



**Ethics and Anti-Corruption Commission v Oparanya & 2 others
(Miscellaneous Application E040 of 2023) [2024] KEHC 12618 (KLR)
(Anti-Corruption and Economic Crimes) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
MISCELLANEOUS APPLICATION E040 OF 2023**

**EN MAINA, J
OCTOBER 17, 2024**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPLICANT

AND

WYCLIFFE AMBETSA OPARANYA 1ST RESPONDENT

TRICOMP ENERGY COMPANY LIMITED 2ND RESPONDENT

**LOCAL AUTHORITIES PENSION TRUST REGISTERED TRUSTEES 3RD
RESPONDENT**

RULING

Introduction

1. By the Notice of Motion dated 15th May 2024 filed herein on 17th May 2024, the Applicant seeks an extension of the preservation order issued by this court on 16th November 2023 for a period of six months. The application is brought under Section 56(3) of the *Anti-Corruption and Economic Crimes Act* (the ACECA) which vests this court with discretion to extend the preservation order issued under Section 56(1) of the *ACECA*.
2. The gist of the application is that the Plaintiff/Applicant requires more time to complete its investigations and to firm up information for purposes of making a determination on whether or not to file a suit against the 1st Respondent for recovery of the preserved funds.
3. In his affidavit sworn in support of the application, Andrew Lekamparish, an investigator, with the Applicant Commission, deposes that in the course of investigation, the Applicant managed to obtain several documents from the County Government of Kakamega which are bulky in nature, and



which require analysis, for purposes of instituting a recovery suit and that the Applicant is reasonably apprehensive that the Respondents may if the order is not extended, deal with the preserved funds in a manner prejudicial to the investigations.

4. The 1st Respondent opposed the application through a replying affidavit sworn by himself on 30th July 2024 where he deposes that he served as the Governor of Kakamega County between the years 2013 and 2022 and during that period he was not involved in any procurement either personally or through proxies. He contends that the allegations by the Applicant that there was a conflict of interest arising from transactions between the County Government of Kakamega and his companies lack sufficient specificity for him to respond. He further deposes that the allegation that he used the 2nd Respondent company as a vehicle to purchase a house in Karen Olorua Ridge is unfounded as he paid the consideration for the same through his annuity savings and from proceeds of a property that he disposed. He also deposes that the house was initially being purchased by the 2nd Respondent but due to its inability to complete the transaction he went ahead to purchase it. He contended that there was no justification for the freeze on his funds as they are not proceeds of corruption and hence the ex-parte order should not be extended but should instead be set aside.
5. The 1st and the 2nd Respondents were represented by one advocate and no replying affidavit was filed separately for the 2nd Respondent.
6. On his part, the 3rd Respondent opposed the application through a replying affidavit sworn by ISAAC MITEI, its Company Secretary/Trustee where he deposes that the 3rd Respondent is a registered Pension Scheme for employees of Local Authorities and engages in a range of investments in the interest of pensioners; that by a letter dated 17th March 2020, Advocates for the 1st Respondent indicated that he was interested in purchasing House no 23 on LR no 6939/2; that the 1st Respondent's Advocates proceeded to transfer ksh 8,900,000 to an escrow account as deposit for the house, that an agreement for sale was duly executed by the parties on 31st March 2022; that the consideration for the house was ksh 89,000,000 and that an additional deposit of ksh 5,000,000 was paid on 23rd May 2022. Further that by a letter dated 27th September 2023 the 1st Respondent requested the 3rd Respondent to terminate the agreement and refund the monies paid; that as the 3rd Respondent was intent on completing the transaction, the request by the 1st Respondent to refund the consideration was a violation of the contract. He contended that the agreement for sale provided for forfeiture of the deposit in the event of breach of contract.
7. Mr. Mitei also deposed that before the 3rd Respondent could lay claim to the deposit, the Applicant obtained a preservation order as a result of which the 3rd Respondent has suffered grave prejudice as the property cannot be disposed to a third party and yet it cannot access the monies in the escrow account. He also contends that the Applicant has not demonstrated that it carried out any investigations during the time of the preservation order and that it has been indolent and guilty of inexcusable delay and that the Applicant has not justified the extension sought.

Analysis and Determination

8. When the application first came up in court, on 17th May 2024, this court granted an interim order extending the preservation order pending the hearing and determination of the application and fixed the same for directions on 28th May 2024. On that date the court was not sitting and so the file went before the Deputy Registrar who fixed it for directions on 5th June 2024. Come that day Mr. Osiemo who had been served with the application on behalf of the 1st and 2nd Respondents informed the court that he had no instructions; that he had not seen the 1st Respondent for one year and so could not act



on his behalf. This forced this court to defer the directions to 20th June 2024 so that the 1st Respondent could be served personally. The interim order granted on 17th May 2024 was then extended.

9. On 20th June 2024 Mr. Osiemo informed this court that whereas he had now received instructions he required time to file a response and he was granted fourteen days to do so. The replying affidavit was filed on 30th July 2024 and so on 16th September 2024 this court gave directions that as Counsel for the 3rd Respondent had also filed a replying affidavit the application would be canvassed through written submissions. However, by the time of writing this ruling no submissions had been received from Counsel for the Applicant or from Mr. Osiemo for the 1st and 2nd Respondents. Only those of the 3rd Respondent were filed albeit out of time.
10. I have considered this application carefully. As I have observed the Applicant did not file its submissions as directed on 16th September 2024 which is akin to a party failing to canvass its case. The only reasonable inference that this court can infer from this act of omission is that the Applicant has abandoned its application. It could also be that the application having taken so long to be heard due to the inaction of Counsel for the 1st and 2nd Respondents, the Applicant already obtained the time it required to conclude its investigations and if that be the case then the application has been overtaken by events and it would no longer be necessary to grant it. Either way the application must fail.
11. I have also perused the 3rd Respondent's replying affidavit as well as its submissions. The same are clearly a plea to this court to discharge the preservation order. However, by law a preservation order can only be discharged if the court is satisfied, on a balance of probabilities, that the property in respect of which the order is discharged was not acquired as a result of corrupt conduct (see Section 56(5) of the ACECA). The 3rd Respondent has not, either in its replying affidavit or in the submissions, adduced any evidence as would warrant this court to make a finding that the preserved funds were not acquired as a result of corrupt conduct. This court cannot therefore discharge the order based on the 3rd Respondent's replying affidavit or submissions.
12. The application shall however be dismissed for want of prosecution and for having been overtaken by effluxion of time.
13. In regard to costs the order that best commends itself to me is that there shall be no order as to costs as none of the parties have succeeded.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 17TH DAY OF OCTOBER 2024.

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E. N. MAINA

JUDGE

