



**Ethics and Anti-Corruption Commission v Kanani & 4 others
(Miscellaneous Application E059 of 2022) [2023] KEHC 3401 (KLR)
(Anti-Corruption and Economic Crimes) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
MISCELLANEOUS APPLICATION E059 OF 2022**

EN MAINA, J

APRIL 20, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPLICANT

AND

WILSON KANANI 1ST RESPONDENT

WILMAN AUTO INVESTS 2ND RESPONDENT

WILLY WALLA INTERNATIONAL LIMITED 3RD RESPONDENT

REGINEEZ ENTREPRISES LIMITED 4TH RESPONDENT

WILCOREG LIMITED 5TH RESPONDENT

RULING

1. By an Order made on December 13, 2022, this court preserved funds held in various bank accounts and two motor vehicles, all registered in the names of the Respondents/Applicants pending investigations by the Respondent/Applicant. The order was issued pursuant to Section 56(1) of the [Anti-Corruption and Economic Crimes Act](#).
2. The 1st to 5th Respondents/Applicants, aggrieved by the Order, filed a Notice of Motion Application under a Certificate of Urgency dated February 22, 2023 supported by an affidavit sworn by the 1st Respondent/Applicant on even date.



3. The Application which is made under Section 56(4) and (5) of the *Anti-Corruption and Economic Crimes Act*, Section 1A, 3 and 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules* seeks the following orders:

- “a. (Spent)
- b. This Honourable court be pleased to extend the time for filing this Application from February 1, 2022 to the date of filing and this Application be deemed to be properly on record.
- c. This Honourable Court be pleased to set aside the order of this court issued on December 13, 2022.
- d. In the alternative to prayer (c) above, this Honourable Court be pleased to vary the orders issued on December 13, 2022 and allow the Applicants to access Kshs 2,240,000.00 per month from at least four out of the eleven frozen accounts for the purpose of the Applicants paying for their recurrent expenses.
- e. Costs of this Application be provided for.”

4. The Application is premised on the grounds stated on the face of it and on the facts deposed to in the supporting and further affidavits of the 1st Respondent sworn on January 22, 2023 and March 28, 2023 respectively wherein it is deposed inter alia that:-

- “a. On December 13, 2022, this Honourable Court, on the Respondent’s Application of even date, issued an order (“freeze order”) prohibiting the Applicants from (for a period of six months) accessing eleven accounts domiciled in various banks, and dealing with two motor vehicles.
- b. The time for filing of this Application ought to be extended because:
 - i. The freeze order was issued on December 13, 2022 and served upon the 1st Applicant on January 17, 2023, almost a month after the order was issued.
 - ii. The Respondent’s Application dated December 13, 2023 alleged investigation for the period of five years between 2016 - 2022. The period under investigations is long and putting together the documentation to explain the source of income for the period under investigations went past the requisite 15 days stated in the Act.
 - iii. Upon being served with the Court order, the 1st Applicant instructed an accountant to examine and reconcile the statements. The Financial Statement Report reconciling the affected accounts was finalized on February 8, 2023.
 - iv. The 1st Applicant thereafter instructed an Advocate to prepare and file this Application which has not been filed with unreasonable delay.
 - v. There is no prejudice likely to be suffered by the Respondent if the extension of time is granted.



- c. The orders issued on 1December 3, 2022 ought to be set aside because:
 - i. The Applicants’ sources of income for the period under investigations can be explained and are from legitimate sources.
 - ii. The evidence relied upon by the Respondent to obtain the order issued on December 13, 2022 was illegally acquired pursuant to a magistrate’s court order issued on November 23, 2022 in Miscellaneous Application No E3753 of 2022 Ethics and Anti-Corruption Commission versus Equity Bank of Kenya. The magistrate’s court order is the subject of an ongoing revision application between the Applicants and the Respondent in HCACECREV /1/2022.
 - iii. Whereas the Respondent is allegedly investigating the 14 Applicant for alleged receipt of corrupt funds when the is Applicant was the Development Control Officer 2, Nairobi City County Government, the 1st Applicant was appointed as the Development Control Officer 2 on May 28, 2020. Most of the transactions allegedly being investigated by the Respondent, were between the years 2016 and 2019, way before the 1st Applicant became a Development Control Officer.
 - iv. The companies in which the 1st Applicant is a director / shareholder do not conduct business with the Nairobi City County Government.
 - v. There appears to be a collateral purpose for which these proceedings were instituted by the Respondent.
- d. The orders issued on December 13, 2022 ought to be varied and the Applicant allowed to access four of the frozen accounts because:
 - i. The frozen accounts belong to the 1st Applicant, his Company business accounts, the 1st Applicant’s children, and the Ist Applicant’s wife’s business accounts. The order has effectively locked out the 1st Applicant and his family from accessing his bank accounts and effectively running the family businesses.
 - ii. The 1st Applicant and his family are now financially crippled by the order. The 1st Applicant’s family are unable to access the funds they need for their day-to-day basic needs including food, bills, clothing, school fee. The entire family are now destitute pursuant to the Court’s order issued on December 13, 2022.
- b. The Respondent’s Application dated December 13, 2022 is an abuse of Court Process aimed at harassing the 1st Applicant.
- c. It is only just and fair that this application be allowed.”



The Response

5. The Applicant/Respondent opposed the Application vide the replying affidavit of Anderson Waweru, an investigating officer with the Applicant, sworn on March 14, 2023.
6. The Respondent avers that this Application was brought outside the statutory timeline of 15 days stipulated in Section 56(4) of the *Anti-Corruption and Economic Crimes Act*. That the delay is inordinate and has not been sufficiently explained by the Respondents; Further, that investigations against the Respondents are still ongoing and are at an advanced stage and the 1st Respondent will be called upon to give his explanation as to how he acquired the assets that will be found to be disproportionate to his legitimate sources of earnings; That the explanation shall inform the Commission's decision whether or not to file a recovery suit against the Respondents and that the preservation order is valid for a period of six months and as such, the Commission should be allowed to complete the investigations within the appointed time.
7. It is also contended that there are reasonable grounds to suspect that the 1st Respondent in his capacity as a public officer occupying a position of trust accumulated assets whose value is disproportionate to his known legitimate earnings; That the cumulative earnings of the 1st Respondent's salary for the period January 2016 to October 31, 2022 is Kshs 7,148,985/ but investigations have however established that during this period of interest, he accumulated cash credits amounting to Kshs 506,397,460/71 which are in excess of his known legitimate earnings. Those excess credits are tabulated as follows:-Kshs 278,045,332/ through Willy Walla International Limited in Account Number 129029xxxxx67 held at Equity Bank.Kshs 5,549,247/22 through Wilson Nahashon Kanani Account Number 0020100014675 Equity Bank: and Kshs 97,666/ through Wilson Nahashon Kanani Account Number 7190xxxxx8-0 HFC Bank.Kshs 181,981,721/49 through Wilson Nahashon Kanani Account Number: 0010037xxxxx10 I & M Bank.Kshs 38,833,494/ through Wilson Nahashon Kanani Account Number: 010450000 NBK Bank.Kshs 630,000/ through Wilson Nahashon Kanani And Serah Joy Account Number: 1290179042063 Equity Bank.Usd 10,500.00 (Kshs 1,260,000/) through Wilson Nahashon Kanani Account Number: 1290282924998 Equity Bank.
8. It is contended further that the 1st respondent was previously charged and convicted of soliciting for bribes in Chief Magistrates Anti-Corruption Criminal Case No 29 of 2007: Republic vs Wilson Nahashon Kanani and that it is in the public interest that the assets remain preserved as should this application be allowed it might result in the 1st Respondent/ Applicant disposing, transferring or wasting the assets therefore defeating any intended recovery proceedings.

PARA 9.

Issues for determination

- a. Whether the Application is time barred
- b. Whether this court should vary or set aside the preservation order made on December 13, 2022



Analysis and determination

Issue a: Whether the Application is time barred

10. Section 56(4) of the *Anti-Corruption and Economic Crimes Act* limits the time for filing an application for variation or discharge of a preservation order to 15 days from the date of service of the order. It states:-

“56(4) 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.”
11. The preservation order herein was issued on December 13, 2022. It is not disputed that the same was not served upon the Applicant until January 17, 2023. Given that time for filing the application begins from the date of service the time in this case begun to run on January 17, 2023. The application filed on February 22, 2023 was therefore filed out of time.
12. Article 159(2) (d) of the *constitution* dictates that justice shall be administered without undue regard to procedural technicalities and accordingly I would allow the Applicant’s plea for enlargement of time of filing this Application noting that no prejudice will be suffered by the Respondent.
13. In the premises this court hereby allows prayer no. 2 of the Application and the application is deemed to be properly on record.

Issue b: Whether this court should vary or discharge the preservation order made on December 13, 2022

14. All applications for a preservation order are made under Section 56(1) of the *Anti-Corruption and Economic Crimes Act* which states:

“On an ex parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct.”
15. Section 56(3) prescribes that the life of the preservation order is six months which period may nevertheless be extended by the court.
16. The court is also vested with power to vary or to discharge the order upon an application by the person affected – (see Section 56(4)).
17. It is clear therefore that the ex parte order was made within the law. As to whether it is a violation of the Applicant’s right to fair trial it is well settled that that is not the case.

In the case of *Kenya Anti-Corruption Commission v Lands Limited and 7 Others* [2008] eKLR Nyamu J, as he then was, expressed himself as follows:-

“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.....

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.”

18. The above position was affirmed by the Supreme Court, albeit in regard to ex-parte warrants to investigate, in the case of [Ethics and Anti-Corruption Commission and Director of Public Prosecuted v Prof Tom Ojienda, SC T/A Prof Tom Ojienda & Associates and 2 others](#) cited in Supreme Court Petition No 30 of 2019 (Consolidated with) Petition No 31 of 2019 when it stated:-

“72 What conclusions can we derive from the foregoing analysis? First and foremost, it must be acknowledged that the 1st appellant has a wide and critical mandate under the [Constitution](#) and the law to combat Corruption and Economic Crime in our society. In executing this mandate, the 1st appellant assumes different postures depending on the nature of the specific function it is carrying out. Thus, on the one hand, the Commission may assume a non-confrontational and largely facilitative role when for example, it is educating the public on the nature and vices of corruption, or conducting research into the nature of corruption, or when undertaking a systems’ review of a specific agency with a view to sealing corruption loopholes. On the other hand, the Commission may assume a law enforcement posture, when conducting investigations into suspected corrupt conduct, effecting arrests of corruption suspects, disrupting corruption networks, and through the Office of the Director of Public Prosecutions, arraigning suspects before courts of law. Lastly, the Commission may assume an intelligence gathering posture, when for example it is tracing the proceeds of crime (asset tracing) with a view to recovering the same.

73 In all these, the Commission will apply different sets of laws and strategies. Regarding investigations, it all depends on what is at stake, the nature of the evidence required, and the urgency with which the said evidence must be acquired. In the circumstances, it cannot be said that the Commission must always give prior Notice to those it intends to investigate before commencing an investigation. We have elaborately interrogated the provisions of Section 26, 27 and 28 of [Anti-Corruption and Economic Crimes Act](#). The said provisions set out very specific circumstances in which the Commission may issue Notice. If the conditions so specified obtain, then the Commission may issue Notice in writing to the affected parties. If the Commission is carrying out a police operation or an intelligence gathering or asset tracing exercise, it cannot be required to issue a prior mandatory Notice to the intended targets. In such a situation, the provision of Section 23 of ACECA, the [Evidence Act](#), the CPC, and any other enabling legislation come into play. It’s however worth emphasizing that, at all times, whatever the nature of the investigations the Commission may be undertaking, it must do so within the confines of the [Constitution](#) and the law.” (underlining mine)

19. My finding therefore is that the ex-parte preservation order was lawfully issued and it does not violate the Applicant’s right to fair trial. The Applicant shall at the opportune time be accorded his right of reply including through cross examination of witnesses.



20. On whether the order should be discharged or varied, again, this court must be guided by the law in that respect the law being Section 56(5) of the *Anti-Corruption and Economic Crimes Act* which states:-

“The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the 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.”

21. In his affidavit in support of the application the Applicant has sought to explain the sources of his wealth and concluded as follows in paragraph 25 and 26:-

“25. I verily believe that hopes of saving my businesses now lies in this courts discretion to set aside the orders issued on December 13, 2022. The order has adversely affected my family financially as follows:

- a. The frozen accounts belong to Companies where I am the director, my personal accounts, my wife's business accounts, and my children's savings accounts. The order issued on December 13, 2022 has therefore effectively locked out my entire family from accessing bank accounts.
- b. My family is now financially crippled by the order. My family is unable to access the funds we need for our day-to-day basic needs including
 - i. Monthly food and shopping at Kshs 100,000/.
 - ii. Monthly bills (electricity, water and service charge) at Kshs 300,000/.
 - iii. School fee for my two children at Kshs. 900,000/ (Kshs 450,000/ each).
 - iv. Paying school fee for my three siblings in college approximately Kshs 450,000/ per semester (Kshs 150,000/ each).
 - v. Paying my domestic workers — two house girls at Kshs 20,000/ each; driver driving my children to school at Kshs 35,000/; food, bills, clothing, school fee.
 - vi. Paying the caretaker of my late father's home at Kshs. 15,000/.
- c. My wife is also unable to effectively run her business since the accounts belonging to Regineez Enterprises Limited, through which my wife operates shops for selling clothes were also frozen by the Court order. In particular my wife is now unable to pay rent for her shops as follows:
 - i. Kshs 320,000/ per month for her shop at the Hub Mall Karen.
 - ii. Kshs 100,000/ per month for her shop located at Lenana Road.
- d. My entire family are now destitute pursuant to the Court's order issued on December 13, 2022.

26. I verily believe that I have explained in detail, my source of income which would be satisfactory to set aside the Court order issued on December 13, 2022. However, in the event the Court is not persuaded



to set aside the court order, I pray that the court do vary the order and allow access to the following accounts:

- a. Account Number 125027xxxxx99 in Equity Bank in the name of Regineez Enterprises Limited which belongs to my wife's business.
 - b. Account Number 104500xxxxx00 in National Bank in my name.
 - c. Account Number 10037xxxxx10 in I & M Bank in my name.
 - d. Account Number 12901xxxxx063 in Equity Bank in my name and that of Serah Joy Malaba.
22. In the further affidavit sworn in response to the Applicant/Respondent's replying affidavit the Applicant reiterates the depositions in the supporting affidavit and further states that the Respondent has failed and refused to acknowledge that his wealth has grown over the years and more specifically failed to appreciate that he had closing balances in his accounts prior to the period of interest. He also deposes that the conviction referred to by the Applicant/Respondent was quashed on appeal to the High Court in *Wilson Nabashon Kanani v Republic* [2012] eKLR and that it is therefore malicious of the Applicant/Respondent to bring it up in these proceedings. He further contends and asserts that these proceedings are intended for a collateral purpose. The Applicant also takes issue with the Respondent's averment that it is still conducting investigations while also affirming that it will commence recovery proceedings. He contends that this infers that the Respondent has concluded its investigations and asserts that if that be the case then it should tender its final findings in this court for scrutiny. He contends that any further delay is only intended to punish him without due process a situation which this court should avert by granting the orders sought.
23. I have carefully considered the application, the facts deposed to in the affidavits, the rival submissions, the cases cited thereat and the law. To grant the application I must be persuaded on balance of probabilities that the assets which are the subject of the preservation order are not proceeds of corruption. To do so the Applicant's case must be a plain and obvious one because at this stage the court must be careful not to delve deep into the matter in dispute lest recovery proceedings be brought before it. In my view the Applicant's case is not a plain and obvious one. For instance, while the Applicant alleges that he received a sum of Kshs 3,500,000/ as an inheritance there is no proof of that fact as all he has annexed is a letter to the Chief by the beneficiaries of the estate of his late father and a letter written by the District Officer setting out the names of the beneficiaries. One would have expected to see a certificate of confirmed grant to that effect but that is missing. The other documents in regard to that matter of inheritance are receipts evidencing payment of monies to his father but not to himself. Other documents relied upon are mainly statements of bank accounts which in my view do not in themselves show the kind of business the Applicant is engaged in and the sources of the funds deposited thereat. The financial report is also premised on these bank statements which ordinarily would not be expected to explain the source of funds deposited in the accounts, much as the depositor is indicated. No trading licences or business permits have been annexed to assist this court in navigating those bank statements for instance. As for the loan agreement on page 174(header) and 405 (footer) there is no indication of who the lender and who the borrower is. I am pointing out all this so as to demonstrate that the Applicant's case is not so plain and obvious as to warrant this court to come to the conclusion that the preserved assets are not proceeds of corruption as would warrant this court to grant him the orders sought. It would be best to afford the Respondent time to carry out its investigations so as to determine whether they intend to bring recovery proceedings in respect to any, or all the assets or just some of them. The Applicant would then have to prove its case on a balance of probabilities and only then would the evidential burden shift to the Applicant. It is also instructive that a preservation order is given for a period of six months which period is almost coming to an end.



24. The upshot is that the application does not meet the threshold and it is therefore dismissed with costs to the Ethics 7 Anti-Corruption Commission/Respondent.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 20TH DAY OF APRIL 2023.

E. N. MAINA

JUDGE

