



**Ethics and Anti Corruption Commission v Wambua (Miscellaneous Application E024 of 2023)  
[2024] KEHC 6772 (KLR) (Anti-Corruption and Economic Crimes) (10 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6772 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
MISCELLANEOUS APPLICATION E024 OF 2023**

**F GIKONYO, J**

**JUNE 10, 2024**

**BETWEEN**

**ETHICS AND ANTI CORRUPTION COMMISSION ..... APPLICANT**

**AND**

**DANIEL MUNYWOKI WAMBUA ..... RESPONDENT**

**RULING**

1. The applicant briefly stated in its case, inter alia that, in the exercise of its mandate under section 11 (1) (d) and (j) of the Ethics and Anticorruption Commission Act 2011 commenced investigations into allegations of embezzlement and/ or misappropriation of public funds, conflict of interest, bribery, and abuse of office by the respondent, an employee of Kenya Rural Roads Authority (KeRRA). The applicant was acting upon reasonable suspicion that the money held by the respondent in three of his accounts was acquired as a result of corrupt conduct and constituted illicit wealth.
2. The applicant vide its originating motion dated 07/08/2023 sought ex parte orders prohibiting the respondent, his agents, servants, or any other persons from withdrawing, transferring, disposing, or in any other way dealing with the funds held in the bank account numbers 0840184059257, 0120196520027 and 0390384299903 held at equity bank limited in the name of the respondent.
3. On 09/08/2023 this court (Kimondo J) granted preservation orders in this matter preserving monies held in the bank as mentioned above accounts held in the name of the respondent. The said orders were to subsist for six months to enable the commission to complete its investigations before instituting recovery proceedings.
4. The respondent vide notice of motion dated 17/08/2023 sought to have the court set aside and vacate orders issued on 09/08/2023. The application was dismissed in a ruling delivered on 09/11/2023.



5. The applicant has filed an originating motion dated 08/02/2024 seeking an order of extension of the preservation orders granted on 09/08/2023 which lapsed on 09/02/2024 for a further period of six months. The application is supported by the affidavit of Julius Simotwo, a forensic investigator with the applicant.
6. On 09/02/2024, this court (Prof (Dr) Sifuna J) extended the preservation orders earlier granted by this court on 09/08/2023 which were lapsing on 09/02/2024 till the hearing and determination of this application.
7. The respondent opposed the application vide his replying affidavit sworn on 19/02/2024. He attempted to explain the sources of the money subject of preservation order. He denied receiving any monies from named companies and argued they were from well-wishers and friends for his dowry payment. He contends that warrants are against him and not his associates hence execution of the same against his associates is illegal. He further contended that his employer has been cooperative but the applicant has been indolent in requesting information as they waited until December to request for them. The respondent argued that he will therefore suffer prejudice and unnecessary infringement of his rights if the freezing orders are extended.
8. The application was disposed of by way of written submissions. The applicant filed its written submissions dated 04/03/2024. The respondent filed his written submissions dated 12/03/2024. Both parties chose not to highlight the same.

#### **ANALYSIS AND DETERMINATION**

9. Borne out of the application, affidavits filed, respective parties' written submissions and the authorities relied upon and the law applicable to these proceedings, is a single issue: -  
Whether this court should exercise discretion and extend the preservation orders issued on 09/08/2023.
10. The applicant submitted that there is a need for an extension of preservation orders to enable them to complete their investigations and initiate forfeiture proceedings.
11. According to the applicant, the commission vide its letter dated 05/12/2023 requested the Director General, KeRRA to furnish them with the original documents for all tenders awarded from 2016 to 2023 to 29 companies listed in the letter. The commission is still waiting for this information from KeRRA which is crucial to its investigations.
12. The applicant further contends that during the pendency of investigations the respondent has acquired landed properties and motor vehicle which are reasonably suspected to have been acquired as a result of corrupt conduct. The commission has discovered that the respondent and his associates have other bank accounts and properties that need to be further investigated, hence, the need for an extension of preservation orders for a further 6 months given the numerous companies, bank accounts, and transactions involved.
13. The applicant submitted that if the extension of the order of preservation is not granted, it stands to suffer immensely and the Government of Kenya and the general public shall suffer irreparable loss as public money stands to be lost.
14. The applicant added that the preserved money could be transferred, withdrawn, disposed of, or otherwise dealt with in a manner that could frustrate the ongoing investigations.



15. The applicant was of the view that, the respondent has not demonstrated the undue hardship he will suffer if the preservation orders are extended.
16. The applicant has relied on sections 56(1) and (3) of the *Anti-Corruption and Economic Crimes Act*, 2003, the cases of Ethics And Anti-Corruption Commission V Gladys Gathoni Chege T/A Digiage Agency [2017] eKLR, Ethics & Anti-Corruption Commission V Equity Bank Of Kenya & Another [2017] eKLR, Ethics & Anti-Corruption Commission (EACC) v Beatrice Kagwiria Mugambi [2018] eKLR, Ethics & Anti-Corruption Commission V Dennis Njau Kimani & Another [2019] eKLR and Susan Waithera Kariuki & 4 Others V Town Clerk Nairobi City Council & 3 Others [2013] eKLR
17. The respondent submitted that the extension of the freezing orders on his bank accounts is highly prejudicial, oppressive, unjustified, and an infringement of his rights. The respondent argued that the applicant has had sufficient time within which to conclude their investigations and has not demonstrated non-cooperation from the respondent. The respondent relied on article 252,47, and 40 of *the Constitution*, Ethics & Anti-Corruption Commission Vs Johncele Insurance Brokers Ltd Kisumu Misc Civil Application No. 178 Of 2014 [2015] eKLR, Section 56 Of The *Anti-Corruption And Economic Crimes Act*, Ethics & Anti-Corruption Commission (EACC) V Lydia Ngingi Lentinina [2018] eKLR, Ethics & Anti-Corruption Commission (EACC) V Beatrice Kagwiria Mugambi [2018] eKLR, And Ethics & Anti-Corruption Commission V Njehia(2022).

### **Preservation orders**

18. The order issued under section 56(1) of ACECA is commonly known as preservation order. But, its actual attribute is; ‘prohibiting the transfer or disposal of or other dealing with property’ which is subject of the order. In essence, the order prevents dissipation of suspect property by the respondent pending investigations for, and eventual forfeiture of the property.
19. The application for preservation order under Section 56 of the *Anti-Corruption and Economic Crimes Act*, is made ex parte, perhaps to guard against possible deliberate and contrived dissipation of property under investigations by respondents. With advanced technology, movement of some assets especially money, funds, stocks, shares, is exceptionally swift with a push of a button or through online applications.
20. The preservation order will be issued if the court ‘is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct’. But, the order under the section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property which incorporates the doctrine of tracing, and recovery of traceable products of the illicit property in whatever form converted, exchanged or derived as profit or income, in the hands of third parties as well.
21. The order lasts for six months, but, the court has discretion to extend the order upon application by the commission (section 56(3) ACECA). The power to extend preservation orders is therefore, discretionary, but which is exercised judicially.
22. The applicant argued that, investigations on the assets in question are on-going and they have, vide its letter dated 05/12/2023 requested the Director General, KeRRA to provide them with the original documents in respect of tenders awarded from 2016 to 2023- the relevant period- to 29 companies listed in the letter.
23. The commission is still waiting for this information from KeRRA which is crucial to its investigations.



24. The respondent took the view that, the applicant has had sufficient time within which to conclude their investigations and has not demonstrated non-cooperation from the respondent. And, that the extension of the freezing orders on his bank accounts is highly prejudicial, oppressive, unjustified, and an infringement of his rights. The respondent relied on article 252, 47, and 40 of *the Constitution*.
25. Prolonged investigations may cause real drowsiness in a person's life, create a feeling of gauntness and dreariness in the person under investigations, and worst of all, may, in appropriate cases, become an infringement of fundamental rights to dignity, privacy, property amongst others. The court does not therefore, take as a trifle, the respondent's plea that he is aggrieved by and continues to suffer the existence and pendency of freezing orders. It is a real possibility and valid concern.
26. Therefore, the need for proportioned balance between the constitutional rights of the respondent, on the one hand, and public interest in the recovery or forfeiture of illicit assets or proceeds of crime as a way of combating crime, in this case, corruption, economic crime and money-laundering, on the other. These are serious organized, and transboundary crimes which have caused the world and nations, severe migraine, and huge economic leakages and social squeeze, prompting, international, regional and national concerted focus and efforts through tools such as United Nations Convention against Corruption, United Nations Convention against Transnational Organized Crime, African Union Convention African Union Convention on Preventing and Combating Corruption, to mention but a few.
27. Freezing orders cannot, nonetheless, be issued in perpetuity (Ethics and Anti-Corruption Commission V Beatrice Kagwiria Mugambi[2018] eKLR.)
28. However, the court is still satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.
29. The applicant has explained the steps it has taken in these investigations and has called for original documents in respect of tenders relative to the investigations which they are yet to receive from KeRRA. And, that it requires a little more time to complete investigations. This is plausible explanation for the delay in concluding the investigations.
30. Merely obiter, most of corruption and economic crimes are committed in extreme secrecy and confidentiality amongst the culprits. Without imputing any ill-will, and it is not the case here, sometimes, persons manning the public institution concerned and in the custody of relevant information, may be terribly complicit and drenched in crime, and partakers of its proceeds. These are some of the headaches and hurdles an investigator endures, hence, the legal tools provided in law to aid investigations such as preservation orders, seizure orders, search orders, gag orders, confidentiality orders which are provided in the law such as POCAMLA, ACECA, CPC, *Evidence Act*.
31. From the information provided, the Commission has also established new developments in its investigations of possible further infringements of law by the respondent and his associates, which gives the investigation another, and wider dimension that will require more time to probe and conclude.
32. It bears repeating that, in the circumstances of this case, there is absolute need to prevent the dissipation of assets under investigation, as such eventuality defeats recovery or forfeiture of such assets. Therefore, the preservation order herein will serve public interest, as opposed to being an infringement of respondent's rights.
33. This court is therefore, persuaded that it would be in the interest of justice to extend the preservation orders. The court is fully aware of the regime of safeguards provided in section 56 of ACECA.



34. The application dated 08/02/2024 is therefore, allowed. The preservation orders issued on 09/08/2023 are hereby extended for another period of six months from the date of this ruling.

35. Orders accordingly.

Dated, signed, and delivered at Nairobi through Microsoft Teams online application this 10<sup>th</sup> Day of June, 2024.

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**F. Gikonyo M**

**Judge**

**In the presence of: -**

PARAGRAPH 1.

**Ms. Lunyolo for applicant**

PARAGRAPH 2.

**Mabeya for respondent**

PARA 3.

Adan C/A

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