



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC MISC NO 22 OF 2020

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

VERSUS

CHARLES MUIA MUTISO.....RESPONDENT

RULING

1. The applicant/respondent (Ethics & Anti-Corruption Commission) filed an originating Motion under certificate of urgency in which it sought preservation orders against the respondent/applicant's (Charles Muia Mutiso) assets to enable it complete investigations against the same, before instituting recovery proceedings.

2. The following assets and bank accounts were named;

- a) Bank account No [XXXX] held at CO-OPERATIVE BANK LTD in the applicant's name.
- b) Bank account No [XXXX] held at ABSA GROUP LTD in the applicant's name.
- c) Bank account no [XXXX] held at ABSA GROUP LTD in the applicant's name.
- d) Bank Account No [XXXX] held at KCB BANK in the applicant's name.

3. The following lists of properties were listed:

- a) LR NO NAIROBI BLOCK 140/ 775 located within Nairobi.
- b) LRNO DONYO SABUK/KIBOKO BLOCK 1/908 within MATUNGULU MACHAKOS.
- c) LR NO.209/16764 –IR 102436 located within NAIROBI
- d) LR NO 209/12104 located within Nairobi.
- e) LR NO MATUNGULU SENGANI/3503 located at Matungulu Machakos.
- f) Motor Vehicle Registration number KCH 393M registered in the applicant's name.

4. The application was supported by an affidavit sworn by one FEIZ ABDI an Investigator with the applicant, in which it was deposed that the Commission had received report to the effect that the respondent, who was a public officer at the National Treasury had accumulated assets that were disproportionate to his known legitimate sources of income.

5. It was contended that it was from the time when the applicant was appointed Senior Assistant Director, External Resources, that he was suspected to had abused and or taken advantage of his position of trust, to accumulate assets, whose value were disproportionate to his legitimate sources of income.

6. It was the respondents position that the applicant was appointed on 16th July 2014 and promoted to his current position on 1st august 2019 with a net monthly salary of Ksh.144675.60 which, during the period under investigations would have a total net salary of Ksh.7,148,985.

7. It was stated that an analysis of the applicant's bank accounts showed that he had received credit amounting to Ksh.41,845,570, which raised suspicion that considering the applicant's salary, the large and frequent deposits into his bank account were disproportionate to his legitimate known source of income and could have been obtained through corrupt conduct.
8. It was further contended that the properties named herein were acquired during the five-year period under investigation and that since the applicant/respondent wanted to commence civil recovery against the applicant, it was necessary to grant orders to preserve the said funds and assets.
9. On 16th July, 2020 this court granted the said orders for preservation for a period of six months and in response to the said application, leave having been granted by this court, the applicant on 28th August, 2020 filed an application and [U1](#) sought an order that this honourable court be pleased to discharge and or vary the order issued herein.
10. The application was supported by his affidavit in which he deposed, that he was first appointed to the civil service in the year 1993 in the Ministry of Public works, before he was transferred to the National Treasury in the year 2002, during which period of time he represented Kenya in various forums both locally and internationally.
11. It was contended that during the period in question, he travelled a total of fifty (50) times to various countries representing the country and he also sat as an alternate director to the cabinet in various boards, where he was paid allowances.
12. It was his case that the applicant/respondent case had no basis, since he acquired his properties including cash through seer hard work and diligence and that his employer had never complained of his involvement in any corrupt conduct and or that he had embezzled public funds. He contended further that over the period of his employment, he had invested his salary and other sources, in income generating activities and therefore acquired his properties through such investments.
13. He deposed further that during the period of his travels out of the country, he used to purchase mobile phones, tablets, iPad and other electronic items which he would sell and that since 2015 he had earned an ex-gratia national budget preparation allowance annually amounting to a sum of Ksh.400,000. Which money he would invest.
14. He contended further that his mother owed land known as LR NO MAU NAROK/SIAPEI BLOCK 7/101/GATIMU where he had been cultivating maize, potatoes and carrots on commercial basis, and would make approximately Ksh.750,000, which money he invested in buying land.
15. It was his case that he sat in several parastatal and Government agencies boards, where he earned allowances of up to ksh 6,500,000 during the period in question, in addition to the income from his wife business and rental income from the properties named herein.
16. In opposition to the applicant for discharge of the orders herein, the commission filed grounds of opposition in which it was contended that in granting the order the court satisfied itself that there were reasonable grounds to suspect that the properties in question were acquired as a result of corrupt conduct and that the applicant had not satisfied on a balance of probability that the subject properties were not acquired as a result of corrupt conduct.
17. The applicant/respondent while the application for the discharge of the orders was still pending, filed an application dated 14th January 2021 in which it sought for the extension of the orders issued in its favour on 16th July, 2020 for a further period of three (3) months to enable it conclude its investigations.
18. The application was supported by an affidavit sworn by FEIZA ABDI, in which it was deposed, that the commission was in the final stages of investigations and had prepared the notice under Sections 26 and 55 of ACECA, requiring the respondent to explain to the commission the sources of his income and assets subject to investigations.
19. It was contended that the said notice had not been issued to the respondent since in the course of investigations, it was established that the respondent had received monies from the Kenya National Highway Authority, an aspect of which they were still investigating. It was stated further that the commission had written to the Kenya Revenue Authority for information on the Respondent tax assessment over the said period, to establish if he committed an offense under Section 2 of ACECA.
20. It was the applicant's contention that it was in the process of carrying out property valuation on the properties herein, which action was affected due to Covid 19 pandemic, as a result of which there was delay in the investigation and if the orders were not extended, the respondent may withdraw the funds and or dispose of the subject properties, thereby rendering the recovery proceedings nugatory.
21. In response to the said application, the respondent filed a replying affidavit, in which he deposed, that the period of six months provided for under the act were sufficient for the applicant to carry its duties and that during the said period of time, the only thing the applicant unearthed was payment made to him by KENHA, when they sponsored him to Arusha Tanzania, to attend a financial Management Course and a further payment to Beijing.
22. He contended that it was upon the applicant to conclude investigations before filing the application for preservation or within the six months and since the applications were taking a great toll on him emotionally and financially, the applicant should not be granted any further extension of the preservatory orders.

SUBMISSIONS

23. Directions were issued that the two applications be heard together, by way of written submissions, which were dully filed and highlighted by Mrs. Odipo, for the commission and Mr. Mwangeli for the respondent.

24. On behalf of the applicant (EACC) it was submitted that the same made the application under section 56 of the Act and were granted the orders herein ex-parte, having established the threshold that it was investigating the respondent on an allegations of corruption, on reasonable suspicion that he had accumulated assets, whose value was beyond his known legitimate source of income.

25. It was submitted that the commission's preliminary investigations had established that there were frequent large deposits into the respondent bank account, which were disproportionate to his legitimate known source of income, which was net of Ksh.118,691.17, against an accumulated net amount of Ksh.41,845,570, during the said period and that he had managed to acquire the assets under investigation.

26. It was submitted that the commission had established reasonable suspicion as was stated in the cases of **ETHICS AND ANTI-CORRUPTION COMMISSION v MOSES KASAINI LENOKULAL & ANOTHER [2019] eKLR** and **ETHICS & ANTI - CORRUPTION COMMISSION v FASTLANE FREIGHT FORWARDERS LTD & 8 OTHERS [2017] eKLR**

27. It was submitted that large deposits were made into the respondent's bank account through cash, cheques, EFT and funds transfer, as in the month of June 2015, six times in a month and that the respondent in one account received credits to the tune of Ksh.3,249,300 and was not making any withdrawals from that account for the period of between August, 2016 and April, 2020, thereby creating reasonable suspicion that the assets were acquired as a result of corrupt conduct.

28. It was submitted that under Section 56 (4) of the Act, the respondent was required to demonstrate to court that he acquired the said property otherwise than through corrupt conduct and that he failed to do so, as he did not point out any specific transactions in his bank account as to the purchase of any of the named assets, as was stated in the case of **ETHICS & ANTI- CORRUPTION COMMISSION v ANDREW BIKETI MUSUYA t/a MUKUYU PETROLIUM DEALERS [2019] eKLR**.

29. It was contended that the verification of the respondent's explanations, could only come out if the commission is allowed to conclude its investigations and since the respondent had not proved that he was unable to meet his daily living expenses the preservative order should be left in place as was stated in the case of **ETHICS & ANTI-CORRUPTION COMMISSION vs CATHERINE NKIROTE MANGA AND 2 OTHERS [2017] eKLR**.

30. It was submitted that the investigations were at an advanced stage and the respondent had been called upon to explain in writing as to how he acquired his assets and it is only after he has done so that the commission will make a determination whether or not to file suit and therefore it was in the public interest that the preservation orders are not discharged as was stated in the case of **DPP v NAIROBI CHIEF MAGISTRATE COURT & ANOTHR [2016] eKLR**.

31. On behalf of the respondent it was submitted that in order for the commission to prove that the property was acquired in the course of or as a result of corrupt conduct, the prosecution must establish the underlying conduct constituting corrupt or economic crime, which can be imputed to the accused, as was stated in the case of: **REPUBLIC vs ALFRED MUREITHI & ANOTHER [2018] eKLR**.

32. It was contended that the commission had not laid sufficient basis for the grant of the orders issued on 16th July, 2020, as the purpose of the preservation order under Section 56(1) of ACECA was stated in the case of **EACC v THE MINISTRY OF MEDICAL SERVICES & ANOTHER [2012] eKLR** quoted with approval in **EACC vs JAMAL BARE MOHAMED** where the judge stated:-

“However it is my view that for a court to grant the orders under section 56 (1) a prima facie case must be presented before the court that the property in question had 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 order to be granted. Where the said orders are granted and it turns out that either the court was misled or no prim facie case existed that the property was acquired as a result of corrupt conduct the court would be perfectly entitled to vacate the orders.”

33. Further reference was made to **H C misc. Application No 587 of 2006** where the court stated that:-

1. The commission must adduce before court evidential facts, which may be said to constitute corrupt conduct,
2. the court makes an order upon being satisfied that the subject property was acquired as a result of corrupt conduct and
3. the court can reverse or discharge its orders upon production of evidence that the property the subject matter of the proceedings was not acquired through corrupt conduct

34. It was submitted that the Respondent had through his affidavits, explained the sources of his income and that two of the properties in question, LR NO. NAIROBI/BLOCK 140/775 and NAIROBI/2019/12/108 were acquired long before the period under investigations [\[U2\]](#) , while he was still paying for one property acquired in the year 2012 being LR NO MATUNGULU /SENGANI/3503

ANALYSIS AND DETERMINATION

35. For record purposes, there are two applications for determination, one by the respondent (CHARLES MUIA MUTISO) for the discharge of the order issued herein under the provisions of section 56(4) of the Act and one by the applicant (ETHICS AND ANTI-CORRUPTION COMMISSION) for the extension of the said order for a further period of three months.

36. For the purposes of this ruling, I will start with the respondent's application, for if the same succeed, then there will be no need for the second application.

37. Corruption by its very nature is a secretive enterprise, in describing how bad corruption had reached in Kenya in the year 2004 the then British High Commissioner to Kenya, Sir Edward Clay had this to say:-

“We never expected corruption to be vanquished overnight. we all implicitly recognise that some would be carried over to the new era. We hoped it would not be rammed in our face. But it has: evidently the practitioners now in government have the arrogance, greed and perhaps a desperate sense of panic to lead them to eat like gluttons. They may expect we shall not see, or notice or will forgive them a bit because they profess to like OXFAM lunches. But they can hardly expect us not to care when their gluttony causes them to vomit all over our shoes, do they really expect us to ignore the lurid and mostly accurate details conveyed in the commendable free media. “He went on to say that if Kenya’s assets were lost or squandered “we may wake up one day at the end of this gigantic looting spree to find Kenya’s potential is all behind us and that it is a land of lost opportunity” The Telegraph 15th July 2004.”

38. The ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, provides for the following procedures when it comes to the fight against corruption in Kenya, section 55, provides for the commencement of proceedings where upon investigations the commission is satisfied that the person has unexplained assets, having been granted/afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate source of income and the commission is not satisfied that an adequate explanation has been given.

39. The proceedings under this section is commenced in the High Court under Originating Summons, which is now known as Civil Forfeiture and is independent of any criminal proceedings against the person. The burden of proof as in any civil proceedings is on a balance of probabilities.

40. Section 56, provides for order preserving suspect property, through an ex parte application, which order is granted if the court is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct, which order has effect for six months unless extended by the court.

41. The person served with the said order may apply to the court to discharge or vary the order or dismiss the application, if the court is satisfied on the balance of probability, that the property in respect of which the order is discharged was not acquired as a result of corrupt conduct.

42. At the time of the issuance of the ex parte order, the commission is required to prove that the property in question, is suspected to had been obtained through illegitimate means or corrupt conduct as was stated in the case of: **ETHICS AND ANTI-CORRUPTION COMMISSION v MOSES KASAINI LENOKULAL** (supra) and once the order is issued the burden shift to the person in charge of the property to prove that it was not obtained through corrupt means.

43. It would seem to me that the owner of the property, would have to provide evidence on a balance of probability, that the said property was legitimately acquired, before the court may discharge and or vary the order issued ex parte in the first instance and should the commission proceed to the second stage under section 55, the same will have a right to cross examine and challenge any evidence adduced by the commission to support their claim that he has unexplained assets

44. At this stage of the proceedings the only issue for determination is whether the applicant presented to court prima facie case that there are reasonable grounds to suspect that the property in question are subject to some corrupt dealing and whether the respondent has discharged the burden placed upon him to show that the said property was not acquired through corrupt means.

45. It seems to me that the section places a burden on the person who seeks to discharge the preservation order to prove that the property in question was not obtained through corrupt conduct, while the commission is only required to prove to court that the property in question is reasonably suspect to had been acquired through illegitimate means or corrupt conduct.

46. What amounts to reasonable suspicion was stated in the case of **EMMANUEL SUIPENO SIYANGA v REPUBLIC [2013] eKLR** where the court stated as follows:-

“15. Such suspicion must have been reasonable and it follows that the factual basis which would make any suspicion which is actually formed a reasonable one must also exist at the material time: 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 actually existing at the time of its formation. If there are not grounds which then made suspicion reasonable, it was not a reasonable suspicion. Whether grounds actually existed at the time is to be tested objectively. Consequently, a suspicion may be reasonable even though subjectively it was based on unreasonable grounds. To prove reasonable suspicion, it must of necessity be recognized that a reasonable suspicion never involves certainty as to the truth. Where it does, it ceases to be suspicion and becomes fact. A reasonable suspicion that goods have been stolen is based on conjecture and therefore always admits to the possibility that the goods may have been obtained not by theft but by some other unlawful means or, of course, innocently. It follows that a reasonable suspicion that goods have been stolen does not cease to be either a suspicion or to be reasonable because the person entertaining it perceives the possibility that his suspicion may be unfounded and that the goods may have been acquired by unlawful means or innocently. There must be a satisfactory account.”

47. In the case of **KENYA ANTI-CORRUPTION COMMISSION v. LANDS LTD and OTHERS (2008) eKLR**, the court stated that at the ex parte stage the evidential facts need not answer the description of any specific offences of corrupt conduct, provided that they point to that possibility, the court proceeded to quote with approval, which I find relevant the case of, **THE QUEEN ON THE APPLICATION OF DIRECTOR OF ASSETS JEFFREY DAVID GREEN & OTHERS [2005] EWHC 3168 (Admin)** as follows:-

“Crow invited me to make it clear that my first question to the preliminary question meant that the Director need neither allege nor prove the commission of any specific criminal offence, and that she must not merely set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct but that she must prove that on the balance of probabilities, the property was obtained by or in return for a particular kind or one of a number of kinds of unlawful conduct. For the avoidance of doubt I confess that is a correct understanding of any first answer to the preliminary issue.”

48. The applicants case is that there were frequent large deposits into the respondent’s bank account which were disproportionate to his legitimate known source of income and that the respondent was not making any withdrawals from those accounts. The respondents in answer to the applicant’s case on the other hand maintained that those deposits were legitimate earnings in the form of his allowances either for traveling out of the country or for sitting in several boards of state entities by virtue of his employment and from some side ‘hustle’ conducted by himself and his wife.

49. It is further the applicants case that it has investigated the respondent and have reasonable grounds for which they have served him with the necessary notice, which the respondent has through his affidavit in support of his application for the discharge of the order herein confirmed.

50. Being alive to the fact that the proceedings before me is not the civil recovery of the properties, but only an order for the preservation of the property in question, the applicant at this stage only need to prove to court that the property in question is reasonably suspected to have been obtained through illegitimate means or corrupt conduct then the burden shifts to the respondent see the case of **ETHICS AND ANTI-CORRUPTION COMMISSION v MOSES KASAINI LENOKULAL (supra)**.

51. Once suspicious if shown, all that the applicant has to do is to show that it has an arguable case and that the refusal of a freezing order will give rise to a real risk that any forfeiture order issued in the action for the same will remain unsatisfied or that recovery will be prejudiced by reason of the removal by the respondent of the assets from the courts hands or their dissipation by the respondent.

52. As stated herein, the respondent on the hand is required to show to court, that the said property was lawfully acquired and not acquired through illegal means. He must show that he has a bona fides defence to the applicant’s suspicion by way of evidence as was stated in the South African case of **STANDARD BANK OF SOUTH AFRICA LTD V EL-NADDOF & ANOTHER 1999 (4) SA 777 at 786** thus:-

“Bonafides cannot be demonstrated by merely making a bald averment lacking in any details. To hold that such bald averment is sufficient to demonstrate bona fides is a classic oxymoron. It effectively negates the requirement that the applicant has a bona fides defence. It could with equal validity be held that a mere statement by an applicant that his defence is bona fide would be sufficient, which is manifestly absurd.”

53. Has the respondent placed material before the court to discharge the said burden? From the material placed before the court, I am afraid the same has failed to do so. The Respondent, as per his affidavit was employed in the public service in the year 1993 and from the material placed before the court by the applicant, there seems to had been a remarkable change in his income and assets which is not supported by the legitimate earning which he ought to explain.

54. The respondent in attempting to offer an explanation, has not placed before the court supporting documents to corroborate his assertion such as is alleged income from the farming activities, sale of electronics and his wife’s business activities thereby failing to dispel the suspicion raised by the applicant.

55. A casual look at the assets listed by the Applicant and the response thereto at this stage of proceedings clearly shows that the same raises prima facie case in favour of the grant of preservation orders as to discharge the same will expose the property to being utilized by the Respondent to the detriment of the Applicant and the general public.

56. The respondent on the other hand could still challenge the application claim against the said assets at the hearing of the forfeiture suit should any be filed and if none is filed he said order shall stand discharged.

57. I have therefore come to the conclusion that the Respondent has failed to discharge his statutory duty under Section 56(4) of ACECA and therefore dismiss his application for discharge of the orders issued herein.

58. Having disposed off the said application, the court is now called upon to determine whether the said orders may be extended for a further period of three months a sought by the applicant? It has been confirmed by the respondent that the same has been served with the requisite notice to explain the sources of his assets by the applicant and that the same has responded thereto.

59. In the case of **ETHICS & ANTI-CORRUPTION COMMISSION VS JOHNCELE INSURANCE BROKERS LTD KISUMU MISC. CIVIL APPLICATION NO 178 of 2014 [2015] eKLR** the court had this to say-

“my understanding of the above quotation is that it is the commission to satisfy the court on the necessity to extend the order for another period. There ought to be plausible reason to permit extension. In short the discretion of the court to exercise it if it deems fit ...”

60. Section 56(111) states that the order may be extended by the court on the application by the commission and in support of the said application the commission stated that there were complications and delays that arose due to Covid 19 pandemic which slowed down the pace of investigation.

61. The court has taken judicial notice that Covid 19 affected all sectors of society and since the respondent has been served with the notice, I see no prejudice the same shall suffer should the preservation order herein be extended to a further period of three months to enable the applicant complete the process herein as it is both in the interest of the applicant and the respondent.

62. I take the view that the object of the Act will well be served by the extension of the preservation order issued herein in favour of the applicant.

63. I will therefore extend the preservation order granted herein for a further period of three months from the date herein to enable the applicant complete the investigations and to make recommendation of the way forward in fulfilment of its statutory mandate.

64. Each party shall bear their own cost.

65. In the final deposition I dismiss the respondent (CHARLES MUIA MUTISO) application for the discharge of the order of preservation and allow the applicants (ETHICS AND ANTI- CORRUPTION) application for extension of the said order for a further period of three months from the date herein.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12th DAY OF MAY, 2021

.....

J. WAKIAGA

JUDGE

In the presence of: -

Mr. Mwangela for Respondent

Mr. Okwara for Munga for the Applicant

Court Assistant Hope

[\[U1\]](#)

[\[U2\]](#)