



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

MISCELLANEOUS APPLICATION NO. E031 OF 2020

IN THE MATTER OF: ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003 &

THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT 2011

-AND-

IN THE MATTER OF: AN APPLICATION BY ETHICS AND ANTI-CORRUPTION COMMISSION FOR AN ORDER UNDER SECTION 56 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003 TO PROHIBIT THE TRANSFER OR DISPOSAL OF OR OTHER DEALINGS (HOWEVER DESCRIBED) WITH THE SUM OF KSHS. 7,847,508/-OR ANY AMOUNT THEREOF HELD IN BANK ACCOUNT NO. [...] FIRST COMMUNITY BANK WHICH ACCOUNT IS HELD IN THE NAME OF CHOKE CONSTRUCTION SUPPLIERS COMPANY LIMITED

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION.....APPLICANT

AND

CHOKE CONSTRUCTION SUPPLIERS COMPANY LIMITEDRESPONDENT

RULING

1) By an Originating Summons dated 23rd December, 2020, brought under Section 56 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and all other enabling Laws and Rules, the Applicant (*Commission*) sought the following order: **THAT**

This Honourable Court be pleased to prohibit withdrawal, transfer, disposal of or other dealings howsoever with the sum of Kshs. 2,612,000/- (Kshs. Two million, six twelve thousand) or any other amount held in Bank Account No. [...] First Community Bank in the name of CHOKE CONSTRUCTION SUPPLIERS COMPANY LIMITED for a period of 6 months pursuant to Section 56 (3) of the Anti-Corruption and Economic Crimes Act 2003

2) Subsequently on 21st January, 2021, the Commission filed another Notice of Motion seeking the following orders: **THAT**

This Honourable Court be pleased to prohibit withdrawal, transfer, disposal of or other dealings howsoever with the sum of Kshs. 7,916,408/- (Kshs. Seven Million, Nine Hundred Sixteen, Four Hundred and Eight) or any other amount held in Bank Account No. [...] First Community Bank in the name of CHOKE CONSTRUCTION SUPPLIERS COMPANY LIMITED pending the hearing and determination of the Application dated 23rd December, 2020.

3) The orders in the Originating Summons dated 23rd December, 2020 and Notice of Motion dated 21st January, 2021 were granted on 24th December, 2020 and 22nd January, 2021 respectively.

4) Aggrieved by the foregoing orders, the Respondent on 31st December, 2020 filed a Notice of Motion under Articles 47, 50 and 159 of the Constitution, Section 63 (e), 1A, 1B, 3A of the Civil Procedure Rules and Section 56 (4) of the Anti-Corruption and Economic Crimes Act

(ACECA) and all enabling provisions of the law seeking orders **THAT:**

- a) **The Court be pleased to set aside, vary or discharge the orders granted on 24th December, 2010 and all other consequential orders freezing Respondent's Bank Account No. [...] with First Community Bank Isiolo Branch**
- b) **Any other order as the court deems fit, just and equitable to grant**
- c) **Costs be provided for**

5) The application is premised on the following grounds. **THAT:**

- i. **The Commission concealed material facts to the court that this matter was heard and substantial decisions rendered by courts of competent jurisdiction**
- ii. **The current application amounts to re-litigation of a matter already determined by courts of competent jurisdiction**
- iii. **The Respondent has been subjected to double jeopardy**
- iv. **The Respondent's constitutional rights to a fair trial and fair administrative action have been infringed**
- v. **The directors of the Respondent have suffered immense hardship and cannot meet their daily needs and those of their families**

Respondent's case

- 6) The Application was supported by an undated affidavit of **HUSSEIN ISSAK MOHAMED**, a director of the Respondent sworn filed on 31st December, 2020.
- 7) The deponent avers that sometimes back, the Respondent supplied goods to the County Government of Isiolo which declined to pay.
- 8) That Respondent filed **ISIOLO CMCC NO. 26 AND 27 OF 2017** in which the defences were struck out and judgment was entered and decrees issued respectively for Kshs. 18,005,833/- and Kshs. 15,480,000/- plus costs respectively (**total Kshs. 35,551,408/-**).
- 9) That consents for decretal sums amounting to Kshs. 168,377,754/- were entered against the County Government of Isiolo in respect of 10 civil suits on 13th August, 2019 out of which the Respondent has received some payment
- 10) That the Commission's application for stay of execution was disallowed by the trial court and the High Court dismissed application for stay of execution on account of misjoinder of parties
- 11) The Respondent asserts that the Commission has not established, that the funds held in the frozen account were acquired as a result of any corrupt conduct and as such its application does not meet the threshold for the grant of conservatory orders under ACECA therefore pray that the Originating summons dated 23rd December, 2020 and Notice of Motion dated 21st January, 2021 be dismissed.

Commission's case

- 12) The Commission opposed the Respondent's chambers summons dated and filed on 31st December, 2020 vide a replying affidavit sworn on 26th January, 2021 by **KIPKOSGEI KILIMO**, a forensic investigator appointed by the Commission and the Lead Investigator in this case.
- 13) The deponent argues that **Article 252(1) (a) and (d)** of the **Constitution** and **Section 11(d) and (1)** of the **Ethics and Anti-Corruption Commission Act 2011** mandates the Commission to investigate corruption, economic crimes and related offences and to institute and conduct proceedings in court for purposes of the recovery, or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption.
- 14) The deponent avers that he has obtained **LPO Nos. 2273458; LPO 2273460**, LPO 2635871 and LPO 2635872 on whose basis judgment for **Kshs. 35,551,408/-** was entered in **ISIOLO CMCC NO. 26 AND 27 OF 2017** for the Respondent against the County Government of Isiolo and he has noted the following discrepancies which raise doubts as to their authenticity:

- i. Payment vouchers attached to the LPOs are not supported by tender opening report, evidence of appointment of members of tender committees, market survey report and valid tender evaluation committees report as provided by the law
- ii. The evaluation report attached to the LPOs suggest on its last page that the Respondent was not among the three bidders that were being evaluated
- iii. Under the Procurement and Disposal of Assets Act 2005, the procurement of large value of goods in this case by request for quotations was flawed and ought to have been procured by open tender

15) The Commission argues that it did not obtain the conservatory orders through suppression or misrepresentation of facts, nor disclosure of material facts as alleged and that it annexed documents that were in its possession at the time.

16) It has been contended that the decrees in **ISIOLO CMCC NO. 26 AND 27 OF 2017** is not a bar to investigations to establish whether the supply of the goods and the payments in issue were regular and further that the Auditor General does not investigate suspect corrupt dealings

17) It is the case of the Commission that since **ISIOLO CMCC NO. 26 AND 27 OF 2017** was based on suspected fraudulent documents, the Respondent had illegally and fraudulently acquired public funds.

18) The Commission further contends that the investigations herein have not been instigated by any ulterior motives or malice but are intended to establish whether the supply of goods and the payments in issue were regular

Analysis and determinations

19) I have considered the affidavit evidence on record together with submission filed on behalf of both parties and the cited authorities.

20) I have identified the issues for determination as hereunder:

i. Whether the Commission's supporting affidavit is defective

ii. Whether Commission is guilty of non-disclosure of material facts

iii. Whether the decrees in ISIOLO CMCC NO. 27 OF 2017 are a bar to investigations by the Commission

iv. Whether the Respondent has established on a balance of probabilities, that the funds in the frozen account were not acquired as a result of corrupt dealings.

(i) Whether the Commission's supporting affidavit is defective

21) The Respondent argues that the affidavit by **KIPKOSGEI KILIMO** supporting the application dated 23rd December, 2020 is defective for having been sworn in Isiolo and commissioned by an advocate whose address is in Nairobi. In support of this contention, the Respondent placed reliance on the persuasive decisions in **Morris Muindi Mutiso v Naomi Namsi Shaban & 2 others [2017] eKLR**, **C.M.C Motors Group Limited vs Bengeria Arap Korir Trading as Marben School & another [2013] eKLR** and **Joan Akoth Ajuang & another v Michael Owuor Osodo the Chief Ukwala Location & 3 others; Law Society of Kenya & another [2020] eKLR** where the courts struck out affidavits sworn in a different place other than where they were commissioned.

22) The Commission contends that the Respondent has not pleaded that the affidavit is defective thereby denying the Commission an opportunity to respond and urges the court to decline the invitation to strike out the supporting affidavit. Reliance has been placed on **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** and **Morris Muindi Mutiso v Naomi Namsi Shaban & 2 others** (above).

23) I have considered the rival submissions on this issue. It is not disputed that that the affidavit by **KIPKOSGEI KILIMO** supporting the application dated 23rd December, 2020 was sworn in Isiolo and commissioned by an advocate whose address is in Nairobi. The issue of whether or not the affidavit is defective has been raised by way of submissions. I am persuaded that the Commission has been denied an opportunity to respond and that if the affidavit is struck out without giving the Commission an opportunity to be heard, it might well feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.

24) Further to the foregoing, that **Article 159(2) (d)** of the **Constitution** places heavy premium on substantive justice as opposed to undue regard to procedural technicalities. There being no evidence that the Respondent has been prejudiced by the supporting affidavit, I decline the invitation by the Respondent to strike it out.

(ii) Whether Commission is guilty of non-disclosure of material facts

25) The Respondent contends that the Commission failed to disclose that the sums of money sought to be frozen arose from decrees in **ISIOLO CMCC NO. 27 OF 2017**. The Commission on the other hand submits that it was not aware of the decrees until this application was filed.

26) The Respondent has not demonstrated that the existence of the aforementioned decrees was within the knowledge of the Commission and was deliberately withheld from the court.

(iii) Whether the decrees in ISIOLO CMCC NO. 27 OF 2017 are a bar to investigations by the Commission

27) An order for freezing of account/s is made on the basis of suspicion that the property was acquired as a result of corrupt conduct. The measure for reasonable suspicion was elucidated in the case of **Emmanuel Suipenu Siyanga vs R (2013) eKLR** as follows:

“.....a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds existing at the time of its formation. If there are not grounds which then made the suspicion reasonable, it was not reasonable suspicion”.

28) The Originating Summons dated 23rd December, 2020 and Notice of Motion dated 21st January, 2021 are based on the grounds that the manner in which the goods were procured was irregular and further on the basis that the procurement process was flawed.

29) From the foregoing, it is my finding that there was reasonable suspicion that the money paid to the Respondent may have been obtained through illegitimate means hence the justification in issuing freezing orders.

(iv) Whether the Respondent has established on a balance of probabilities, that the funds in the frozen account were not acquired as a result of corrupt dealings.

30) The only statutory duty imposed upon the Commission is to prove to the court that the property in question is reasonably suspected to have been obtained through illegitimate means or corrupt conduct. The court is also duty bound to examine and interrogate the materials placed before it and to be satisfied that indeed there is a prima facie case established to warrant exercise of its discretion before issuing an *ex parte* order.

31) The Commission did tender affidavit evidence that *prima facie* demonstrates first, that payment vouchers attached to the LPOs are not supported by tender opening report, evidence of appointment of members of tender committees, market survey report and valid tender evaluation committees report; secondly that the Respondent was not among the three bidders that were being evaluated and finally that the goods were procured by request for quotations and not by open tender.

32) Since there is already suspicion in the manner stated at paragraph 30 above, I find that there was reasonable suspicion that the money in question may have been obtained through illegitimate means hence the justification in issuing freezing orders.

33) Consequently, I find that the interests of justice are in favour of affirming the preservation orders granted by this Honorable Court on 24th December, 2020 and 22nd January, 2012 as I hereby do to allow the Commission to conduct exhaustive investigations into the tender appurtenant to the supply of goods by the Respondent to the County Government of Isiolo.

34) The orders shall unless extended, remain in force for 6 months from the date of the initial order on 24th December, 2020

DATED AT MERU THIS 11TH DAY OF MARCH 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicant - Mr. Mokuu Advocate

For Respondents -Mr. Muriuki for Mbogo & Muriuki Advocates