



**Ethics & Anti-Corruption Commission v Equity Bank Kenya Limited & another
(Miscellaneous Application E009 of 2022) [2023] KEHC 17589 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17589 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E009 OF 2022**

MW MUIGAI, J

MAY 11, 2023

**IN THE MATTER OF: THE ANTI-CORRUPTION &
ECONOMIC CRIMES ACT (CAP 65) AND THE ETHICS &
ANTI-CORRUPTION ACT (CAP 65A) LAWS OF KENYA**

-AND-

**IN THE MATTER OF: AN APPLICATION BY ETHICS &
ANTI-CORRUPTION COMMISSION FOR AN ORDER
UNDER SECTION 56 OF THE ANTI- CORRUPTION &
ECONOMIC CRIMES ACT (CAP 65) AND SECTION
11(1) OF THE ETHICS & ANTI-CORRUPTION ACT (CAP
65A) TO PROHIBIT THE TRANSFER OR DISPOSAL OR
OTHER DEALINGS (HOWSOEVER DESCRIBED) WITH
AND ACCOUNT NUMBER 0010291118483 AT EQUITY
BANK KENYA LIMITED RIDGEWAYS BRANCH**

BETWEEN

THE ETHICS & ANTI-CORRUPTION COMMISSION APPLICANT

AND

EQUITY BANK KENYA LIMITED 1ST RESPONDENT

ESTHER WANJIRU CHEGE 2ND RESPONDENT



RULING

Notice of Motion

1. The Applicant filed an Application under Certificate of urgency dated July 18, 2022 seeking the following orders, That:
 - a. Spent
 - b. An order do issue to freeze account number 0010XXXXXXXX483 in the name of held at Equity Bank of Kenya Limited Ridgeways Branch thereby prohibiting the respondents, by themselves or through their agents, servants or assigns from transferring, disposing of, wasting, or in any other way dealing with the said accounts for a period of six (6) months.
 - c. There be no order as to costs.
2. The same is supported by the affidavit of Mahmoud Mohdhar a forensic investigator with the Ethics and Anti – Corruption Commission (hereinafter referred to as “EACC”) deponed on July 18, 2022 in which he contends that he is investigating allegations of corruption of that the 2nd respondent, an employee of te Kenya Rural Roads Authority(hereinafter referred to as “”), Kajiado region is using Reswan Enterprises Limited and Rokays Enterprises Limited companies affiliated to her to trade with and receive money from resulting to conflict of interest and she received money from the companies bank account number 0010XXXXXXXX483 in the name of held at Equity Bank of Kenya Limited, Ridgeways Branch.
3. He said he had obtained warrants to investigate the two accounts together with bank accounts of Reswan Enterprises Limited and Rokays Enterprises Limited holders of account number 0010XXXXXXXX029 and 1340XXXXXXXX987 respectively held at Equity Bank of Kenya Limited, Ridgeways Branch. On the same basis, he collected bank statements from the 1st respondent for the 2nd respondents personal account. He deponed that the statement reflects that the said account is active as the same has been deposited with monies and transfer transactions and whose balance as at March 25, 2022 was KSHS 3,062,027.69.
4. Also, based said warrant collected mandate/authority to operate bank account showing the 2nd respondent is among the signatories of the bank account held by Reswan Enterprises Limited and account opening forms showing that the 2nd respondent is among the signatories of the bank account held by Rokays Enterprises together with the bank statements.
5. He contended that preliminary investigations reveal that the 2nd respondent has been using Reswan Enterprises Limited and Rokays Enterprises Limited bank accounts to receive monies from , deposit and transfer monies raised out of her corrupt conduct. That investigations further reveal that the 2nd respondent is currently holding sum of Kshs 3,062,027.69 at Equity Bank of Kenya Limited, Ridgeways Branch and the Applicant intends to conduct investigations and file a recovery suit so as to safeguard public interest. That unless the orders sought are granted, the investigations and main objective of the application may be rendered nugatory and the respondents may dispose of the assets.

Responses

6. The 1st respondent did not participate in these proceedings.



7. The 2nd respondent filed a replying affidavit on October 3, 2022 in which she only admitted to being an employee of KeRRA and denied all the contents of the affidavit in support of the Originating Motion. She deponed that account number 0010XXXXXXXX483 is her personal account. She contends that the warrants were obtained without her being notified despite the fact that her interests were affected and the application was mischievous and prosecuted in violation of her constitutional reasons and reference to the same should be disregarded.
8. Further, that any information illegally obtained should be struck out and /or disregarded. She opined that the depositing that she was a signatory to the account was false as her names are clearly marked as cancelled in the document alleged. She admitted that her account does hold the balance indicated and the monies are almost fully from her salaries. The account was opened in 2007 and has been used for salary remittance save for occasional small credits from other sources including friendly loans from associates and chamas. She contends that the application herein is in bad faith and seeks to regularize misadventures in Misc E088 of 2022 where the Applicant mischievously accessed her properties without any reference to her and hence blatant violation of her constitutional rights.
9. The 2nd respondent deponed that granting the orders would be harsh and oppressive and would render her destitute as the funds form part of her salary, would criminalize the receipt and access to personal emoluments as well as criminalizing a saving culture. Further, that the purported investigations were a mere witch hunt intended to unfairly harass and intimidate the deponent.

Further Affidavit

10. Mahmoud Mohdhar filed an affidavit on October 17, 2022 in rejoinder reiterating the contents of the supporting affidavit and further stated that section 56 (4) of ACECA, 2003 provides that a person served with an order under the section may within 15 days of being served apply to the court to discharge or vary the orders which has not been filed by the 2nd respondent.
11. Further, he opined that the 2nd respondent is associated with Reswan Enterprises Limited and Rokays Enterprises Limited as she is a signatory to the company's bank accounts, she has been trading with and receiving monies from KeRRA as evidenced in the company's bank statements and they have established a pattern on receiving of the monies from KeRRA ,Reswan Enterprises Limited and Rokays Enterprises Limited would immediately send some large amounts of monies to the 2nd respondents bank account and the monies are withdrawn in cash by the 2nd respondent.
12. On 6.7.2016 a sum of Kshs 1,704,037 From KeRRA Kilifi was deposited into bank account 0010XXXXXXXX029 and on July 16, 2016 a sum of Kshs 1,168,870 Paid to the 2nd respondents account. On December 31, 2019 a sum of Kshs 5,163,753 from Kajiado was deposited in bank account 0010XXXXXXXX029 and on the same date Kshs 968,000 withdrawn in cash by the 2nd respondent and Kshs 868,000 of the withdrawn cash deposited into the 2nd respondent's account.
13. He deponed that it is reasonably suspected that Reswan Enterprises Limited and Rokays Enterprises Limited are the 2nd respondent's proxies and may have been used to embezzle public funds or conceal proceeds of corruption on her behalf. The Applicant deponed that the search warrants were lawfully obtained and there is no statutory or constitutional requirement to make prior demand or give notice for an application of this nature as giving notice may lead to failure of the operation. He said that the 2nd respondent has failed to sufficiently explain how they acquired the monies preserved by this order and the same remain suspect. Further that she will not be rendered destitute as she is still in employment and earning a monthly salary of Kshs 279,800 at and the orders have not curtailed/ stopped her legitimate sources of income. The applicant contends that the Application was made in good faith.



Submissions

14. The Applicant filed submissions on 8.11.2022. It was submitted that the 2nd respondent did not make an application as set out in section 56 (4) and (5) of the [ACECA](#), 2003 but opted to file a replying affidavit and such there was no application for discharge before the court. Reliance was placed on the case of [Ethics & Anti-Corruption Commission v Njage Makanga & 2 others](#) [2017] e KLR.
15. As to whether the commission had satisfied the court that there is reasonable suspicion that the monies preserved were acquired as a result of corrupt conduct, it was submitted in the affirmative. While relying on the case of [Ethics & Anti-Corruption Commission vs National Bank of Kenya & another](#) [2017] e KLR and [Ethics & Anti-Corruption Commission v Andrew Biketi Musuya t/a Mukuyu Petroleum Dealers](#) [2019] e KLR, it was submitted that there were reasonable grounds to suspect that the 2nd respondent in conflict of interest embezzled and/or misappropriated public funds and has accumulated assets disproportionate to her known legitimate source of income. Further that she has not explained the source of funds currently preserved in the listed bank accounts. Thus the burden of proof on her part as required by section 107 and 109 of the [Evidence Act](#) had not been satisfied.
16. Further, that the 2nd respondent had not supplied the court with any legal documents proving her other sources of income including loans from associates and chama. She has failed to demonstrated how the preservation orders have caused her hardship that far outweighs the risk of the subject money being concealed and transferred. Reliance was placed on the cases of [Ethics & Anti-Corruption Commission v Fast Lane Forwaders Limited & 8 others](#) [2017] e KLR and [Ethics & Anti-Corruption Commission v Catherine Nkirotye Maingi & 2 others](#) [2017] e KLR.
17. The 2nd respondent filed submissions on January 16, 2023 and stated while relying on [Mrao v First American Bank of Kenya Limited & 2 others](#) [2003] e KLR that this being an application for temporary injunction, the Applicant must demonstrate that they have a prima facie case with a probability of success, that they will suffer irreparable loss that cannot be adequately compensated by damages or that the balance of convenience is in their favour. She submitted that she had no relationship with the said companies and the applicant has not adduced evidence related to the two companies to show their relationship with her, that the applicant failed to conduct thorough analysis on the said companies and the 2nd respondent's involvement with them and thus did not establish a prima facie case.
18. It was submitted that the 2nd respondent is apprehensive that her right to property under article 40 of the [Constitution](#) risks being violated through the intended closure and she will suffer irreparable harm which cannot be adequately compensated by damages as she provides for the family using the said account. She also submitted that the balance of convenience tilts in her favour since both parties still have their day in court.
19. As to whether the court has authority to dismiss the orders issued to the Applicant on July 18, 2022, it was submitted in the affirmative for lack of adducing thorough evidence and failure to provide documentation for the aforementioned companies and disclose the relationship with the 2nd respondent. While relying on the case of *The Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* (1989) KLR 1, It was submitted that the court has inherent jurisdiction to hear and determine the case and in doing so dismissing any orders that it had issued that would be infringing on the rights of one of the parties or without thorough analysis of the evidence tendered as is the case here.



Determination

20. I have considered the Originating Motion, the affidavits in support and against it as well as the submissions of the parties. The question before the court is whether the Applicant is entitled to the order to;
- a. freeze account number 0010XXXXXXXX483 in the name of held at Equity Bank of Kenya Limited Ridgeways Branch thereby prohibiting the respondents, by themselves or through their agents, servants or assigns from transferring, disposing of, wasting, or in any other way dealing with the said accounts for a period of six (6) months.
21. Section 56 of the *Anti-Corruption and Economic Crimes Act* states as follows:
- (1) 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 if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.
 - (2) An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.
 - (3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission.
 - (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.
 - (5) 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.
 - (6) A person who is served with an order under this section and who contravenes it is guilty of an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.
 - (7) In this section, “corrupt conduct” means—
 - (a) conduct that constitutes corruption or economic crime; or
 - (b) conduct that took place before this Act came into operation and which—
 - (i) at the time, constituted an offence; and
 - (ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime
22. The Certificate of Urgency was filed on 18/7/2022 and orders were sought to freeze the Account of 2nd respondent Account 0010XXXXXXXX483 Equity bank. The Court granted freezing of Account for 6 months pending further investigations and/or orders
23. On 3/10/2022 the respondent filed responding affidavit and was yet to serve the applicant. On 19/10/2022 parties through Counsel agreed to file and exchange written submissions within 21 days each. On 7/2/2023, parties through Counsel confirmed filing and exchange of Written Submissions. In the meantime, the Applicant filed a Certificate of Urgency and sought extension for 6 months



24. In the meantime; the court orders of 8/7/2022 were extended by the Duty court.
25. The court should satisfy itself whether the application establishes that there are reasonable grounds to suspect that the property/funds/money was acquired as a result of corrupt conduct.

In the case of *Kenya Anti-Corruption Commission v John Joel Ria and 17 others* [2012] eKLR the learned Judge stated:

“...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...”

The 2nd respondent has rights under the article 47(1) of the *Constitution* that provides that;

“every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

26. In a nutshell the applicant EACC deposed that under investigations was a Public Officer suspected of opening/holding and operating bank Accounts under the names Reswan Enterprises Ltd, Rokays Enterprises Ltd held in the 1st respondent’s bank. It was deposed that initial investigations disclosed that the companies are in 2nd respondent’s relatives names as Directors as per the Certificate of Registration attached. The said Companies have been awarded several contracts by the 2nd respondent’s Employer and payments made to the said Companies and then distributed to the said Accounts and to a school owned by the 2nd respondent and spouse.
27. The applicant detailed progress of ongoing investigations and laid a basis for extension of the freezing of accounts for further 6 months. That there are ongoing searches of ownership documents of properties and valuations of the said properties.
28. The 2nd respondent submitted that the Court granted *ex parte* orders and froze account for 6 months to enable investigations to be conducted and concluded. The said period has lapsed and the said orders are spent and the court considers that the 2nd respondent was not given a hearing under art 50 *CoK* 2010 and rights under art 47 of Fair Administrative Action and right own property/funds under article 40 *CoK* 2010 maybe infringed.
29. The applicant relied on the cases of *Giella vs Cassman Brown*; *Mrao Ltd vs First American Bank of Kenya Ltd v 2 others* [2003] eKLR & *Stek Cosmetics Limited v Family Bank Limited & another* [2020] eKLR
30. This court notes with concern that the 2nd respondent has not controverted the findings of the initial investigations as alleged by the applicant.

In *Ethics & Anti Corruption Commission (EACC) v Lydia Ngini Lentinina* [2018] eKLR the court considered a similar application and the court observed;

EACC has wide coercive powers to summon suspects and witnesses in an investigation. However, investigations as part of fair trial must be attended to by fairness and expedition as delay thereto will occasion injustice to the respondent. It should be noted that freeze of accounts is a clog on the property at issue. And, in line with the principle of innocence, prolonged freeze of her account will be oppressive and unjustified. I note that close to ten months have passed by since the preservation order was issued. Even if the investigation involves 60 persons, it does not involve complex issues which would demand intense and gruelling inquiry I am also aware that corruption is a cancer with insidious characteristics.



Disposition

1. The court is satisfied that there are reasonable grounds for alleged corrupt conduct, based on the initial investigation results.
2. However, the court is cognizant of balancing fundamental individual rights and at the same time facilitating investigations in terms of section 56 of EACA. The chance and/or period for freezing Accounts must be timebound.
3. Strictly, for those reasons shall I permit an extension of the freeze order of 18/7/2022 extended on 18/1/2023 now it shall be for only 30 days from 18th May, 2023.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 11TH MAY 2023.
(VIRTUAL /PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

