



Osoro v Ethics & Anti- Corruption Commission (Miscellaneous Application E044 & E002 of 2023 (Consolidated)) [2023] KEHC 21423 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS APPLICATION E044 & E002 OF 2023 (CONSOLIDATED)**

PN GICHOHI, J

JULY 19, 2023

BETWEEN

ALPHANUS MOKAYA OSORO APPLICANT

AND

ETHICS & ANTI- CORRUPTION COMMISSION RESPONDENT

RULING

1. The summary background of this matter is that under certificate of urgency, Ethics & Anti-Corruption Commission (herein referred to as the Respondent) filed against Alphanus Mokaya Osoro (herein referred to as the Applicant) two Exparte Originating Motions under Section 56 of the [Anti-Corruption & Economic Crimes Act](#) No. 3 of 2003 being High Court Kisii Misc. Application No. E002 of 2023 and No. E 044 of 2023 dated 16th January 2023 and 10th February 2023 respectively.
2. The basis of the investigations being carried out by the Respondent in both applications were allegations that the Applicant had fraudulently acquired public funds, through conflict of interest and abuse of office from the County Government of Kisii by awarding fictitious or irregular contracts to six companies namely Sopit Investments Company Ltd, Mocha Farm Investment Ltd, Milimo Investment Company Ltd, Jomok Holdings Ltd, Jemmy Farm Ltd and Jeduwa Company Ltd without following procurement laws and in turn received benefits in monetary terms from these contracts through his accounts.
3. The Respondent alleged that since December 2017 the Applicant had been using his position to award various tenders in his department to Mocha Farm Investment Ltd, Jeduwa Company Ltd, Jemmy Farm Ltd among other companies for a cumulative sum of Kshs. 150,000,000.00. The Respondent however stated that for purposes of that application, Respondent was able to retrieve payment voucher for Mocha Farm Investment Ltd for Kshs. 5,955,000/=, contract agreement and acknowledgement letter for Jemmy Farm Ltd and a contract agreement and corresponding payment Voucher for Jeduwa



- Company Ltd owned owned by his relatives to facilitate embezzlement of public funds through inflated tenders.
4. In Misc. Application No. E002 of 2023, the Court issued orders dated 20th January 2023 prohibiting the Applicant, his agents, servants or any other persons from withdrawing, transferring, granting as security, offering as collateral, disposing or in any other way (howsoever described) dealing with Kshs. 29,554,540.00 held in Sacco Account Membership Number 0110919 at Stima Sacco Society Limited and Kshs. 7,000,000.00 held in Sacco Account Member Number 0018603 at Ukulima Sacco Society limited in the name of the Respondent.
 5. In Misc. Application No. E 044 of 2023, the Court issued an order dated 10th February 2023:
 1. Prohibiting the Respondent, his agents, servants or any other persons from exiting from the Sacco and withdrawing, transferring, granting as security, offering as collateral, setting off, disposing or in any other way (howsoever described) dealing with shares, dividends, savings held in the Accounts Sacco Member Number 30638 held in Waumini Sacco Society Limited holding a balance of Kshs. 13,490,683.43 .00 in the name of the Respondent.
 2. Prohibiting the Respondent, his agents, servants or any other persons from exiting from the Sacco and withdrawing, transferring, granting as security, offering as collateral, setting- off against, disposing or in any other way (howsoever described) dealing with shares, dividends, savings held in the Accounts for Sacco Member Number 008473 held in Safaricom Sacco Society Limited in the name of the Respondent.
 6. In both applications, the Court ordered that the orders subsist for Six (6) months. Upon being served with the said orders, the Applicant filed a Notice of Motion dated 22 February 2023 on each of the two files seeking orders that:
 1. The Prohibition Orders issued therein be set aside and/or discharged.
 2. In alternative, the said Prohibition Orders issued therein be varied on such terms as this Court would consider just in the circumstances of the case.
 3. The Costs of this Application be provided for.
 7. The grounds on the face of the application were that the Respondent’s “preliminary investigations” which were still in formative stages were based on non-existent facts and based purely on suspicion. That the Respondent had the burden under Section 107 and 109 of the *Evidence Act* to prove on a balance of probability that there were public funds in the Applicants Sacco Accounts to warrant freezing orders at ex-parte stage.
 8. He accused the Respondent of deliberately misleading the Court in that it failed to establish that the funds in the Applicant’s Sacco Accounts constitute his lawfully acquired property as envisaged and protected under Article 40 of *the Constitution* and that Applicant’s right to said deposits ought to be protected by Court. That the Respondent never established before the Court that the money in his Sacco Account were acquired as a result of any corrupt conduct and therefore, the application did not meet the threshold for the grant of the orders.
 9. Arguing that he has a right to fair Administrative Action that is efficient, lawful expeditious, reasonable and pecuniary fair, he stated that the application for prohibition orders filed by the Respondent were mere public relations exercise to hood wink the public and is an abuse of the court process. He maintained that the warrants to investigate his Sacco Accounts was a violation of Section 28 (1), (2), (3) and (7) of *ACECA* and tainted with illegalities and irregularities.



10. In support, the Applicant swore an affidavit on 22nd February 2023 where he deponed that he is a Veterinary Surgeon by profession and to date, he practices as a consultant in the name and style of Dr. Mokaya. A.O. Veterinary Consultancy and Services. That he was employed as Chief Officer by the County Government of Kisii between 14th December 2017 and 14th December 2022 in the Department of Fisheries, Livestock and Veterinary Services. Prior to his engagement with the County Government of Kisii, he was and still is a successful veterinary surgeon and businessman who focused his business prospects on agriculturally related activities including, sugarcane and livestock farming, leasing of land for agriculture and dog breeding, leasing and training.
11. Further, he depones that Agri- business is very capital and intensive and the cost of sustaining both the crops and animals require a significant amount of working capital for feeds, pests and disease control, mechanization and skilled labour. That in order to raise and sustain the working capital, he saved most of the sales and profits from his businesses and also took several loans with Stima Sacco Society Limited, Ukulima Sacco Society Limited, Waumini Sacco Society and Safaricom Limited. That the dividends he earned from the deposits would often go offset the loans. He stated that his Ukulima Sacco Account was his salary account and therefore, the deposits therein constituted his lawfully acquired property, envisaged and protected under Article 40 of *the Constitution*.
12. He deponed that he has never received any report from the Respondent and while detailing his duties and the procurement process, he maintained that since his employment with the County Government of Kisii, he has never, either directly or indirectly, done business with the County, or received any benefit from any supplier of the County Government of Kisii by reason that they had been awarded any tenders or contracts to supply goods or provide services for the County Government of Kisii. He denied having influenced the award of any tenders or having received any benefits from the six companies for a cumulative sum of Kshs. 150,000,000.00 as alleged by the Respondent.
13. He deponed that he only started signing letters of award of contract in October 2018 for a value of less than Kshs. 30,000,000/= . That whereas the six companies were awarded contracts, he had no role in evaluation and selection of the companies for purposes of awarding contracts. That he never signed any prequalification or request for quotation in favour of the six companies and was surprised that he was being investigated for alleged impropriety in the award of contracts when the six companies still supplied for the County Government of Kisii during his predecessor's tenure.
14. Terming himself an outsider in the procurement chain, he wondered why he was the only being isolated for investigations yet all the people involved in the procurement were left out. He deponed that as a consequence, he conducted due diligence and established that all the six companies were pre- qualified and existed in the list of suppliers to the County Government of Kisii. He therefore stated that he cannot be the one who influenced prequalification of the suppliers.
15. Maintaining that George Okondo is not his relative, he deponed that he did not know that George Okondo was the director of Jemmy Farm Investment Company Limited which is a supplier of Kisii County Government but he recalled offering his veterinary services to him in his private capacity and he raised invoices. That had the Respondent carried out proper investigations, it would have established that the deposits of Kshs. 363,0000/= made on 22nd January 2018, Kshs. 198,000/= made in February 2018 and Kshs. 70,000/= made on 12th July 2018 and fagged by the Respondent, were part payments for his private consultancy business. He therefore deponed that instead of seeking to freeze only this amount that was in contention, the Respondent improperly and in bad faith sought and obtained orders freezing his entire life savings thereby putting him in a state of financial paralysis based on unsubstantiated allegations.



16. Admitting that Jemimah Wanjiru Nduati is his sister-in-law, he states that elementary investigations would have revealed that he also took care of her animals and he received payment from her. He stated that he did not know and could not have known that Jemimah Wanjiru Nduati was a director of Jeduwa Company Limited.
17. As regards Mocha Farm investment Limited and Jomok Holdings, he deponed that though his wife was a director, she relinquished her directorship and sold the companies on 11th September 2018 and never been involved in the companies again. He therefore deponed that the Respondent did not avail evidence to rouse any suspicion in regard to these companies.
18. Further, he depones that the Respondent never availed evidence on the allegation that the projects for which the contracts were awarded for the six companies were not undertaken or are incomplete hence not commensurate with the payments made.
19. As regards allegation that he had accumulated large deposits in his Sacco Accounts which are not commensurate with his known earnings during the period under investigations that is 14th December 2017 to 14th December 2022, he deponed that his contract with the County Government of Kisii had already lapsed.
20. He termed it wrong and unjustified for the Respondent to invoke Section 56 (1) and (3) and obtain the freezing orders when investigations were only preliminary, lacking insight and depth. He therefore urged the court to discharge the orders and instil confidence in the public of the equal protection of the law as guaranteed by *the Constitution*.
21. In reply, the Respondent filed an affidavit sworn on 10th March 2023 by David Naibei Sangula where he depones that the Applicant was employed as a Veterinary Officer by the Ministry of Livestock Development and posted to Masaba South in Nyanza Province vide a letter dated 15th March, 2011. Thereafter, he was absorbed into the Kisii County Government in 2014. In January, 2016 the Applicant was appointed to act as Director of Veterinary Services before becoming the Chief Officer in the Fisheries, Livestock & Veterinary Service Department.
22. He therefore drew a table to show when the Applicant joined the four Saccos as well as the approximate sum of deposits in the four Saccos since inception. He deponed that the total deposits in the four Saccos under investigation are over Kshs. 100,000,000/= and that EACC was still gathering information and documents which could vary the amount upwards when all the Applicant's assets are taken into account.
23. He deponed that the amount indicated in the table appearing in respect of this Ukulima Sacco Account is actually exclusive of the salary paid to the Applicant and as a consequence, the Applicant cannot claim that the monies therein protected under Article 40 of *the Constitution*. He therefore maintained that preliminary investigations indicate that the Applicant was trading with the County through his close relatives and friends and gaining a benefit through monies being deposited to his four Sacco accounts.
24. As an illustration, he listed the four Saccos, date of registration and particulars thereof and concluded that it would be false for the Applicant to state that he was not involved in the procurement processes from the time he was absorbed into the county.
25. He stated that one of the responsibilities of the accounting officer of an entity is to provide request for quotations to pre-qualified bidders under Section 106 (2) of the Public Procurement and Disposal Act of 2015 , the Act envisages a situation where the accounting officer will have knowledge of the chosen bidders/companies, and therefore it is not plausible that the Applicant did not know his sister-



- in-law was behind Jeduwa Company Limited as alleged in the Applicant's affidavit yet the documents indicate that the Applicant signed the contract as Chief Officer and his sister in-law also signed it as a director of the company and indicated her full names.
26. He therefore concluded that as the Accounting Officer of the entity, the Applicant was signing the Head of Procurement's professional opinion to indicate approval of the Notification of award of Contracts to the companies and therefore, he was fully aware of who was awarded the contract and this shows conflict of interest.
 27. He further deponed that though some of the contracts were signed before the Applicant was appointed as the Chief officer, there is evidence that he was participating in the tender process. That this included raising purchase requisitions and participating in the inspection and acceptance of goods delivered by Mocha Farm investment Ltd and Jomok Holdings Ltd when he was the Director of the department and therefore, it is unlikely that he did not know that his wife or sibling or friend was a director or involved in either of the companies under investigation.
 28. He deponed that upon the Commission being granted the preservation orders, the burden of proof shifts to the Applicant to show on a balance of probabilities how he acquired his assets and which he has not done other than giving general statements of denial. He therefore states that despite the assertions in the Applicant's affidavit in support, preservation orders herein will not prejudice the Applicant herein since the Applicant has also indicated that he has a thriving Veterinary Consultancy and Practice as well as agri-business which contributes to his earnings and which businesses are going concerns hence, he is still able to cater for his living expenses.
 29. While urging the Court not to discharge the orders herein, he states that it is in the interest of justice and fairness that the Respondent be allowed to conclude its investigations after which the Courts will have an opportunity to hear the evidence from both parties since the evidence laid before this court is based on material retrieved from preliminary investigations.
 30. Upon being served with this relying affidavit, the Applicant sought leave and filed a further affidavit which he swore on 28th March 2023 and deponed that in its Replying Affidavit sworn by David Naibei Sangula, the Respondent appears to have substantially shifted its earlier position to a brand-new position as in the earlier affidavit, the Respondent had indicated that its inquiry or investigation was in respect of the period December 2017 to December 2022 but it had failed to substantiate or furnish proof of any the allegations they had raised leading to freezing of his Sacco accounts. That in the Replying Affidavit, it seems that the period has been expanded to cover the prior years of 2013 which is a period of more than five (5) years when the Applicant was not the Chief Officer of the Department of Livestock at the County Government of Kisii, or generally, this makes it very onerous for him to recollect any information, or obtain relevant documents which would otherwise have assisted him in setting up a proper defence.
 31. He therefore stated that it is not only improper but also unfair and prejudicial for the Respondent to keep on shifting position since regarding the scope of its investigations since this denies him the opportunity to specifically and substantively respond to the issues now raised by the Respondent thus breaching his right to fair administrative action and a fair hearing as envisaged under *the Constitution*.
 32. He deponed that he has never denied employment by the County Government of Kisii. That prior to December 2017, the document produced was only a recommendation for his appointment as a Director and at no point in time was he ever substantively appointed to the position of Director or acting Director of Veterinary Services in the County Government of Kisii, and therefore, the bulky submission of his employment records are irrelevant to the issue at hand and only meant to mislead this Court.



33. Further, he deponed that by alleging in the Replying Affidavit that since inception when the Applicant's four Saccos had approximate deposits of Kshs. 105,894,496.00, the Respondent is misleading this Court as the scope of the investigation being conducted by Respondent was indicated as covering December 2017 to date and therefore, there is no nexus between any deposits made into his Sacco Accounts prior to December 2017. Further, he stated that the Respondent aggregated the total amount of deposits made into his various Sacco Accounts from the time he joined the Saccos, without also considering the total amount of withdrawals that were made from the same Sacco Accounts.
34. Referring to the Sacco Statements attached to his Supporting Affidavit, he deponed that the said Sacco Accounts are transactional Accounts and the deposits therein are an accumulation of deposits and reinvested dividends which have grown from 2011, 2015, 2016 and 2017 to date. He further explained that the deposits made into his Sacco Accounts include personal business remittances, salary remittances and dividend payments earned from share deposits and ploughed back into the Accounts.
35. He further deponed that membership forms for Ukulima Sacco Society and Stima Sacco Society annexed by the Respondent simply prove the dates he applied to join the said Saccos which is not an issue in contention in these proceedings. He however contended that the said documents do not at all corroborate the allegation of the approximate sum of deposits made into his four (4) Sacco Accounts, or otherwise prove any fact in issue in this particular case.
36. Further, he stated that the Ukulima Sacco application form clearly indicates that he would contribute Kshs. 15,000.00 per month and his source of income or employer is clearly indicated to be the Ministry of Livestock Development. That his Ukulima Sacco Account was opened on 30 June 2011 and he has consistently been making deposits therein until the Respondent sought to freeze the Account in January 2023.
37. As regards the Stima Sacco, he stated the application form indicates that he would contribute Kshs. 5,000.00 monthly, source of income or employer being his private veterinary services and farming. That his Stima Sacco Account was opened on 19th May 2017 and he has been consistently making deposits therein until the Respondent sought to freeze the Account. He further stated that the Respondent has failed to establish to the satisfaction of this Court that these deposits are proceeds of corruption and therefore, it is unfair for the Respondent to purport to take away his right to property as protected under Article 40 of *the Constitution*.
38. He further stated that the Respondent failed to point to this Court any credits or payments into his Sacco Accounts by the six (6) companies to justify the allegation that he was receiving kickbacks from them but only flagged deposits amounting to Kshs. 631,000.00 by Jemimah Nduati and Jemmy Farm Investment Company Limited. He reiterated that these were payments made to him for offering veterinary services, proof of which he has availed by way of invoices but the Respondent has not responded to or controverted this evidence.
39. He stated that having sufficiently explained their source of funds and circumstances in which the same were credited into his Sacco Accounts, there was no proof that he was indeed and in fact trading or doing business with the County Government of Kisii and therefore, no reasonable suspicion of corruption or economic crime can arise by citing these deposits and hence, he had discharged the burden under Section 56 (5) of *ACECA*.
40. He further stated that apart from the Applicant's wife and sister-in-law, the Respondent failed establish any relationship of consanguinity or affinity with any of the other Directors of the six (6) companies cited herein and therefore, the allegation that these are the Applicant's close relatives or cronies therefore cannot stand.



41. He stated that his wife Charity Wamuyu Nduati, resigned as a Director of Mocha Farm Investment Limited and Jomok Holdings Limited . While attaching a copy of a Memo, he stated that after his appointment as the Chief Officer, he formally wrote to the CEC, Finance and Economic Planning on 2nd February 2018 indicating a possible conflict by reason of his wife's resignation as a director and her previous association with Mocha Farm Investment Limited and Jomok Holdings Limited and was informed that since she was not associated with the two (2) companies and the Applicant had not awarded any contracts to the two (2) companies at the time when the Applicant was Chief Officer, no conflict of interest existed.
42. He therefore stated in any event, the Respondent failed to establish that these two (2) companies were awarded tenders by virtue of his association with Charity Wairimu or his position in the County Government of Kisii. That the Respondent also failed to avail any evidence to demonstrate he signed even a single contract for either Mocha Farm Investment Limited and Jomok Holdings Limited and the County Government of Kisii and in the circumstances, the allegation of conflict of interest is anchored on conjecture and mere speculation.
43. He further stated that the Respondent never availed any evidence that he awarded any contracts between December 2017 and September 2018 to Mocha Farm Investments Limited and Jomok Holdings Limited companies, either with or without the knowledge that Charity Wamuyu Nduati was a Director and signatory for the bank accounts of the two (2) companies, or that any of his Sacco Accounts received any payments from the two (2) companies within that period.
44. He stated that having conceded that Mokaya John Momanyi and Charity Wamuyu Nduati resigned as Directors of the two (2) companies on 11th September 2018, then the Respondent's allegation that they remained as signatories of Mocha Farm Investments Limited and Jomok Holdings Limited is untrue and misleading.
45. He further deponed that the Respondent failed to adduce any evidence to support its allegation that George Okondo Maeri was the Director of Jemmy Farm Investment Ltd and that Emily Moraa Mokaya is signatory to its bank account, that Emily Moraa Mokaya is a Director of Milimo Investment Company Limited and that Jemimah Wanjiru Nduati is a Director of Jeduwa Company Limited.
46. He further stated that the Respondent failed to establish that any proceeds of corruption were deposited into his Sacco Accounts by George Okondo Maeri, Emily Moraa Mokaya and Jemimah Wanjiru Nduati and the companies associated with them. He further stated that though the Respondent alleged that the said companies deposited in excess of Kshs. 100,000,000.00 being proceeds of corruption into his Sacco Accounts, it failed to provide proof of any such deposits or to link any such deposits to George Okondo Maeri, Emily Moraa Mokaya, Jemimah Wanjiru Nduati and the Companies associated with them, or any of them.
47. On procurement, he deponed that Requisition was raised by the Director of Veterinary Services being the User Department and approved by the A.I.E. Holder being the Chief Officer at the time but he was not the Chief Officer. He therefore stated that he had no control on the process or procedure that the Procurement Department of the County Government of Kisii adopts in selecting the preferred supplier after the request for quotations are issued to the suppliers and he could not have known, nor did he have any influence on which company would submit the highest or lowest bid and he was not a member of the tender quotation opening committee whose members included a Procurement Officer, an Accountant and an ICT Officer, all from different Departments from that of Agriculture.
48. On the the allegation that he was signing purchase requisitions and participating in the inspection and acceptance of goods delivered by Mocha Farm Investment Ltd and Jomok Holdings Limited,



he stated that he was simply performing his duties and obligations as required by the law and that would not disclose any impropriety, corruption or unethical conduct on his part. He further stated that the Respondent never made any allegations of collusion between him and other officers in the procurement or supply chain of the County Government of Kisii and therefore, even in circumstances where he clearly did not award any contracts to the cited companies, yet persons who did are indicated in the documents adduced by the Respondent. He therefore stated that the continued purported investigations on the Applicant and the freezing of his Savings Accounts unfair, witch-hunt and in bad faith on the part of the Respondent.

49. He stated that he had never been a director of any of the six (6) companies cited by the Respondent and was not part of the Procurement Department in the County Government of Kisii and therefore, he would never have known the basis on which Mocha Farm Investment Ltd and Jomok Holdings Limited, or any other of the Companies cited by the Respondent were pre-qualified as suppliers for Kisii County Government . That since the companies are separate entities from their directors, and the veil of incorporation is not lifted during inspection and acceptance of goods, there is no way he could have known who the Directors of the Mocha Farm Investment Ltd and Jomok Holdings Limited are as presumed by Respondent.
50. Lastly, he urges the Court to find that he has joined issues with the Respondent in relation to the deposits made into his Sacco Accounts and had completely answered all allegations and therefore, he urged the Court to lift the prohibition orders issued against his Sacco Accounts.

Applicant's Submissions

51. The submissions herein dated 12th April 2023 are a highlight of the affidavits and counsel listed two issues for determination that is :
1. Whether the Commission furnished prima-facie evidence to show that there exist reasonable grounds to suspect that the funds in Dr. Mokaya's Sacco Accounts were acquired as a result of corrupt conduct, that Dr. Mokaya was involved in the corrupt conduct or that a Respondent subsequently acquired the funds in the Sacco Accounts which were initially acquired as a result of corrupt conduct.
 2. Whether Dr. Mokaya has been able to furnish proof and explain the sources of the funds in his Sacco Accounts in such a manner that on a balance of probability, he has been able to satisfy the Court that any part of the funds in his Sacco Accounts was not acquired as a result of corrupt conduct.
52. On the first issue, counsel submitted the Respondent never attempted to prove , substantiate or set a prima-facie case in the least, to support any of the blanket allegations against the Applicant, but simply brought letters of appointment, payslips, account opening forms and bank statements but these did not provide factual foundation or arouse speculation that the funds in the Applicant's Sacco Accounts were proceeds of corruption.
53. Counsel further submitted that the Respondent failed to demonstrate that there were any direct fund transfers from the County Government of Kisii to the Applicant's Sacco Accounts apart from his salary. That the Respondent did not show any transfer of funds by the six (6) companies it purported the Respondent had been trading with. He submitted that as regards funds flagged by the Respondent as having deposited into the Sacco Account, the Applicant has given a complete answer on the basis of the transfers. While relying on case of *Ethics and Anti-Corruption Commission v Moses Kasaine*



- Lenokulal & another* [2019] eKLR, counsel submitted that the Respondent failed to establish a casual link between the funds held in the Applicant's Sacco Accounts and corruption.
54. Further, counsel submitted that the Respondent has never invited him to explain to it the sources of funds held in his Sacco Accounts for purposes of investigating and inquiry into unexplained assets under Section 26 of the *ACECA*. He therefore submitted that in absence of such an inquiry, it is impossible for the Respondent to allege that the Applicant is not able to explain the sources of the funds held in his Sacco Accounts.
55. Counsel further submitted that most of the letters of notification of award of contract which the Respondent adduced in support of its allegations were not signed by the Applicant, and if signed, it was shown that he was simply discharging his statutory obligation as an Accounting Officer. That the Respondent did not attempt to show how the Applicant influenced any pre-qualification or award of tender to any company including the ones it cited.
56. While relying on the case of *Ethics and Anti-Corruption Commission v Ministry of Medical Services and Another* (2012) eKLR and *Emmanuel Suipanu Siyanga v Republic* Cr. Appeal 124 of 2009 (2013) eKLR, counsel submitted that Prohibition Orders must be based on actual foundation discernible from facts but not allegation based on mere speculations. Counsel therefore urged the Court to find that the Respondent did not prove the first issue.
57. On the second issue, counsel submitted that the Applicant explained and substantiated in his Affidavits, all the sources of the deposits in his Sacco Accounts, which are attributable to his private businesses being farming, livestock keeping, leasing of land, dog breeding and a private veterinary consultancy, his salary remittances and dividends earned from his deposits and ploughed back into share capital. That further, the Applicant has shown that deposits in his Sacco Accounts have accumulated since the accounts were opened and has shown that the same are not disproportionate to his known and disclosed sources of income before or during the time he was appointed as the Chief Officer in the County Government of Kisii thus discharging his burden.
58. In conclusion, counsel submitted that lifting the Prohibition Orders outweighs advantages as the Applicant's businesses have come to a halt and loans are not being serviced now that his contract with the County Government has lapsed and therefore, the inconvenience caused to him cannot be ignored by the Court.

RESPONDENT'S SUBMISSIONS

59. In their submissions dated 24th April 2023, counsel for the Respondent maintained the Respondent's affidavits and submitted that she saw no need of reproducing them. As a highlight, counsel submitted that the orders were obtained as a result of preliminary investigations which showed that the Applicant had amassed assets not commensurate with his known sources of income. On the issue as to whether the Respondent set out a prima facie case, counsel submitted that the answer is in the positive in that through the material before Court, the Respondent laid a basis for its reasonable suspicion that the Applicant was involved in acts of corruption.
60. While relying on *Ethics & Anti-Corruption Commission v Daayo Construction and General Supplies Ltd & 2 others* [2019] eKLR and *David Kinyae Isika & another v EACC & another* [2022] eKLR, counsel submitted that based on the investigation that has been done up until January, 2023, there was reasonable suspicion that the Applicant is likely to have committed acts of corruption that resumed in the amassing of assets beyond his known sources of income and that this was captured in the Investigating Officer's affidavits.



61. While further relying on the case of David Kinyae Isika & another (supra) ,counsel submitted that the Applicant has not demonstrated that the preservation orders will cause him undue hardship that far outweighs the risk of the assets in issue being concealed or transferred. Further, counsel submitted that the Applicant confirmed that he runs successful businesses which are still earning him an income and which the preservation orders have not curtailed.
62. On the Applicant’s argument that he was not called to explain the source of his wealth, counsel submitted that the Respondent served the Applicant with a notice under Section 26 of ACECA on the 14th April 2023 and therefore, the Applicant ought to allow the ongoing investigations to take their course to a logical conclusion.
63. On the Applicant’s grievance that his right to fair hearing was violated, counsel submitted that there is no legal requirement for the Respondent to obtain the consent of the Applicant before commencing investigations on the Applicant’s Sacco Accounts. While urging the Court to adopt the reasoning in Ethics & Anti-Corruption Commission v Daayo Construction and General Supplies Ltd & 2 others [2019] eKLR (supra) , counsel further submitted that Article 47 does not apply on matters investigation. That the Applicant’s right to a fair hearing was cured by Section 56 (4) of ACECA which gave him a right to file the present application having been aggrieved by the orders issued to the Respondent by this Court.
64. On the Applicants' argument that his Constitutional right under Article 40 would be curtailed if the preservation orders are not discharged, counsel submitted that the said provision does not grant an absolute right to property and that indeed, the proprietary rights do not extend to any property found to have been unlawfully acquired. Counsel therefore submitted that any hardship occasioned to the Applicant is of a temporary nature and permissible when compared to the public interest sought to be protected.
65. Lastly, counsel urged this court to dismiss the Applicants application with costs and submitted that to discharge the orders obtained at this juncture would render the on-going investigations and any ensuing recovery proceedings nugatory.

DETERMINATION

66. To start with, the impugned orders made therein were under Section 56 of ACECA which are basically ex-parte in nature and with no provision for inter-partes hearing at that stage. This is because the section provides specifically in subsections 1,2,3, 4 and 5 as to the sequence of action by the parties that:
 - (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.

67. The argument by the Applicant that he was not called before or during the investigations to explain himself is misplaced. The Respondent has no obligation to do so before obtaining the said orders. The Respondent's power to carry out the investigations herein are anchored on Section 11(1) (d) of the Ethics and Anti-Corruption Act, Section 23 (3) of the Anti-Corruption and Economic Crimes Act and Section 180 (1) of the Evidence Act to obtain warrants to investigate any account of any person.
68. Therefore, the Applicant's right to respond is after the ex-parte orders are so issued and it is in compliance with Section 56 (4) that this application has been brought. Since the Respondent admits that they only served the Applicant on 14th April 2023 after obtaining the impugned orders, then it is not logical for the Respondent to argue at the ex-parte stage that the amounts alleged to be as a result of corrupt activities were unexplained deposits. Of course, if the Applicant had not been called by the Respondent to explain, he cannot be accused of failure to explain. He could only be expected to respond after being notified either during investigations or after being served with the freezing orders.
69. The Respondent filed his response to this application but that response prompted Mr. Akhaabi to orally seek leave to file a further affidavit in repose to the issues raised in the Respondent's replying affidavit. That raised an argument between the advocates on record as to whether Section 56 (4) of ACECA gives the Applicant the right to file a further affidavit after the Respondent (EACC) had filed a response.
70. Ms Wairimu for the Respondent argued that there was no such right to the Applicant on the grounds that since investigations are ongoing, the Applicant was asking this Court to allow him to explain the source of his wealth and this Court lacks jurisdiction to do so. She submitted that if the Court allowed the Applicant to file a further affidavit, then the Respondent should also be given leave to file a further response.
71. In response, Mr. Akhaabi for the Applicant argued that Section 56 (4) is A substantive and not procedural law and therefore, the Applicant had a right to file a further affidavit after the Respondent filed his replying affidavit introducing a "brand new application". He argued that Section 56 (4) does not provide for the Respondent (EACC) a right to file any response to the Applicant's further affidavit. Counsel cannot argue that this court lacks jurisdiction to entertain the Applicant's explanation to as to the source of funds when Section 56 is clear that the burden shifts to the Applicant to satisfy the Court that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct. There would have been no other way of doing it after the Respondent appeared to have introduced new material in that replying affidavit. This Court did agree with the Applicant and allowed the Applicant to file a further affidavit with no corresponding leave to the Respondent.
72. I have considered the voluminous material placed by parties before this Court and the submissions thereto following the two orders issued on the 20th January, 2023 and 10th February, 2023 by this Court differently constituted. The broad issue for determination therefore, is whether the Applicant has satisfied this Court to justify orders sought under Section 56 (4) and (5) thereof.
73. It is true that the burden of proof shifts to the Applicant herein after the orders are issued and this proof is on a balance of probabilities that the property in respect of which the orders are made under Section



- 56 (1) and 2) was not acquired through corrupt practices . However, it is my view that before the said burden shifts, the it was the Respondent duty to place material before the Court to justify the orders.
74. It was incumbent upon the Respondent to show the causal link between the funds in the Applicant's Sacco Accounts in form of fictitious projects and non-existent dealings for the amount paid for and which was allegedly wired and traceable to the Applicant's Sacco Account.
75. It is noted from the Court record that there were no detailed reasons for granting the orders at the ex-parte stage and it is not mandatory for the Court to do so. It is expected that the such details would be after hearing inter-partes as is the case here.
76. I do not however believe that Parliament's intention of framing of Section 56 (1) and (2) of the ACECA was that any material placed before Court at that ex-parte stage, regardless of the depth and weight, would suffice bearing in mind that the orders are issued without giving the party affected by the orders an opportunity to defend himself and bearing in mind that the consequences thereof at times cause untold hardship to the party against whom it is issued.
77. According to the Notice of Motion and Originating Motion, the period under investigations was from December 2017 and that was what the Applicant herein was expected to respond to and which he did in his application and affidavit in support. It was therefore unjustified for the Respondent to expand this scope to an earlier period which was not brought to the attention of the Court in the application leading to the ex-parte orders.
78. No doubt, the four Sacco Accounts belong to the Applicant and it is not in dispute that they contain large deposits but that would not be the issue. The issue is why the Respondent suspected it was from corrupt practices. The Respondent linked these funds to the Six Companies which were said to belong to the Applicant's relatives and linked to contracts that allegedly awarded to the companies and the money then wired to the Applicant's Accounts during the period he worked with the County Government of Kisii as the Chief Officer.
79. Though the Applicant denied involvement in tender awards or having any influence on the award, he was the Accounting Officer. He cannot argue that the procurement process was handled by several people who are not under investigation. It is clear from the Public Procurement and Asset Disposal Act that procurement is a process that involves several stages and with different actors.
80. He cannot say that he did not know the directors of the six companies. When he put his name and signed on the documents Jeduwa, Sopit, Mocha, Milimo , Jemmy and Jomok between 2018 and 2019, his duty was not expected to be mechanical such that he simply put his signature as an Accounting Officer.
81. The names of the directors were indicated on each of the contracts. He later stated that of the six companies, he only engaged two Directors out of the six companies but in his private capacity as a consultant veterinary surgeon. He named George Okondo of Jemmy Farm Investment Company Limited and who he said was not related to him at all , and Jemimah Wanjiru Nduati of Jeduwa Company Limited who he said is his sister-in-law. Though he claims that the Kshs. 631,000/= flagged by the Respondent was money the two paid him for veterinary services and attached documents, his management with them while in his position in the County Government was enough to arouse suspicion that he could have had influence in regard companies at any stage of the procumbent process.
82. It is not material that other actors in the procurement chain and some of who had signed some documents before he joined were not under investigations. It is not also material that the companies had been prequalified and he was not involved in the process. He admits that in February 2018, he



sought clarification as to whether there would be a conflict of interest in view of his relationship in some companies involving his wife now that he had been appointed.

83. The fact that his wife sold the companies and ceased to be a signatory on 11th September 2018 does not change the fact that documents he signed bore the name of Jemima and Emily who are his relatives. There was therefore suspicion that he knew the directors of the companies had contracts with the County Government where he worked as an Accounting Officer. There is no doubt that these companies were paid huge sums of money according to the statements availed.
84. The issue then is, were the contracts awarded fictitious, not carried out or incomplete so that the Respondent could suspect embezzlement of public funds which it now wishes to protect? There must be some prima facie case that the funds in the Applicant's Sacco Accounts were wired by the six companies after they were paid by the County Government of Kisii. This should not be a blanket statement. I am persuaded by the case of *Ethics and Anti-Corruption Commission v Moses Kasaine Lenokulal & another* [2019] eKLR, where the Court had this to say:

“The commission must on prima facie basis establish a link between the money in those accounts and the money illegally obtained from Samburu County Government or that the money is generally suspected to be obtained through illegal means ... We can not use section 56 of *ACECA* to achieve a mareva injunction through the back door thereby attaching all accounts of a litigant in anticipation of entry of a Judgment where there is no substantive suit.”

85. The Respondent must be able to locate the movement of funds through paper trail or otherwise from the point of payment by the County Government, to the six companies or any of them, and finally to the Applicant's account. Apart from Kshs. 631,0000/= and which the Applicant has attempted to explain. The Respondent did not show which of these huge sums of money in the Sacco Accounts were identified as having been paid to the companies in question and then wired to the Applicant's accounts directly or otherwise.
86. The Applicant's explanation is that even before he joined the County Government, he was thriving in his private businesses and the deposits were from profits ploughed back, earnings from dividends, loans and salary. He even produced his wealth declaration form to show he has been declaring his source of income. I am persuaded the case of *Ethics and Anti-Corruption Commission v Ministry of Medical Services and Another* [2012] eKLR where the Court held that:

“Under subsection (2) an order may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property... However, it is my view that for the Court to grant the orders under section 56 (1) a prima facie case must be presented before court that the property in question has been the subject of some corrupt dealings. It is not enough for the Commission to simply walk into Court with a request and expect the said orders to be granted. Where the said orders are granted and it turns out that either the Court was misled or no prima facie case existed that the property was acquired as a result of corrupt conduct, the Court would be perfectly entitled to vacate the orders.”



87. In the circumstances, I am satisfied that the Respondent did not present a prima facie case to warrant freezing all the Applicant's Sacco Accounts as was done here. In *David Kinyae Isika & another v Ethics & another* [2022] eKLR the Court held that

“To succeed in setting aside/discharging a preservation order the applicant ought to demonstrate that the orders have exposed him to undue suffering/hardship that far outweighs having the funds concealed or transferred.”

88. The argument by the Respondent that the inconvenience caused to the Applicant is only temporally as he would have a chance to explain in the main suit is an understatement. Even through the Applicant is said to have a thriving business, it is not shown how the businesses would be operational when all his accounts including transactional accounts are frozen.

89. There is nothing that would stop the Respondent to continue with its investigations if it so desires even without the prohibition Orders herein as outcomes of such investigations are not limited to freeing orders. The Applicant satisfied, on the balance of probabilities, that the property in respect of the two orders issued was not acquired as a result of corrupt conduct.

90. In the upshot, the two orders issued herein are hereby discharged. Each party to bear his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 19TH DAY OF JULY, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Soire for Mr. Akhaabi for Applicant

Ms Wairimu for the Respondent

Kevin Isindu, Court Assistant

