**Ethics & Anti-Corruption Commission v Lodwar Midwest Hotel Limited & 2 others (Miscellaneous Civil Application E109 of 2023) [2024] KEHC 136 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 136 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**MISCELLANEOUS CIVIL APPLICATION E109 OF 2023**

**JRA WANANDA, J**

**JANUARY 19, 2024**

**IN THE MATTER OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003 & ETHICS AND ANTI-CORRUPTION COMMISSION ACT, 2011**

**BETWEEN**

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

**AND**

**LODWAR MIDWEST HOTEL LIMITED ..... 1ST RESPONDENT**

**SAMUEL KUWOM EREGAE ..... 2ND RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED ..... 3RD RESPONDENT**

**RULING**

1. Under Section 11 of the *Ethics and Anti-Corruption Commission Act*, 2011, the Applicant is clothed with the legal mandate to, inter alia, institute and conduct proceedings in Court for the purposes of recovery or protection of public property or for the freezing or confiscation of proceeds of corruption or related to corruption.

2. This Ruling is in respect to the 1st and 2nd Respondent's Application brought by way of the Notice of Motion dated 5/07/2023. The Application basically seeks that this Court varies, discharges or sets aside its orders made on 25/05/2023 whereof the Court "froze" two bank accounts operated by the 1st and 2nd Respondents at the 3rd Respondent bank.

3. The background of the Application is that by the ex-parte Originating Summons dated 23/05/2023 and filed under a Certificate of Urgency on the same date through E.W. Githinji Advocate, the Applicant sought orders, pursuant to Section 56(1) and (3) of the *Anti-Corruption and Economic Crimes Act* (hereinafter referred to as "the ACECA") that this Court prohibits the withdrawal, transfer,

disposal or other dealings with the sum of Kshs 3,684,208.80 and Kshs 2,866,884.15 or any amount thereof held in two respective bank accounts at the 3rd Respondent in the name of the 1st and 2nd Respondents, respectively, for a period of 6 months.

4. The grounds for the Application were that the Applicant is conducting investigations touching on conflict of interest by the 2nd Respondent, an employee of the County Government of Turkana (hereinafter referred to as "the County Government") who has been trading with the County Government through his company, the 1st Respondent, that the 2nd Respondent, through the 1st Respondent, has received fraudulent and irregular payments from the County Government totalling Kshs 59,444,113.10 during the period 1/01/2019 and 11/05/2023 through the Respondent's said bank accounts, that preliminary investigations have established that upon receipt of the payment by the 1st Respondent, the same was withdrawn in tranches of less than Kshs 990,000/- by the 2nd Respondent and his wife in an effort to avoid suspicion and detection by bank officials. The Applicant further pleaded that as an employee of the County, the 2nd Respondent is prohibited under Section 42 of the *ACECA* from trading with his Principal and that that any payments arising from dealings between an agent and principal amounts to proceeds of crime which are recoverable by the Applicant and that investigations have also established that in the same period, 1/01/2019 to 5/02/2023, the 2nd Respondent has received suspicious payments from the County Government of Kshs 7,663,630/- through his salary account held at the 3rd Respondent. In the circumstances, the Applicant prayed for freezing of the said accounts for a period of 6 months pending conclusion of investigations.

5. Upon considering the Application ex parte as provided under Section 56(1) of the *ACECA*, this Court granted the orders sought. Noting that under Section 56(3), the ex parte orders are to remain in force for up to 6 months in the first instance with a possibility of extension upon lapse thereof, this Court fixed the matter for Mention for 27/11/2013, a date after lapse of the 6 months, for purposes of review of the status thereof and for further directions.

6. In the present Application dated 5/07/2023 as aforesaid and filed through Messrs Nyachoti & Co. Advocates, the 1st and 2nd Respondents seek orders as follows:

   i. [.....] Spent

   ii. That pending the hearing and determination of this Application inter partes, the 1st and 2nd Respondents/Applicants be allowed limited access of Kshs 750,000.00 in Account No. [.....] and Kshs 750,000.00 in Account No. [.....] held at KCB Bank (Kenya) Limited, Lodwar Branch in the name of the Lodwar Midwest Hotel Limited and Samuel Kuwom Eregae respectively.

   iii. That this Honourable Court be pleased to vary, discharge and/or set aside the orders issued by this Honourable Court on 25th May 2023 by the Hon. Justice Wananda J.R. Anuro prohibiting the withdrawal, transfer, disposal of or other dealings howsoever with the sum of Kshs 3,364,208.80 and Kshs 2,866,884.15 or any amount thereof held in Bank Account No. [.....] and [.....] at KCB Bank (Kenya) Limited, pursuant to Section 56(5) of the Anti-Corruption & Economic Crimes Act, 2003.

   iv. That the 1st and 2nd Respondents/Applicants be allowed unimpeded access to the amounts Kshs 3,364,208.80 in Bank Account No. [.....] and Kshs 2,866,884.15 in Bank Account No. [.....] and [.....] at KCB Bank (Kenya) Limited.

v. That in the alternative the 1st and 2nd Respondents/Applicants pray for limited access of the said accounts in the tune of Kshs 2,000,000.00 each to enable them meet their daily needs and requirements.

vi. That time be and is hereby enlarged and the 1st and 2nd Respondents/Applicants Application herein under Section 56(4) of the *Anti-Corruption and Economic Crimes Act* be and is hereby deemed as properly filed and served.

vii. That the orders be served upon the Branch Manager, KCB Bank (Kenya) Limited at Lodwar.

viii. That the costs of the Application be in the Cause.

7. The Application is brought under Article 159(2)(d) and Article 50 of the *Constitution* of Kenya, Section 56(4) & (5) of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003, Order 51 Rule 1 of the *Civil Procedure Rules* 2010, Sections 1A, 1B, 3A of the *Civil Procedure Act* "and all other enabling provisions of the law". The Application is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the 2nd Respondent, Samuel Kuwom Eregae.

8. In the Affidavit, the 2nd Respondent deponed that the Respondents are in urgent need of access to the bank accounts to enable them meet their daily needs including settling bills in respect of food, rent, school fees and accommodation for the 2nd Respondent's children and statutory obligations to Kenya Revenue Authority and other statutory bodies, that the 1st Respondent operates a hotel, restaurant and catering business and is unable to meet its financial obligations to its landlord and suppliers and is at risk of laying off over 20 of its employees who will be subjected to hardship and difficulties noting that the employees are all residents of Turkana County which is currently facing drought, and that the 1st Respondent is apprehensive of the impending closure of business should the status quo remain. He deponed further that he is a salaried employee currently on his terminal leave pending retirement which is due in August 2023, the continued freezing of his bank account amounts to a great injustice as his family is undergoing unforeseen hardship since the monies held therein are his only source of livelihood, he is not aware of any corrupt conduct involving them as insinuated by the Applicant since no investigations have been conducted on them, and that he is only aware of a suit filed by the Applicant being High Court ACEC No. E025 of 2022 which is pending for hearing.

9. The 2nd Respondent deponed further that the Applicant obtained the said ex parte order without any due notice as required under Section 56(4) of the *ACECA* and that the same is yet to be served upon the Respondents as required by law, the orders are therefore unprocedural, irregular and without any justification and have caused them untold suffering since all their operations have been stymiedly and frustrated and they have been reduced to abject poverty. He deponed further that no prejudice will be occasioned to the Applicant should the orders be granted and that orders obtained in violation of his right to hearing should be set aside ex debito justisiae.

**Applicant's Replying Affidavit**

10. In opposing the Application, the Applicant relied on the Replying Affidavit sworn by one David Mutua and filed on 23/07/2023. In the Affidavit he deponed that he is an investigator with the Applicant, that the Applicant's mandate includes, inter alia, to investigate the conduct of any person or body that amounts to corruption and/or economic crime or unethical conduct, that upon completion of investigations, the Applicant is required to make recommendations to the Director of Public Prosecutions (DPP) for the prosecution of any person found culpable, that the Applicant is mandated to institute and conduct proceedings in Court for purposes of the recovery or protection of public property or for the freeze or confiscation of proceeds of corruption or related to corruption, or the

payment of compensation or other punitive and disciplinary measures, and that Parliament in its wisdom provided for the preservation of the subject matter of investigation vide Section 56 of the *ACECA* through ex parte application for a period of 6 months to safeguard the subject matter and allow the Applicant time to complete investigations.

11. The deponent then recounted the background, basis and manner of the investigations carried out and leading to the issuance of the ex parte orders on 25/05/2023 and added that the 2nd Respondent is prohibited by Section 42 of *ACECA* and Section 16 of the *Leadership and Integrity Act* (LIA) from engaging in any business or having an interest in any contract emanating from his employer save for receiving his salary, that further Section 17 of *LIA* prohibits all Public and State Officers from participating in any tenders involving their employers, that receipt of Kshs 59,444,113/- and Kshs 7,663,630/- through the said Bank Accounts is unjustified and the amounts are disproportionate to the 2nd Respondent's salary of Kshs 75,860.55, it is therefore reasonable to suspect that the total sum of Kshs 67,107,743.10 received by the Respondents were proceeds of crime acquired through corrupt conduct and therefore within the jurisdiction of the Applicant, that the Applicant further established that the respective Bank Accounts had balances of approximately Kshs 3,684,208.80 and Kshs 2,866,844.15 forming part of the subject matter of the investigations and that to prevent loss of public funds the Applicant properly filed moved the Court.

12. According to the deponent, the Application was regular, lawful and procedural as the Applicant demonstrated reasonable suspicion to warrant the orders granted, that Section 56(1) of the *ACECA* provides for an ex parte Application therefore dispensing with the requirement for issuance of a notice, that the Court also fixed the matter for Mention on 27/11/2023 after the 6 months period, that thereafter the Order as well as the Application were served on the 2nd Respondent on 6/06/2023 which was approximately 7 days after issuance thereof and the Applicant filed an Affidavit of Service, that pursuant to Section 56(4) of the *ACECA*, the 2nd Respondent was required upon receipt of the Order, if aggrieved, within 15 days of service, to apply for the discharge or variation thereof, and that the Application is out of time having been filed almost 2 months after service.

13. Further, the deponent contended that pursuant to Section 56(5) of the *ACECA*, an order under sub-Section (4) can only issue if the Court is satisfied, on a 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, that it is apparent that the Application has not provided any explanation and/or documents to justify the colossal payments made to them by the County Government, a mere denial of corrupt conduct will not suffice, the Application therefore falls short of the requirement under Section 56(5) of the *ACECA*, there is no basis for release of any of the funds, the allegation by the Respondents that they need to access the funds to pay school fees, meet their daily subsistence and statutory obligations are not sufficient to cause the Court to vary or discharge the orders, that the Respondents concede that they operate a hotel, restaurant and catering business which business has not stopped and continues to be undertaken and the income generated therefrom is within their control, that the 2nd Respondent further concedes that he continues to be an employee of the County Government and thus receives a salary, the Respondents sources of income are therefore still intact and any claim of financial frustration is not believable, that the documents attached only show school fees for two institutions which are both for the period 23/05/2023 before the orders herein were issued, the perceived financial needs are therefore not real but imagined, it is in the public interest to uphold the orders as allowing access to any of the accounts will be tantamount to perpetuating corrupt conduct, that upon conclusion of the investigations the Applicant intends to file a recovery suit which would be rendered nugatory should the funds be released, that the Applicant intends to forward a report to the DPP and thus if access is allowed, it will compound the possible prosecution.

14. The deponent termed the allegation by the Respondents that the Applicant is required to issue them with a notice of its investigations as misconceived and that the suit filed at the High Court ACEC Division at Milimani, ACEC E025 of 2022 involves a different subject matter in which the 2nd Respondent is sued for different reasons touching on procurement. In conclusion, he deponed that the Respondents will be given an opportunity to be heard in due time and therefore the allegation made by the Respondents that they have not been heard is premature as the investigations are still progressing.

**Hearing of the Application**

15. The Application was canvassed by way of written Submissions. Pursuant to directions given on 26/07/2023, the 1st and 2nd Respondents' Counsel filed his Submissions on 18/08/2023 while the Applicant filed hers on 20/09/2023.

**1st and 2nd Respondents' Submissions**

16. In his Submissions, Counsel for the 1st and 2nd Respondents submitted that Order 40 Rule 7 of the Civil Procedure Rules provides that an injunction may be discharged or varied or set aside on application by any party dissatisfied with such order. He then cited the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 on the principles for granting an injunction and submitted that the Applicant has failed to meet and/or satisfy the requirements of Order 40 Rule 7 (supra), that the 1st and 2nd Respondents have been subjected to undue hardship which has exposed and continues to expose them to loss of livelihood since the orders are unprocedural, irregular and without any justification. He cited the case of *Kenya Anti-Corruption Commission versus Joel Ria and 17 Others* [2012] eKLR to the effect that the right of the Applicant to prevent and detect economic crime must be balanced with the fundamental rights of the Respondents not to be deprived of interest in property. Counsel further averred that the proceeds in the bank accounts are of legal and legitimate business springing from the 1st Respondent's operations and catering engagements, office imprests, wages and allowances from the County Government and other legitimate business ventures.

17. Counsel contended further that the Applicant has not offered any tangible evidence of corrupt conduct to warrant the orders save for the bank statements, that although the investigations are still ongoing the same should never be used to block a deserving party from accessing his property just because the investigations have not revealed the source, that at most, the Applicant can only allege that the source is suspect, and suspicion alone, however strong, is not evidence. He cited the case of *Emmanuel Suipenu Siyanga v R* [2013] eKLR, case of Ethics & Anti-Corruption Commission v Oregonia Supplies Services & Another [2016] eKLR and the case of *Ethics & Anti-Corruption Commission v Joseph Chege Gikonyo & Another* [2016] eKLR.

18. Counsel further argued that the burden of proving the existence of a fact is on the party that alleges its existence, and that the Applicant has not discharged the same. On this point, he cited the case of *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* [2017] eKLR and also the case of *Ethics & Anti-Corruption Commission v County Government of Marsabit* [2017] eKLR. In conclusion, he submitted that the Applicant has failed to demonstrate any link between the monies held in the bank accounts and the alleged actions that constitute corrupt conduct and that the Application that led to issuance of the freezing orders was in breach of the 1st and 2nd Respondent's fundamental freedoms as envisaged under Article 31, 40, 47 and 50 of the *Constitution*.

**Applicant's Submissions**

19. On her part, Counsel for the Applicant reiterated that preliminary investigations established that the 2nd Respondent had been trading with his employer - the County Government - and received a colossal amount of Kshs 59,444,113.10 from the County Government through his company, the 1st Respondent contrary to the law, that in order to avoid detection the sums were then withdrawn by the 2nd Respondent and his wife in tranches of Kshs 1,000,000/-, that the 2nd Respondent also received Kshs 7,663,630/- through his salary account, that the amounts are disproportionate to the 2nd Respondent's known income, and that the payments were also unjustified by virtue of the 2nd Respondent being an employee of the County Government and thus prohibited from trading with his employer. Counsel further submitted that orders for preservation are provided for under Section 56(1) of the *ACECA*, that the provision can be divided into two limbs, namely, that the application is made ex parte and secondly, that the orders are granted on reasonable grounds to suspect that the property was acquired as a result of corrupt conduct. She submitted that investigations require some element of secrecy and it would be a mirage if notice was required, that it is for this reason that the *ACECA* provides for ex parte orders. On this point, she cited the case of *EACC v Fastlane Freight Forwarders Limited & 8 Others* in which the Court cited the book, "Freezing and Search Orders" by Mark S.W. Hoyle, 4th Edition and submitted that the drafter's intentions were to preserve the subject of investigations by restraining the Defendants through an ex parte Application, and that it would have been senseless for the Applicant to inform the Respondents of its intention to preserve monies believed to have been proceeds of crime, monies which at the time of the Application were in their control.

20. Counsel agreed that orders under Section 56(1) must be based on reasonable grounds to suspect the property was acquired as a result of corrupt conduct but submitted that in this case, it is not contested that the 2nd Respondent is an employee of the County Government, that he is a co-Director of the 1st Respondent and a signatory to the 1st Respondent's Account, that the 1st and 2nd Respondents received payments from the County Government through their accounts, that being an employee of the County Government, and the 2nd Respondent is expressly prohibited under the law from engaging in business with his employer.

21. It was Counsel's further contention that under Section 56(4) and (5) of the *ACECA*, before the Court varies an order for preservation, it must be satisfied that on a balance of probabilities, the property to be discharged or varied was not acquired through corrupt conduct, that this essentially means that the burden of proof shifts from the Applicant. She cited the case of *EACC v Njage Makanga & 2 Others* [2012] eKLR and the case of *EACC v Equity Bank Kenya Limited & Anothe*r [2016] KLR and also Section 107-109 of the *Evidence Act* and submitted that the Respondents have failed to discharge this burden. He contended that the Respondents want the orders lifted to ease financial constraints yet financial difficulty is not a ground envisaged under Section 56(5) of the *ACECA*.

22. Counsel submitted further that in an attempt to hoodwink the Court, the Respondents have attached two forms which they allege to be Conflict of Interest and Confidentiality Declaration Forms, that through the same, the Respondents purport to have declared their interest for the period 2019-2023 and purport the same to be statutory forms required by law, that a perusal of the forms discloses that they are not statutory forms but letters authored by the 1st Respondent addressed to the County and further, that there is no evidence that the letters were received, and that in any event, the duty to declare interest does not absolve an employee from criminal liability for trading with his Principal. Counsel stated further that the 2nd Respondent admits to receiving monies through his salary accounts which he alleges are from imprests and business ventures but no documentation has been provided in support. Counsel denied that the orders granted under Section 56 of the ACECA offends Article 25, 47 and

50 of the *Constitution* and reiterated that the Act provides that the orders are granted ex parte, that an aggrieved party is given an opportunity to apply for the discharge/variation of thereof within 15 days of service and that the Respondents appear to be under the false impression that the Application was made under Section 55 of the *ACECA* which is different from Section 56. He cited the case of *EACC v Sachdeva Nabhan & Another* [2019] eKLR and also the case of *EACC v Stanley Mmombo Amuti* [2015] eKLR.

**Analysis & Determination**

23. Upon examination of the Pleadings, Affidavits, Submissions and the entire Record, I find the one broad issue that arises for determination in this matter to be as follows:

> " Whether the 1st and 2nd Respondents have presented sufficient material to warrant the setting aside, discharge and/or variation of the ex parte orders granted by the Court under Section 56(1) "freezing" the 1st and 2nd Respondents' bank accounts for a period of 6 months"

24. The genesis of the Respondent's present Application (Notice of Motion) is the earlier Application (Originating Summons) filed by the Applicant pursuant to which this Court issued preservation orders under Section 56(1) of the *ACECA* "freezing" the two bank accounts held and operated, respectively, by the 1st and 2nd Respondents. The orders were to be in effect pending conclusion of investigations by the Applicant on whether the funds in the bank accounts are proceeds or a result of corrupt conduct or dealings. That Section provides as follows:

> " On an ex parte application by the commission, the High Court may make an order prohibiting the transfer, disposal of or other dealing with property if satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct"

25. The present Application seeks the discharge of the said Preservation Orders and is brought under Section 56(4) of the *ACECA* which provides as follows:

> " 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."

26. It is clear from a reading of the above provision that under Section 56(4) of the *ACECA*, an Application seeking discharge of a preservation order is required to be brought within a period of 15 days from the date of being served with the order. In this case, the impugned order was granted on 25/05/2023 and the present Application was filed on 5/07/2023, about 1 month and 2 weeks later. I however note that the 1st and 2nd Respondents have at prayer 6 of the Application prayed that the time within the Application was to be filed be enlarged and that the Application be deemed to be properly filed. At ground 8 of the Application and reiterated at paragraph 9 of the Supporting Affidavit, it is further stated that ".... the Applicant obtained the said prohibitory orders without any due notice .... .... and the same are yet to be served upon the Respondents as required by law".

27. The 1st and 2nd Respondents therefore allege that by the time that they filed the present Application, they had not yet been served with the Court order. If truly as alleged the Respondents had not been served with the ex parte orders then by dint of the provisions of Section 15(4) above, the 15 days' timeline cannot start running. However, in its Replying Affidavit, the Applicant has deponed that the Order as well as the Application were served upon the 2nd Respondent on 6/06/2023 and that the 2nd Respondent received the same both on his own behalf and also on behalf of the 1st Respondent noting

that the 2nd Respondent is a director of the latter. An Affidavit of Service has indeed been exhibited to that effect. If the contents of the Affidavit are correct, then it means that the 15 days' timeline within which the Respondents ought to have filed the Application expired on or about 21/06/2023. Having been filed on 5/07/2023, again if the contents of the Affidavit of Service are correct, then it means that the present Application was filed more than 2 weeks out of time.

28. I have perused the said Affidavit of Service and on the face of it, it indicates that indeed the 2nd Respondent was served as aforesaid on 6/06/2013 and in acknowledgment of receipt, he signed the documents served. The Respondents have not made any effort to controvert this allegation of service yet on 26/07/2023 this Court granted them leave to file a Further Affidavit by which they could have countered the same. Having opted not to file a Further Affidavit to controvert the Affidavit of Service, it follows that the Applicant's contention that the Respondents were served on 6/06/2023 remains unchallenged. In the circumstances, I find that the Application has been filed out of time.

29. I note that the *ACECA* does not appear to contain any express provision permitting enlargement of time to apply for discharge of ex parte orders granted under Section 5(1). Be that as it may, in my view, there would be nothing barring the Court from nevertheless invoking its inherent powers where sound reasons for delay have been presented. However, in this instant case, even if this Court were to invoke its inherent powers to enlarge the 15 days' timeline, there being no explanation whatsoever on the reasons for the delay, this Court has no material before it to exercise that discretion.

30. The above findings are sufficient to dispose of the Application in favour of the Applicant. I will however still proceed to examine the substantive issues and determine the merits of the Application as well.

31. It is not disputed that the Applicant, Ethics and Anti-Corruption Commission (EACC) is a public body established under Section 3(1) of the *Ethics and Anti-Corruption Commission Act*, 2011. The statutory mandate or mission of the Applicant is basically to combat and prevent corruption, economic crime and unethical conduct in Kenya through law enforcement, prevention, public education, promotion of standards and practices of integrity, ethics and anti-corruption. In executing its mandate, the Applicant gathers information on corruption occurring in Government and the public Sector from a variety of sources.

32. It is not in doubt that under Section 11(1)(j) of the *Ethics and Anti-Corruption Commission Act*, 2011, the Applicant's legal mandate includes, inter alia, the following:

> " 11. Additional functions of the Commission
>
> 1. Article 252 and Chapter Six of the *Constitution*, the Commission shall ...
>
> .....
>
> (j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures ....."

33. The grounds raised by the 1st and 2nd Respondents in seeking discharge of the preservatory orders "freezing" the two bank accounts can basically be summarized into three, namely, that no prior notice was served upon them before the Application leading to the orders was filed and/or heard and that they

were therefore denied their constitutional right to be heard, secondly, that they are in dire need of funds and thus need to access the bank accounts to enable them meet and cater for their financial obligations and, thirdly, that no nexus has been established to link the bank accounts to any corrupt dealings.

34. I fully agree with the 1st and 2nd Respondents' sentiments as expressed by the 2-Judge bench decision (Mwera J and M. Ibrahim J (as he then was) in the case of *Kenya Anti-Corruption Commission versus Joel Ria and 17 Others* [2012] eKLR to the effect that the right of the Applicant to prevent and detect economic crime must be balanced with the fundamental rights of the Respondents not to be deprived of any interest in property. I also agree that although investigations are still ongoing, the same should not be used to block a deserving party from accessing his property just because the investigations have not revealed the source thereof. Further, I agree that suspicion alone, however strong, is not sufficient evidence to warrant the freezing of a bank account by a Court. With this in mind, I now proceed to examine the grounds presented by the 1st and 2nd Respondents.

35. Regarding the ground that the Respondents were not served with prior notice of the Application pursuant to which the preservatory orders were issued, it is clear that Section 56(1) of the *ACECA* expressly provides that the Application is to be made and heard ex parte. The only requirement for service is service of the ex parte order after the same has already been issued, not prior. To this end, the Applicant's Counsel is right that the nature of investigations undertaken by the Applicant require some element of secrecy, that it would be a mirage if notice was required, and that it is for this particular reason that the *ACECA* provides for ex parte hearing. On this point, I agree with the holding in the case of *EACC v Fastlane Freight Forwarders Limited & 8 Others* cited by Counsel for the Applicant in which Achode J (as she then was) cited the following passage from the book, "Freezing and Search Orders" by Mark S.W. Hoyle, 4th Edition:

> " A freezing order is sought because the claimant fears the consequences of not restraining the defendant. Thus, in whichever court the application is made, it is almost always without notice, based on affidavit or draft affidavit evidence..."

36. Counsel for the Applicant is therefore right in her submissions that the intention of the drafters of the *ACECA* was to preserve the subject of investigations by restraining suspects through an ex parte Application, and that it would have been senseless for the Applicant to inform the Respondents of its intention to preserve monies believed to be proceeds of crime, monies which at the time of the Application were in the Respondents' control. The allegation that the orders were obtained unprocedurally or irregularly cannot therefore be correct.

37. On the constitutionality of the ex parte nature of Section 56(1) of the *ACECA* and whether it violates the sacrosanct right to a hearing, I share the conclusion reached by Achode J (as she then was) in the same case of *EACC v Fastlane Freight Forwarders Limited* (supra) in which she cited the South African case of National Director of *Public Prosecutions -v- Mohamed N.O and others* (2003) ZACC 4, which considered whether the South Africa's ex-parte statutory preservation provisions similar to Kenya's Section 56 of the *ACECA* was unconstitutional. Achode J held as follows:

> " 44. The South African court in upholding the said provision stated that while the statute may be a temporary deprivation of the right to fair hearing under the South African Constitution, such a limitation was justified as it "…. enables the Act to function for the legitimate and most important purpose for which the Act was designed, …. and to reduce the risk of the dissipation of the proceeds and instrumentalities of organized crime."

45. In the publication titled "Stolen Asset Recovery, A Good Practices Guide for Non-Conviction Based Asset Forfeiture" by the need for obtaining freezing orders ex-parte was justified at page 55 as follows:-

> "The ability to obtain an ex-parte order ... for freezing an account should be clearly stated in the forfeiture legislation. The absence of such a provision risks providing a possible loophole and an opening for the dissipation of assets. In addition government officials should be able to obtain documentary evidence such as bank records without notice to the account holder because the account holder can quickly transfer secret assets upon learning that an investigation is underway."

38. It is therefore clear that in its wisdom, Parliament provided for preservation of the subject matter vide Section 56 of the *ACECA* through ex parte application. In this case, the investigations are still ongoing and upon conclusion, and if the Applicant and the DPP find sufficient grounds to prosecute the 1st and 2nd Respondents, then at that stage, the latter will be given ample opportunity to be heard. The Respondents' allegation that they have not been heard is therefore premature since the investigations are still in progress at this stage. In the circumstances, the Respondents' contention that the orders should be discharged because of failure to serve the Application or prior notice is clearly misconceived.

39. The 1st and 2nd Respondents' second ground is that they need to access the funds because of their dire financial situation and to, inter alia, pay school fees and meet their daily subsistence. I observe that although there is no doubt that under Section 56(4) of the *ACECA*, this Court is empowered to discharge or vary preservatory orders issued under Section 56(1), the grounds upon which the Court can exercise that power is expressly limited in Section 56(5) in the following terms:

> " The court may discharge or vary an order under subsection (4) only if the court is satisfied, on a 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"

40. Section 56(5) therefore sets out the threshold which the Respondents must meet before the orders can be discharged. However, a reading of the above provision does not provide for the ground of "financial difficulty" as a recognized ground for discharging the orders. "Financial difficulty" may be a consequence of other recognized reasons and thus a secondary ground but cannot by itself be advanced as a primary ground for discharge.

41. Regarding the third ground to the effect that no corrupt dealings have been linked to the frozen bank grounds, as already observed, the Court may discharge or vary an order under subsection (4) but "..... only if the court is satisfied, on a 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"

42. To succeed under Section 56(5) therefore, the burden of proof is at that stage shifted to the Respondents and the standard of proof is one of "a balance of probabilities". This position was appreciated in the case of *Ethics and Anti-Corruption Commission v Njage Makanga and 2 others* (2017) eKLR, where Onyiego J held as follows:

> " ..... the burden of proof as articulated under the provisions of Section 56(5) of the *Anti-Corruption and Economic Crimes Act* is on a balance of probabilities and in this case lies with respondent/applicant".

43. The phrase "balance of probabilities" was explained in the case of *In Re H C minors* {1996} AC 563 at 586 where Lord Nicholls expressed himself as follows:

> " The balance of probability standard means that a Court is satisfied an event occurred, if the Court considers, that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegations, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation ....."

44. The question as to what amounts to "proof on a balance of probabilities" was also described by Kimaru, J (as he then was) in the case of *William Kabogo Gitau v. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

45. Further, in the case of *Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the Court of Appeal quoted the following statement made by the eminent Denning J. in Miller v Minister of Pensions (1947) 2 ALL ER 372 as follows:

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties ... are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

46. Finally, the Court of Appeal in the case of *Mumbi M'Nabea v David M.Wachira* [2016] eKLR again expressed itself as follows:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

47. In this case, it is not contested that the County Government of Turkana in which the 2nd Respondent is an employee, did between 1/01/2019 and 11/05/2023 pay colossal amounts of money to the Respondents through the two bank accounts frozen herein. It is also not denied that the 2nd Respondent is a co-director of the 1st Respondent and also a signatory to both the bank accounts. From the evidence supplied by the Applicant, during the said period, the 1st Respondent through its bank

account, received payments from the County Government totalling Kshs 59,444,113.10. The balance remaining in that account is presently only Kshs 3,364,208.80. Further, during the same period, the 2nd Respondent through its bank account, received payments from the same County Government totalling Kshs 7,663,630/-. The balance remaining in that second account is presently only Kshs 2,866,884.15. According to the Applicant, the payments are proceeds of business trading between the 2nd Respondent and his employer, the County Government, which is contrary to the law. It is also discernible that the said payments are quite disproportionate to the 2nd Respondent's monthly salary of Kshs 75,860.55. It is also apparent and curious that immediately upon being credited into the bank accounts, the Respondents, over a relatively short period of time swiftly made frequent cash withdrawals thereof almost depleting the amounts received.

48. The Applicant has then pleaded that as an employee of the County, the 2nd Respondent is prohibited under Section 42 of the *ACECA* and also Section 16 of the *Leadership and Integrity Act* (LIA) from trading with his Principal, that any payments arising from dealings between an agent and principal amounts to proceeds of crime which are recoverable by the Applicant, that the 2nd Respondent is prohibited from engaging in any business or having an interest in any contract emanating from his employer save for receiving his salary, and that Section 17 of the *LIA* prohibits all Public and State Officers from participating in any tenders involving their employers.

49. The above allegations are quite serious and expose the 1st and 2nd Respondents to possible criminal prosecution with serious repercussions and penalties. No one would smilingly welcome accusations of corruption particularly where one believes that he is innocent. I would therefore have expected the 1st and 2nd Respondents, in a bid to exonerate themselves this early and to quash the negative aspersions cast against them, to strenuously challenge the corruption allegations by supplying to this Court evidence to prove the allegations wrong or at least to create some doubt on their veracity. However, although the 1st and 2nd Respondents have simply denied that the funds paid to them by the County Government are proceeds of corrupt conduct, and alleged that the payments are office imprests, wages and allowances from the County Government, and that they constitute proceeds of legal and legitimate business ventures springing from the 1st Respondent's daily operations and outside catering engagements, the Respondents have not placed before this Court any evidence to support these allegations. The Respondents have done very little to controvert the very serious and damning allegations made by the Applicant. The reasons alluded to for not supplying such evidence are not at all convincing. It cannot be sufficient for the 2nd Respondents to simply state that the payments are office imprests, wages and allowances and not proceed further to demonstrate the truth of that explanation. Further, as aforesaid, the payments are quite substantial and would create reasonable doubt on whether simple office imprests and allowances to an individual employee of a County Government can really amount to such huge and colossal sums.

50. In my view therefore, the 1st and 2nd Respondents have not placed any evidence to demonstrate nor have they done enough to satisfy this Court, "on a balance of probabilities", that the colossal funds received by them from the County Government were not fraudulent or irregular payments and that the same are not proceeds of or were not acquired as a result of corrupt conduct. On its part, I am satisfied that the Applicant sufficiently discharged its burden of demonstrating the existence of facts to create a reasonable suspicion of corrupt dealings.

51. On the standard of proof, Counsel for the 1st and 2nd Respondents submitted that the Applicant's case is based on mere suspicion and has relied on the case of *Emmanuel Suipenu Siyanga v R* [2013] eKLR. However, I may point out that the said case was a criminal case where the standard of proof was "beyond reasonable doubt", and not "on a balance of probabilities" as required under the *ACECA*. The same may not therefore be pefectly applicable to the present case. Under the *ACECA*, the Applicant

is not obligated to prove "beyond reasonable doubt" that a person suspected of corrupt conduct did indeed commit the act complained of. A reading thereof reveals that "reasonable suspicion" as used in *ACECA* is relative and is to be considered at from eyes of the ordinary person otherwise known as the "officious bystander". Of course, "reasonable suspicion" should not be lowered to the level of mere speculation or other extraneous factors (see the decision of Onyiego J in *Ethics & Anti-Corruption Commission v Andrew Biketi Musuya t/a Mukuyu Petroleum Dealers* [2019] eKLR). Fortunately, the Courts are well equipped to separate the "wheat from the chaff"

52. Upon perusing the other authorities relied on by Counsel for the 1st and 2nd Respondents, I find that in those other cases, unlike herein, the Courts found that the persons suspected of corruptly receiving funds had sufficiently explained the sources of such funds and thus accordingly satisfied the Courts on a "balance of probabilities".

53. I therefore find that in this case, the Applicant sufficiently demonstrated a link between the monies paid into the bank accounts and possible corrupt dealings to reveal reasonable suspicion, on a balance of probabilities, that the payments may indeed be a result of acts constituting corrupt conduct. I do not therefore agree with the 1st and 2nd Respondents that the proceedings that led to issuance of the freezing orders was in breach of their fundamental freedoms as envisaged under Article 31, 40, 47 and 50 of the *Constitution*. The moment the Applicant established the existence of reasonable suspicion that the payments were proceeds of corrupt conduct, the burden of proof essentially shifted to the Respondents to demonstrate otherwise. In my view, the Respondents have failed to discharge this burden.

54. Having given due consideration to all the relevant matters arising herein, I find that it is in the public interest to uphold the preservatory orders granted on 25/05/2023 to allow the Applicant time to conclude its investigations. Needless to state, the freezing of the bank accounts is merely a stop-gap measure at this stage and full access to the bank accounts shall be restored to the 1st and 2nd Respondents should the investigations absolve them.

**Final Orders**

55. In the end, the 1st and 2nd Respondent's Notice of Motion dated 5/07/2023 fails both on the ground that the same was filed out of time and also on merits. The Motion is therefore hereby dismissed with costs to the Applicant (Ethics and Anti-Corruption Commission).

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JANUARY 2024**

**WANANDA J.R. ANURO**

**JUDGE**