel for the Commission in other jurisdictions notably England and Wales, Northern Ireland, Scotland and South Africa. The common objective of fighting crime is clearly shared by all these jurisdictions under their respective specific Acts of Parliament which are similar to our *ACECA*, and I therefore need not reproduce them here. Perhaps I could have found the justification of reproducing them if I had found merit in the current application brought to discharge or set aside an order granted by another judge. However, the only provision given by the legislature is an application to vary, discharge, or dismiss the application to enforce or renew the orders either on the application of *KACC* or an aggrieved party. The prayer seeking the setting aside is therefore incompetent.

What is significant to this court is that both Ireland and South Africa have written Constitutions just like Kenya and have for the reasons of public interest upheld similar provisions. To illustrate the point in the South African Case of *NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT v YASIEN MAC MOHAMED AND OTHERS CC 744/02* the court held as follows concerning the right of hearing under s 38 (equivalent to s 56) - at page 107.

“49. The same approach must be adopted when considering whether by necessary implication, the audi principle has been excluded from section 38. In my view it cannot be found that it has been excluded. There are no exceptional circumstances and the purpose of the Act can be fully achieved when in relation to section 38, the principle relating to the issuing of rules nisi and the making of interim preservation orders are applied by the High Court.”

50. The essence of these principles is their practicability, flexibility and adaptability. They can be narrowly and appropriately tailored to accommodate the interest of the State in

attaining the purposes of the Act, in particular preventing property to which the State can lay claim under the Act from disappearing or being squandered and also to protect as far as possible the interests of the individuals by observing the audi rule and in so doing to afford them as far a trial as possible under s 38.”

The South African Court went on to hold that the limitation of the fair hearing at the ex-parte stage enables the Act to function for the legitimate and most important function for which it was designed.

I hold the same that such limitation of hearing at ex-parte stage is necessary and justifiable in a democratic state and in our case under s 1A of the Constitution, and this interpretation gives scope to the attainment and the upholding of the public interest behind the Constitutional provision.

Evidential Facts under Section 56 of ACECA

The Court’s findings on this is that the Applicant/Respondent has not provided sufficient material to controvert the material placed before, my learned brother Hon Justice Visram on 25th July, 2006. Thus, there is evidence of excision of LR 164/4 see exhibit *NN5* at page 16(a). It has not also been demonstrated that the Commissioner of Lands had authority to allocate the land. Finally the fact that the Applicant/Respondents acquired from *M/s RIANG ESTATES LTD* does not exempt the acquisition from the ambit of section 56(2) of *ACECA*. In the absence of sufficient explanation by the Applicant/Respondents there cannot be any good ground for the court to interfere with the preservatory order now registered against the challenged titles.

To reinforce the above findings, I adopt fully the reasoning of the Supreme Court of Ireland in the case cited by Mr Kimani, the learned Counsel for *KACC* namely, *MURPHY v M (G) 2001 1ESC 82 (18/10/01)* and in particular the following observations and holdings:-

At page 29 para 130 the Supreme Court held:-

“As to the submission that the procedure permitted under the Act are so unfair as to be unconstitutional, it is necessary to recall again that it is to be presumed that the Oireachtas (Parliament) intended the procedure provided for under the Act would be conducted in accordance with the principles of constitutional justice and that any departure from those principles will be restrained or corrected by the courts.”

Moreover the proceedings under s 56 are essentially civil and therefore the affidavits grounding the interim and interlocutory application of necessity indicate to the Applicant/Respondent the nature of the case being made on behalf of the Applicant.

It is also significant to note that on the issue of “equality of arms” or lack of it, section 56 clearly proceeds on the basis that the Applicants/Respondents will normally be the persons in possession or control of the property and therefore should be in a position to give rebuttal evidence to the Court without any problem. They have such an obligation under s 112 of the Evidence Act. I must also point out that the principle of equality of arms principally applies to maintain a balance between the rights of an accused and the State. Section 56 proceedings as observed above are civil in nature.

I also find that the provision of s 56 does not violate the guarantees of private property rights under the Constitution in view of the permissible limitation to those rights under s 75(6) and also the clear need for the courts to uphold, in the public interest, the principal objectives and purposes of a democratic society such as those set out in the Act and s 1A of the Constitution.

As regards the nature of the evidence to be relied on, I adopt the reasoning in the English case of *THE QUEEN ON THE APPLICATION OF DIRECTOR OF ASSETS RECOVERY AGENCY AND OTHERS v JEFFREY DAVID GREEN & OTHERS [2005] EWHC 3168* (Admin) where the Court held at para 50:-

“Mr Crow invited me to make it clear that my first question to the preliminary question meant that the Director need neither allege nor prove the commission of any specific criminal offence, and that she must not merely set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct but that she must prove that on the balance of probabilities, the property was obtained by or in return for a particular kind or one of a number of kinds of unlawful conduct. For the avoidance of doubt I confess that is a correct understanding of any first answer to the preliminary issue.”

The answer to the seven (7) issues in the light of the above analysis are:-

1

The Applicant has satisfied the requirements of s 56 of **ACECA**.

2

Section 56 is not inconsistent with s 75(I) and section 76(I) of the Constitution. There cannot be any taking away, if the property was not validly acquired in the first place. In the case of the later provision it protects against arbitrary search or entry and has absolutely nothing to do with s 56 of **ACECA**.

3

Section 56 of **ACECA** does not undermine the principles of natural justice and equity. It has an inbuilt right of hearing. On the contrary it advances other constitutional objectives and public interests concerns that are at the heart of the nation.

4

Section 56 is not oppressive in that it has inbuilt provisions for a hearing on merit at the earliest opportunity and that hearing is in the High Court which is the citadel of Constitutional enforcement of fundamental rights and the Constitution. The High Court has the power to vary or discharge the order in deserving situations and the chances of the order operating in perpetuity are remote. There is a mechanism for vesting the property in the Government pursuant to the needs of the public interest. A suspect who cannot explain why he landed into the property the subject matter of the litigation cannot reasonably be heard to complain. I dare say, if he did not plant in tears the joy of the harvest cannot be his! While the joy of the harvest is perhaps visible for all to see, the tears of the planting are only known to him, and it is only him who can explain their source or origin!

5

Section 56, is a tool against corruption and economic crimes and this is an objective embraced by all known democratic societies.

6

The application by way of Originating Summons is properly before the court.

7

This ground puts the cart before the horse. There is prima facie evidence and the issue of the sufficiency of the evidence is a matter for the Court hearing the main application.

I endorse the quote in the **QUEEN's** case (supra) as good law concerning the interpretation of s 56 of **ACECA**, and further rule that imposing any preconditions not set out in the section would defeat the purpose of the Act.

All in all, the application dated 10th August, 2006 must fail and the same is dismissed with costs to ***KACC/COMMISSION***.

Finally, I should take this opportunity to thank Counsel for their industry in handling this matter, and in this regard I would like in particular to commend Mr Kimani for the considerable research he has undertaken as appertains to other comparable jurisdictions and for the clarity of thought he has demonstrated in making his submissions which is a rare trait not seen in the recent past from that office in the matters which have found their way to my Chambers.

DATED and delivered at Nairobi this 17th day of October, 2008.

J.G. NYAMU

JUDGE