



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

ACEC SUIT NO. E003 OF 2021

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

FISH NETS ENTERPRISES LTD.....1ST DEFENDANT
BONAYA DIDA BONYA.....2ND DEFENDANT
QABALE WARIO HALAKE.....3RD DEFENDANT
WARIO BORU TORE.....4TH DEFENDANT
HALAKE TADICHA.....5TH DEFENDANT
GUYO ADI.....6TH DEFENDANT
ELIJAH KIARIE NDUATI.....7TH DEFENDANT
CHRISTOPHER KIMATHI.....8TH DEFENDANT
ZAINAB TACHE GUYO.....9TH DEFENDANT
GUYO BUKE SUKU.....10TH DEFENDANT
HAWO GALGALO KANATO.....11TH DEFENDANT
MUTEA JOHN KIUNGA.....12TH DEFENDANT
GIRO LIBAN.....13TH DEFENDANT
FAYO GALGALO.....14TH DEFENDANT

RULING

1. In the Notice of Motion dated 1st March, 2021 filed under a Certificate of Urgency of even date and which is premised on Order 40 Rule 10 and Order 51 Rule 1 of the Civil Procedure Rules the Plaintiff/Applicant seeks the following orders: -

“a) Spent

b) Spent

c) An Order be issued preserving the sum of Kenya Shillings Five Million One Hundred and Eight Seven Thousand Only (Kshs. 5,187,000) held in bank account number 01109xxxxxxx at Cooperative Bank Limited and the 3rd and 4th Defendants be

restrained from removing, withdrawing, transferring or disposing the said money pending the inter partes hearing and determination of this suit.

d) Costs of this application be in the cause.”

2. The application is premised on the grounds stated on the face thereof and on the supporting affidavit sworn on 1st March 2021 by Kipkosgei Kilimo, an investigator with the Plaintiff/Applicant.

3. On 1st March 2021, the Plaintiff/Applicant obtained *ex parte* interim orders in terms of prayers 1 and 2 of the application and the orders have been extended from time to time and continue to subsist to date. The Plaintiff/Applicant now seeks orders that shall subsist until the hearing and determination of this suit.

4. The application is vehemently opposed by the 1st, 2nd, 3rd and 4th Defendants/Respondents. They rely on a Replying Affidavit dated 9th July 2021, sworn on their behalf by Qaballe Wario Halake, the 3rd Defendant/Respondent herein. The 5th to 14th Defendants/Respondents did not file any responses and neither did they participate in the application.

BACKGROUND

5. On 27th August 2020 pursuant to **Section 56 (3)** of the Anti- Corruption and Economic Crimes Act, the Plaintiff obtained a preservation order in **Meru High Court Miscellaneous Civil Application No. 73 of 2020** for the sum of Kshs. 5,157,000/- for a period of six months which order lapsed on 27th February 2021. The preservation order allowed the Plaintiff to conclude investigations which have now culminated into the filing of the current suit, which seeks the recovery/forfeiture of the entire sum of Kshs. 7,220,000/-.

6. The gravamen of this application is that the Plaintiff/Applicant has filed this suit against the Defendants/Respondents for recovery of a sum of Kshs. 7,220,000/- on the ground that the County Government of Isiolo paid the said sum to the 1st Defendant/Respondent through fraud, procurement malpractice and open embezzlement of public funds orchestrated by the 5th to 14th Defendants who were employees of the County Government. The Plaintiff/Applicant avers that it conducted investigations and established that no goods were supplied to the County Government of Isiolo by the 1st Defendant to justify the payment of the said sum of Kshs.7,220,000/- and that the documents purporting to acknowledge receipt of the goods were falsified as they were prepared on 19th May 2017 and could not apply retrospectively given that the goods which were perishable foodstuffs were alleged to have been delivered three years earlier on 2nd and 8th November 2014. The Plaintiff/Applicant contends that out of the sum of Kshs. 7,220,000/- paid to the 1st Defendant, Kshs. 5,187,000/- was transferred to an account no. 01109xxxxxxxxx at Cooperative Bank Limited Isiolo Branch held in the joint names of the 3rd and 4th Defendants/Respondents which account was fairly inactive and which only had a balance of Kshs.540/=. The Plaintiff/Applicant alleges that immediately the money was paid to the 1st Defendant, various cheques were drawn in the name of the 3rd Defendant for a sum of Kshs. 2,033,000/- which was immediately withdrawn by the 4th Defendant. The Plaintiff/Applicant is therefore apprehensive that unless the orders sought are granted, there is reasonable cause to believe that the 3rd and 4th Defendants are likely to withdraw the sum of Kshs. 5,187,000/- hence obstructing or preventing the Plaintiff/Applicant from executing any decree that may be passed against the Defendants in the suit. The Plaintiff/Applicant also avers that it is in public interest and the interest of justice that the orders sought are granted.

7. In their joint response the 1st to 4th Defendants/Respondents state that the application is a non-starter and ought to be dismissed in the first instance as the Plaintiff/Applicant has not demonstrated that the funds it seeks preserve were obtained through corruption or that they were proceeds of crime. They contend that the sum of Kshs. 5,198,000/- was paid to the 1st Defendant by the County Government of Isiolo for food supplied to the County in the year 2014. They contend that sometime in July, 2014, following a successful prequalification process, the County Government of Isiolo notified the 1st Defendant that it was amongst the prequalified suppliers selected for the supply and delivery of food stuff for the financial year 2014/2015; that the 2nd Defendant who at the time was a Clerical Officer working for the County Government disclosed to the Head of procurement in writing that he was a Director and shareholder of the 1st Defendant hence declaring the possible conflict of interest and further that in August 2014, the County Government requested for quotations from pre-qualified suppliers and on 14th August, 2014 the 1st Defendant presented its quotation and was subsequently awarded the tender vide an Award Letter dated 29th October, 2014. The Defendants/Respondents contend that it was on the strength of that Award that on 2nd and 8th November, 2014 the 1st Defendant supplied the County with foodstuffs worth Kshs. 7,220,000/-. They contended that the County Government has never disputed the delivery of the goods and that it even approved the payment of the contract sum through its internal mechanisms. They also contend that in 2017 the 1st Defendant was issued with the Inspection and Acceptance Certificate Local Purchase Orders and payment vouchers for purposes of processing payment although the 1st Defendant had already supplied the goods. They aver that the understanding was that the Local Purchase Orders would be issued as and when there were funds available for payment. Finally, they aver that the reason the payment for the goods was delayed was because it was part of the debts inherited from the first County Government of Isiolo, and that the 1st Defendant filed a claim in **CMCC No. 22 of 2017 Fishnet Enterprises Limited v the County Government of Isiolo** which culminated in the County paying the sum of Kshs. 7,220,000/- in three instalments of Kshs. 1,082,700/- paid on 14th February 2020, Kshs. 3,611,000/- paid on 12th August 2020 and Kshs. 2,526,300/- paid on 14th August, 2020. The 1st to 4th Defendants/Applicants assert that immediately the payments were effected, the Plaintiff approached the Directors of the 1st Defendant and purported to investigate them on allegations of fraud and illegality and that the 1st to 4th Defendant's position is that these allegations are false, unfounded and meant only to deny the 1st Defendant the benefit of its hard-earned money. They urge that the Plaintiff's application be dismissed with costs.

SUBMISSIONS OF THE PLAINTIFF/APPLICANT

8. Learned Counsel for The Plaintiff/Applicant submitted that there are sufficient grounds established to grant the orders sought; that the 1st Defendant was paid a sum of Kshs. 7,220,000/= through procurement fraud, orchestrated by the 5th to the 14th Defendants, who were all

employees of the County Government of Isiolo; That no goods were supplied to the County Government to justify the payment; That, there were massive procurement irregularities, breaches, forgeries and conspiracy between the Defendants which facilitated and enabled the embezzlement of public funds and that the monies paid into the 1st Defendant's bank account and subsequently transferred into the 3rd and 4th Defendants' bank accounts form the subject matter of this suit and that it would therefore be in the interest of justice that the sum of Kshs.5,187,000/= be preserved pending the hearing and determination of the suit. Counsel further submitted that the supporting affidavit sworn by Kipkosgei Kilimo the Investigating Officer on 1st March 2021, specifically paragraphs 10, 11, 12 and 13 demonstrate that the documents used to support the requisition of food by the County Government of Isiolo were founded on forged letters purporting to be genuine letters by the Ward Administrator and Member of County Assembly of Cherab Ward and that there is a report from the document examiner exhibited as an annexure that confirms that the letters dated 25th July 2014 were forgeries and which also demonstrate that from the beginning, the process that led to the payment of the money to the 1st Defendant was fraudulent. Counsel for the Plaintiff/Applicant asserted that the 1st Defendant and her Directors did not provide procurement documents to support the payment when they were interrogated by the investigating officer; that, the County Government of Isiolo did not also avail any procurement records to the investigating officer and further that had the process of procurement been above board, there would have been no difficulty for the County Government of Isiolo or the 1st Defendant and its directors providing such evidence. Counsel contended that the documents attached to the 3rd Defendant/Respondent's replying affidavit are questionable and do not answer the questions arising from the investigations conducted by the Plaintiff; that, the 2nd Defendant/Respondent's letter dated 12th April 2014 addressed to the Head of Procurement at Isiolo County only makes a declaration that the 2nd Defendant is a director of the 1st Defendant and seeks assistance but it does not disclose that Fish Nets Enterprises Ltd was participating in or intended to participate in any procurement initiated or carried out by the County. Further, that **Section 42(3) of the Anti-Corruption and Economic Crimes Act** prohibits and abhors an employee of a public organ or entity from holding any private interest in a contract agreement or investment emanating from or connected with such an organ or entity and therefore, even with the disclosure of conflict of interest by the 2nd Defendant, it would still be unlawful for the County Government of Isiolo to enter into a contract with 1st Defendant.

9. Counsel pointed out that the invoice and delivery notes attached to the 3rd Defendant's Replying Affidavit are dated 8th November 2014, yet the inspection and acceptance certificate attached thereto is signed and dated by the Inspection and Acceptance Committee Members on 22nd and 23rd November 2016. Counsel contended that it is questionable how perishable goods could have been inspected two years after delivery. Counsel also pointed out that the Local Purchase Orders which are critical procurement documents, were not filled on material parts as they do not bear the Tender/Quotation reference number and they lack a contract reference number, date, or requisition number.

10. Counsel submitted that whereas **Article 227 (1)** of the Constitution provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective the process of procurement in this case did not adhere to any of those principles. Counsel contended that there is no indication of how the 1st Defendant was selected as a supplier of the food commodities as no procurement proceedings were maintained by the County Government of Isiolo; no minutes of the tender Committee or quotations were produced as evidence, no evaluation was done, no letter of award was made, there was no written acceptance of offer, no contract signed by the parties and there were no purchase orders issued. Counsel stated that virtually all the provisions of **Sections 88 and 89 of the Public Procurement and Disposal Act, 2005** were not adhered to.

11. Counsel further argued that goods valued at Kshs. 7,220,000/- are purported to have been procured through a **Request for Quotations** yet the maximum value of goods that could have been procured by public entities through such a process was Kshs. 500,000/-. Counsel further argued that where the value of the goods procured was above Kshs. 500,000 then an open tender or a direct tender was required. On this Counsel relied on the **Third Schedule of the Public Procurement Regulations 2006 and Gazette Notice Number 719 of 24th January 2007**. Counsel reiterated that the process of payment in favour of the 1st Defendant commenced on 19th May 2017 and that procurement documents were fabricated to support the payment. Counsel noted that the 3rd Defendant/Respondent admitted in her replying affidavit that the procurement documents were prepared after the delivery of goods for purposes of payment and asserted that that is proof that there was procurement fraud and an illegality which this court should not sanction or protect.

12. Finally, Counsel for the Plaintiff/Applicant urged that the Applicant has met the test for grant of a temporary injunction as laid down in the case of **Giella vs. Cassman Brown and Company Limited (1973) E.A. 358** and as subsequently adopted in the case of **East African Development Bank v Hyundai Motors Kenya Limited [2006] eKLR**. Counsel submitted that in respect to the first principle, the Applicant has presented material to demonstrate that the procurement process was not in conformity with the Constitution, the Public Procurement and Assets Disposal Act 2005, and the applicable regulations; that consequently, the payment arising therefrom was irregular and unlawful and therefore the Plaintiff/Applicant has established a prima facie case with a probability of success. In regard to the second principle Counsel submitted that given the speed with which the 2nd and 3rd Defendants moved the monies from the 1st Defendant's account, there is reasonable cause to believe that the Defendants are likely to withdraw, remove or dispose the said monies in circumstances affording reasonable probability that the Plaintiff will be obstructed or delayed in the execution of any decree that may be passed against the Defendants in this suit and hence the principle of irreparable loss has been established to warrant grant of the preservation orders.

SUBMISSIONS OF THE 1ST TO 4TH DEFENDANTS/RESPONDENTS

13. For the 1st to 4th Defendants, it was submitted that the very first burden an applicant in an application such as this must discharge is establishing on the preponderance of the evidence that there are reasonable grounds to suspect that the funds in the frozen accounts belonging to the Defendants are proceeds of crime or that they were acquired as a result of corrupt dealings. In so stating Learned Counsel for the 1st, 2nd, 3rd and 4th Defendants/Respondents put reliance on the case of **Mrao Ltd. v. First American Bank of Kenya Ltd & 2 others 2003 KLR 125** and the case of **Ethics & Anti-Corruption Commission (EACC) v. Lydia Ngini Lentinina 2018 eKLR**. Counsel submitted that a prima facie case is one which on the material presented to this court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. In other words that the Plaintiff must demonstrate on the balance of probabilities that there is a causal link between the money in question and the alleged corrupt conduct or activities as was held in the case of **Ethics and Anti-Corruption Commission v. Moses Kasaine Lenokulal & another (2019) eKLR**. Counsel contended that the threshold is evident in the wording of **Section 56(1)** of the Anti-Corruption and Economic Crimes Act

(ACECA), which provides that:-

"On an ex parte application by the commission, the High Court may make an order prohibiting transfer or disposal of or order 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."

Counsel asserted that the Plaintiff's application is a non-starter and ought to be dismissed in its entirety since the Plaintiff has not demonstrated that the funds it seeks to have preserved or frozen were obtained through corrupt conduct or that it was proceeds of crime. Counsel stated that whereas the Plaintiff has challenged the procurement method used by the procuring entity it has not demonstrated how the 1st to 4th Defendant can be faulted for the flaws in the procurement procedure and that as there is no evidence to show that the 1st to 4th Defendants were involved in the choice of the procurement method, such flaws if any can only be blamed on the officers of the County Government. Counsel submitted that the flaws in the procurement procedure should not be used as a reason to deny the 1st Defendant the payment it received for the goods. On this Counsel cited HCC No. 1096 of 2000 **Brite Print (k) Ltd vs. Attorney General** and the case of **Moses Gitari another v Republic [2020] eKLR**. Counsel further submitted that the impugned procurement was an emergency procurement for the supply and delivery of relief food; that the Award Letter dated 29th October 2014 expressly provided that the procurement was for emergency purposes and further provided the prices and the quantities for each of the goods that were to be supplied by the 1st Defendant; that, a person dealing with corrupt government officers can only be denied contractual benefits if it is shown that he was an accomplice to the breach of the internal government regulatory procedures by the officers or if it is shown that he had exercised undue influence or played fraud or tricks in the matter. Counsel contended that the Plaintiff has not established a prima facie case with a probability of success against the 1st to 4th Defendants. Counsel argued that the impugned procurement process was regular, that the goods were duly delivered, and that the payment of Kshs.7,220,000/- owed was approved, recommended, and certified by the Auditor General in their Special Report dated 21st April 2019, thereby demonstrating its eligibility and authenticity. Counsel argued therefore that it is beyond peradventure that the Plaintiff has not proved that there is a causal link between the money paid to the 1st Defendant by the County Government of Isiolo and the alleged corrupt conduct, activities, or violation of procurement laws.

14. Counsel further argued that the Plaintiff/Applicant has not established that it is likely to suffer irreparable injury, loss, or harm if the orders sought are not granted. Counsel contended that even if the injury that the Plaintiff stands to suffer should this court not grant it the orders sought is irreparable, it is not continuous and neither is it substantial; that suspicion cannot be held to be reasonable if it is founded on non-existent facts, for that would be a subjective test which must be based upon grounds existing at the time of its formation. Counsel argued that if there are no grounds which then made the suspicion reasonable, it was not reasonable suspicion. Counsel contended that there is no evidence showing that the 1st to 4th Defendants had previously withdrawn, removed, or disposed monies in Bank Account No. 01109xxxxxxxxx or attempted to do so in violation of the preservation orders issued by this court on 27th August, 2020 and hence the Plaintiff's apprehension, suspicion, or belief is misguided, unreasonable, and unfounded and, therefore, it has failed to show how it will suffer irreparable injury and the specific particulars of that injury should this court not grant it the orders sought.

15. Counsel for the 1st to 4th Defendants/Respondents further stated that the balance of convenience does not favor the Plaintiff; that, the inconvenience that will be caused to the 1st to 4th Defendants if a preservation/injunctive order is granted to the Plaintiff and the suit is ultimately dismissed outweighs any inconvenience that the Plaintiff stands to suffer if the order is not granted. Counsel stated that the freezing of the funds in Bank Account No. 01109xxxxxxxxx has already ground the business operations and activities of the 1st Defendant to a halt and led to its ultimate temporary closure, meaning the 1st to 4th Defendants/Respondents are already experiencing inconvenience. Counsel cited the case of **Ethics and Anti-Corruption Commission v. Moses Kasaine Lenokulal & another (supra)**, where the court held that **Section 56 of ACECA** should not be used to generally ground a person's legitimate investment or affairs but should strictly be used to target ill-gotten property. Counsel contended that granting the orders sought by the Plaintiff would continue to greatly inconvenience the 1st to 4th Defendants/Respondents as they shall not gain access to their hard-earned cash. Counsel also relied on the case of **Bryan Chebii Kipkoech v. Barnabas Tuitoek Barqoria & another 2019 eKLR**. Counsel reiterated that the Plaintiff has irredeemably failed to show the existence of a prima facie case with a likelihood of success, irreparable injury, or a balance of convenience and submitted that the evidence on record is insufficient to support or justify the grant of the drastic injunctive and preservation orders sought by the Plaintiff and urged this Court to in the interests of justice and fairness dismiss the Plaintiff's application with costs to the 1st to 4th Defendants.

ANALYSIS AND DETERMINATION

16. The Plaintiff seeks preservation orders pending the hearing and determination of this suit. The Plaintiff/Applicant has the mandate under **Article 252 of the Constitution** and **Section 11 of the Ethics and Anti-Corruption Commission Act** 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, or the payment of compensation, or other punitive and disciplinary measures. It is on this Constitutional and Statutory authority that they have filed the application before me. The application is brought under **Order 40 Rule 10 and Order 51 Rule 1 of the Civil Procedure Rules 2010**, which provide as follows:

"Order 40 Rule 10

10. Detention, preservation, inspection of property [Order 40, rule 10.]

(1) The court may, on the application of any party to a suit, and on such terms as it thinks fit—

a) make an order for the detention, preservation, or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;

b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; or

c) *for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.*”

Order 51, rule 1.

“All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.”

17. The order sought by the Plaintiff/Applicant is a preservation order but not an injunctive order although by granting the preservation order the court must of necessity restrain any conduct that would lead to any withdrawal or dealing with the money in the account the subject of the application. If what the Plaintiff/Applicant intended to obtain was an injunctive order it would have come under **Order 40 Rule 1 of the Civil Procedure Rules** which provides for injunctions but not Order 40 Rule 10 of the rules. The principles in the cases cited by Counsel for the parties would in my view therefore, not obtain in this application. It is also instructive that ordinarily preservation orders are sought under **Section 56(1) of the Anti-Corruption and Economic Crimes Act** and as such the Plaintiff/Applicant has taken a long route to obtain the orders which it seeks in this case. Be that as it may the issue of procedure was not raised by the Defendants/Respondents and as **Article 159 (d) of the Constitution** also obligates this court to determine the application on its merit I shall proceed to do so regardless of the procedure invoked.

18. The Plaintiff/Applicant has sought a preservation order for a sum of Kshs.5,187,000/- held in a bank account No. 01109xxxxxxxxx at Co-operative Bank Isiolo Branch which is the subject of this forfeiture suit. I have considered the application, the grounds for the application, the affidavits in support and in reply and the rival submissions of the learned Advocates for the parties and I am satisfied that the Plaintiff/Applicant has demonstrated reasonable grounds to warrant this court to grant the prayers sought. It is my finding that were this court to decline the orders sought and the suit succeeds the same will be rendered nugatory as there shall be no money to forfeit. On the other hand, if the order is granted and the case does not succeed the money which will still be in the account will be released to the 1st to 4th Defendants/Respondents and they do not therefore risk to suffer substantial loss. It is my finding therefore that the balance of convenience tilts in favour of the Plaintiff/Applicant. It is also my finding that it is in the public interest that this court grants the order sought. My findings are supported by the decision of the court in the case of **Ethics and Anti-Corruption Commission Vs Jamal Bare Mohamed [2018] eKLR** where it was held:-

“The balance of convenience does tilt in favour of the Plaintiff which will be inconvenienced if the orders sought are not granted. It is the commission that will expend the resources to trace and recover the money if successful in the application and the costs will be borne by the taxpayer.”

19. Accordingly, the application for a preservation order is allowed and orders are granted as prayed. The orders shall subsist until this case is finally heard and determined.

20. Costs shall be in the cause. It is so ordered.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 9TH DAY OF DECEMBER, 2021.

E.N. MAINA

JUDGE