REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 587 of 2006

ANTI-CORRUPTION LAW

IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT 2003

AND

IN THE MATTER OF: AN APPLICATION BY KENYA ANTI-CORRUPTION COMMISSION FOR A PRESERVATION ORDER IN RESPECT OF L.R 5851/21 L.R. NO.164/4 AND ANY SUBDIVISIONS CREATED THEREFROM

KENYA ANTI-CORRUPTION COMMISSION ..... APPLICANT

VERSUS

1. **LANDS LIMITED**
2. **KIMONDA LIMITED BERNADETTE MUTHIRA GITARI**
3. **MAJOR GENERAL DEDAN NJUGUNA GICHURU**
4. **REBECCA NJERI KARANJA**
5. **PHILIP NJUGUNA GACHUKI**
6. **RIANGI ESTATES LIMITED**
7. **KURIA GREENS LIMITED**
8. **RENEGE PROJECT LIMITED …….. RESPONDENTS**

RULING

The application before me is dated 8th September 2006 and is supported by the affidavit of Richard Mundia Kariuki.

The application is brought under Order XLIX Rules of the Civil Procedure Rules, Section 56(4) of the Anti Corruption and Economics Crimes Act 2003 Section 3(a) of the Civil Procedure Act and all enabling

provisions of Law.

The application seeks the following orders:

1) The Honourable Court be pleased to grant leave for the 5th Respondent to file her application under Section 56(4) of the Anti-corruption and Economic Crimes Act out of time in terms of the attached draft application;

2) The 5th Respondent's application attached be deemed to have been duly filed and served upon payment of the requisite filing fees;

3) Costs in the cause.

The grounds upon which the application is grounded are that the 5th Respondent/Applicant having been served with a preservation order under Section 56 of the Anti-Corruption and Economic Crimes Act (ACECA), on 2nd August 2006 forwarded the court documents to her advocate, Mr Richard Kariuki who has sworn the supporting affidavit to this application on 8th August 2006, with instructions to represent her in the matter. Mr Kariuki had to travel to Mombasa on 9th August 2007 for the Law Society of Kenya Annual

Conference as this had been pre-arranged. The conference ended on 12th August 2006. Mr Kariuki travelled back to Nairobi studied the papers and advised the 5th Respondent that an application under section 56(4) of ACECA was necessary. However before the application could be finalised Mr Kariuki was taken ill and admitted at Nairobi Hospital from 19th August to 25th August 2007? Upon his discharge he was on bedrest and only resumed his duties on 4th September 2006, by which time the 15 days allowed by the Act for presenting an application under Section 56(4) had passed.

The application before me to extend time has been necessitated by the above facts which have not been controverted.

The applicant has argued that since no provision has been made in the Anti Corruption and Economic Crimes Act (ACECA) to extend time the application is substantially based on this court's inherent power which is expressed in the Civil Procedure Act, in terms of Section 3A.

The application was opposed on three main grounds:

1) That the applicant has not properly invoked jurisdiction of the court;

2) The application is incompetent for invoking Civil Procedure Rules;

3) There is no provision for extension of time under the Anti Corruption and Economic Crimes Act after 15 days from the date of service of the Order;

4) There is no provision clothing the court with jurisdiction to admit an application under Section 56(4) outside the 15 days grace period; or

5) Allowing party to invoke the provisions of the Civil Procedure Act & Rules made thereunder or the inherent jurisdiction of the court;

6) Parliament must have intended the remedy under S 56 to be an expeditious remedy and an official tool in facilitating investigations of corruption which is not fettered by:

· An intricate/complicated procedure

· Procrastination.

7) Where Parliament intends to grant an extension of time it does say so expressly

e.g. Civil Procedure Act & Rules power to extend is donated by Section 95 and Order 49 respectively

· Appellate Jurisdiction Act and Rules section 7 and rule 4 respectively

· Limitation of Actions Act – there is a provision

At the other end of the pendulum is the Law Reform Act and Rules which do not donate the power to extend.

In support of the above contentions, the Respondent/Applicant has relied on holdings in the English case of ***THE QUEEN v THE COUNTY COURT JUDGE OF ESSEX AND CLARKE 1887 Vol XVIII QBD 704 at page 707*** where the court held:-

"**The ordinary rule of construction therefore applies in this case, that where the legislature has passed a new statute giving a new remedy, that remedy is the only one which can be persued."**

And at page 708 where Lopes LJ observed:-

"**That Act gave a new jurisdiction, a new Procedure, new form and new remedies and the procedure forms and remedies here prescribed must, where they have not been altered by subsequent legislation, be strictly complied with."**

Also relied on as regards rent cases, is the unreported case of ***SYDNA MOHAMED BURHANMDIN SAHER v MOHAMEDALLY HASSANALLY ca NO.28 of 1980.*** The Respondent have also cited the cases of ***COZEN v NORTH DEVON HOSPITAL (1966) 2 ALL ER 276 and SANT BENOIST PLANTATION LTD v JEAN EMILE ADRIEN FELIX CA NO. 25 of 1954.***

On the other hand the Applicant has cited two cases –

i. ***MICROSOFT CORPORATION v MITSUMI COPPUTER GARAGE (2001) IEA 127*** where the Court stated:

"**in the interests of Justice, procedural lapses should not be invoked to defeat applications unless the lapse went to jurisdiction of the court or caused substantial prejudice to the adverse party"**

ii. In ***SAGGU v ROADMASTERS CYCLES V LTD (2002) E.A 258,*** the Court reiterated**:-**

"**the administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights."**

I have fully considered the arguments of the two parties as outlined above and I have some observations to make concerning the position taken by the parties as follows:

The holdings in the case of the ***Queen v The County Council Judge of Essex and Clarke*** apply in a special way to the English position in that they do not have a written Constitution and where until recently, (due to the coming into force the Human Rights Act and the European Convention for Human Rights) it is the common law of the land which governs what one would call constitutional rights. This is to be contrasted with our position where we have a written Constitution which provides for the right of hearing under S 77(9) in respect of civil obligations.

i. The British Parliament is supreme whereas in our case it is the Constitution which is supreme and

not Parliament. Our courts can adjudicate on validity of Acts of Parliament whereas the British Courts do not have power to rule on the constitutionality of the Statutes enacted by Parliament;

ii. It follows that the ***QUEEN's*** decision though persuasive cannot apply to all our situations because all our statutes must comply with our Constitution;

iii. In the case of Kenya procedural due process is inbuilt in most provisions of the constitution including the provision touching on property rights, and interests in property and in the circumstances of this case the relevant Sections are S 70, S 75 and 77 of the Constitution which include the right of hearing. Thus, although the preservation order has been made pursuant to ACECA, an Act of Parliament, the court cannot ignore the provision of S 70 and 75 and S 77 of the Constitution. Inbuilt in these constitutional provisions are procedural safeguards aimed at ensuring due process before any right to property can be taken away and also incorporating the right of hearing. The right of hearing and the right of access to the court are of fundamental importance to our system of justice and even when they are not expressed specifically in any law the supreme position of the Constitution must be implied in every Act especially, the right to due process, and it cannot be taken away. Constitutional rights, cannot be taken away without due process. The right of hearing is an important constitutional right and it is unique in that there are no limitations – see ***HON MARTHA KARUA HIGH Court Civil Case NO. 288 OF 2004***. I am therefore unable to follow the English decision and I find that this Court is constitutionally empowered to order an extension under S 56 of ACECA;

iv. I am also not persuaded that a procedural lapse in not filing the application within the stipulated 15 days, due to reasons an applicant could do very little about, including an intervening illness by her Counsel, goes to jurisdiction of this court, in the face of S 60 of the Constitution. This court's jurisdiction is not limited in the circumstances and it can grant a reasonable extension to enable the Applicant to articulate her case by opposing the preservation order which has been imposed ex-parte on her property. Indeed failure to grant any such extension would be that the preservation order would automatically result in the extinguishment of her right of ownership without a hearing which process would in my view be patently unconstitutional. In the exercise of this court's jurisdiction the Constitution comes first and not ACECA see Section 3 of the Judicature Act

In addition it is crystal clear to me that no prejudice is likely to be suffered by the Respondent by the admission of the applicants application to set aside the preservation order which has been extended at least once after the final period of 6 months. In fact the applicant will be placed together with other five Respondents, who are opposing the same preservation order. On this point I would lean heavily in favour of the Microsoft the Saggu decisions cited above

(v) The other reason I must grant the extension is that any denial would result in the applicant being shut out without due process in a matter where her right to property might be taken away. In my view in situations where a person's right is likely to be taken away pursuant to statutory power conferred by Parliament there is an implied right of due process and also a presumption that any such power vested in a body will be exercised fairly. In this regard, the Respondent's opposition to due process, is to exercise statutory power unfairly and this court must be able to intervene by upholding the right to due process.

Finally nothing could possibly take away the court's inherent power to do justice and to always be a fountain of justice. To rule against nature is vanity and against reason and common sense. Illness is beyond us. Our laws must inspire confidence and good sense. This court's inherent power was well described in the case of ***KENYA BUS SERVICE LTD & 2 OTHERS v ATTORNEY GENERAL AND THE MINISTER FOR TRANSPORT AND 220 OTHER IPS HC Misc 413 of 2005 (now reported).***

"**Where there is no specific provision to set aside the court's power or jurisdiction would spring from the inherent powers of the court. Whereas, ordinary jurisdiction stems from the Acts of Parliament or statutes, the inherent powers stems from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations."**

Sir Isaac **J.H. JACOB** writing in his work entitled ***THE REFORM OF CIVIL PROCEDURE LAW***

AND OTHER ESSAYS IN CIVIL PROCEDURE (1982) *VERSION* has described the inherent powers in clear terms at page 224:

"**The answer is that the jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". This description has been criticized as being "metaphysical" but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court, it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law. The Judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner."**

In the circumstances, I would have invoked this jurisdiction as well.

In the result, I grant orders in terms of prayer 1,2 and 3 of the 5th Respondent's application dated 8th September, 2006 and further order that any replies and further replies together with skeleton arguments with lists of authorities be filed, and exchanged within 7 days.

It is further ordered that the Applicant's application be heard along with similar application on 17th July 2007 within the same time, as allocated.

It is so ordered.

DATED and delivered at Nairobi this 29th day of June, 2007.

J.G. NYAMU

JUDGE