



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

MISC. APPLICATION NO. 35 OF 2019

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

V E R S U S

HAMMAD KASSAI.....1ST DEFENDANT

AHMED SAHAL OMARI2ND DEFENDANT

YUSUF DAYIB ALI3RD DEFENDANT

BARE IDRIS AMI4TH DEFENDANT

DAAYO CONSTRUCTION & GENERAL SUPPLIES LTD5TH DEFENDANT

OSMAN ABDI JIMALE..... 6TH DEFENDANT

AHMED ABDI JIMALE.....7TH DEFENDANT

FINE TRUST CONSTRUCTION CO. LTD..... 8TH DEFENDANT

RULING

Applicant's Case

1. By a Notice of Motion dated 9th August 2019 brought pursuant to Sections 1A, 1B, 3A of the Civil Procedure Act and Orders 40(1)&51(1) of the Civil Procedure Rules, the applicant herein sought orders as hereunder;

- i. That this application be certified urgent and service thereof upon the defendants be dispensed with in the 1st instance.
- ii. That pending the hearing and determination of this application interpartes the 5th -8th defendants by themselves; their agents, servants and / or employees be restrained from withdrawing funds or in any other way dealing with the following bank accounts;
 - a. Kenya Commercial Bank Ltd Account No. 1220***** Wajir Branch.
 - b. Kenya Commercial Bank Ltd Account No. 1226***** Wajir Branch.
- iii. That pending interpartes hearing and determination of this application the Defendants by themselves, their agents, servants and/or employees be restrained from selling, charging, leasing, transferring, wasting, disposing or in any similar manner dealing with motor vehicle Land Cruiser VX 8 LC 200 Series Registration No. KCQ 004U.
- iv. That pending the hearing and determination of this suit the 5th – 8th Defendants by themselves, their agents, servants and/or employees be restrained from withdrawing funds or in any other way dealing with the following bank accounts;

a. Kenya Commercial Bank Ltd Account No. 1220***** , Wajir Branch

b. Kenya Commercial Bank Ltd Account No. 1226***** , Wajir Branch

v. That pending hearing and determination of this suit the Defendants by themselves, their agents, servants and/or employees be restrained from selling, charging, leasing, transferring, wasting, disposing or in any similar manner dealing with motor vehicle Land Cruiser VX 8 LC 200 Series Registration No. KCQ 004U.

vi. That in the alternative, pending hearing and determination of this suit this Honourable Court be pleased to make an order for the sale by public auction of motor vehicle Land Cruiser VX 8 LC 200 Series Registration No. KCQ 004U and the proceeds be deposited in a joint interest-earning account between the parties herein.

vii. The costs of this application be provided for.

2. The application is predicated upon grounds set out on the face of it and an affidavit sworn on 9th August 2019 by Abraham Lorot an investigator working with EACC. It is the applicant's case that in the course of executing its investigation mandate, it received information that Kshs. 26 million intended for the purchase of two (2) motor vehicles for Governor Wajir County Government were misappropriated. That the 5th defendant was irregularly awarded the tender to supply the said motor vehicles at a cost of Kshs. 39.44m. That out of 26m disbursed to the 5th defendant, 14m was spent on one motor vehicle Reg. No. KCQ 004U and a balance of 12 million irregularly transmitted to the 8th defendant for no apparent consideration.

3. It was further stated that, further investigations revealed that the contract in question was tainted with irregularities enumerated as follows;

a. The 5th defendant submitted to the County Government of Wajir a forged tender bond No. MP1732702301R purportedly issued by Kenya Commercial Bank which was later disowned by KCB vide their letter dated 12th February 2018 (Annexure "AL"3); that KCB confirmed that the said tender bond had actually been issued to Eastern Link Investments (see annexure 'AL' 4). That the 5th defendant misrepresented its experience on supply of similar type of motor vehicles to Kitui and Kisii County Governments a fact that was categorically refuted by the County Government of Kitui vide its letter marked "AL5" dated 25th October 2018 and Kisii County Government's letter dated 31st January 2009 (annexure No. "AL"6).

4. He further averred that the 2nd – 6th defendants ought to have declared the tenders in question unresponsive as per the professional opinion and advice given by of the procurement officer considering that the bidder declared successful had not met the requisite conditions. That without following due process in processing funds through voucher examination process, the 2nd – 4th defendants processed irregular payment for the benefit of the 5th defendant.

5. That the 2nd – 4th defendants caused the County Government of Wajir to enter into an agreement with the 5th defendant which agreement was not signed by the 6th and 7th defendants being the Directors of the 5th defendant. He further stated that the sum of 26 million used to pay for the two motor vehicles was not budgeted for in the procurement plan for the executive department.

6. It was deposed that out of a sum of 26m paid to the 5th defendant for supply of 2 motor vehicles, only 14m was transferred to Cosmos Ltd to purchase the motor vehicles leaving a balance of 12 million which was transferred to the 8th defendant who had nothing to do with the contract. That no motor vehicle was supplied for the sum of 12 million as the 5th defendant had only procured for the supply of only one used motor vehicle KCQ 004U at a price of 14 million which was never transferred to the County Government.

7. Having discovered the said fraud, the applicant moved to court for preservation orders of the said motor vehicle vide **Misc. Application No. 5/2019 EACC v Dayo Construction and General Supplies and 2 Others** which were issued on 11th February 2019.

Response by the 1st, 2nd and 4th Defendants

8. In their response, the 1st, 2nd and 4th respondents filed a replying affidavit sworn on an unknown date by Bare Idris Amin in which he denied involvement in any fraudulent activities in receiving funds from Wajir County Government.

9. He averred that there was no proof that the tender awarded to the 5th defendant (Daayo Construction Company) was irregular and that the funds used to purchase the motor vehicle the subject of the tender in question was not budgeted for.

10. According to the defendants, funds were budgeted for by the procurement entity known as County Government of Wajir and not a department within the entity in conformity with the Procurement Laws and Regulations of 2015 in particular Section 2. He attached a copy of the procurement plan Annexure BA 2 for the year 2017- 2018 to confirm that the purchase of the motor vehicles was planned for.

11. Regarding the regularity of the tender process, it was deposed that the same was done through competitive tendering method which was advertised in the Nation and Standard daily and due process thereafter followed until the award was made.

12. Touching on the alleged irregularities in the tendering process as set out in paragraph 5 of the applicant's affidavit in support of the application, forged bid bond and letters of reference and experience from Kitui and Kisii County Governments, he deposed that there was no proof or knowledge of the alleged forgery by the 1st, 2nd and 4th defendants.

13. As to the allegation of irregular amendment of the tender document with the intention of favouring the 5th respondent, he averred that the same was done in good faith and within the law thus affecting 11 tenders some of which the 5th defendant was not a bidder.

14. Regarding the alleged refusal to heed to professional opinion from a procurement officer, he averred that the same was not binding pursuant to Section 84 of the PPDA Act 2015 and that in any event the said opinion was not specific nor did it refer to any provision not complied with.

15. Concerning the transfer of money by the 5th defendant to a 3rd party, he contended that it was not the business of the County Government as he had legally been paid and therefore not bound on how to use the money received. Relying on the National Transport Authority documents in respect of motor vehicle KCQ 004U, the deponent averred that the County Government of Wajir is indicated as a previous owner implying that the same had assumed ownership thereof. He attached exhibits BA/3 – BA/6 to prove that the said motor vehicle was duly received by the County Government of Wajir and the allegation that it was not is not correct.

Response by the 5th, 7th and 8th Defendants

16. Through their replying affidavit (undated) purportedly sworn by Osman Abdi Jamale on his behalf and on behalf of the 5th, 7th and 8th defendants, he strongly opposed the application. The affidavit is purely a replica of the contents contained in the affidavit of the 1st, 2nd and 4th respondents.

17. They basically stated that the contract in question was overboard and that the subject motor vehicles were supplied as per the contract with KCQ 004U having been registered in the name of Wajir County Government (see log book marked PAS 14). That the 2nd motor vehicle a Toyota Pick Up was delivered on 31st May 2019 as reflected in the relevant transfer documents marked OA 13 – OA 16.

Submissions by the applicants

18. Vide their submissions filed on 13th May 2020, Mr. Kagucia appearing for the applicant urged that their application had met the threshold to issue an injunction as set out in the case of **Giella Cassman Brown and Company Limited (1973)EA 358**. He expressed the view that they have established a prima facie case with a probability of success; they will suffer irreparable damage if the orders sought are not granted and, on a balance of convenience, the scales of justice does tilt in their favour.

19. Mr. Kagucia posed questions as to whether the tender was published the same day a requisition was made and whether the period for submission of bids was irregularly shortened to favour the 5th defendant. That the respondents had avoided to answer those questions as there was evidence of irregular award of the contract which evidence shall be tested during the hearing of the case.

20. On the alleged irregularities, counsel basically reiterated the averments contained in the affidavit in support of the application and the annexures thereof. As to whether the procurement entity in this case meant the County Government of Wajir, counsel made reference to the definition of who a procuring entity refers to under Section 2 of the PPDA which includes a department in this case the Executive and the Legislature.

21. That since documents used to secure the contract were forged which is not disputed and considering that no budget was provided for provision of the motor vehicles, there is breach of procurement laws which then establishes a prima facie case with a probability of success.

22. Concerning the possibility of suffering irreparable damage, counsel submitted that loss of public funds through misappropriation of public resources amounts to breach of public trust which will then promote impunity thus lowering citizens' confidence in utilization of public funds. That such injury on the public cannot be compensated in monetary terms as it cannot be quantified.

23. In support of his submission, counsel made reference to the decision in the case of **Joseph Ntombura v Godfrey Simiyu and 4 Others (2018)eKLR** where the court set out the test of irreparable loss as;

“The test should be whether the person applying for the injunctive relief will suffer irreparable harm. The test is not whether the person against whom the orders is to be made will suffer irreparable harm.”

24. Regarding the test of balance of convenience, counsel opined that between the applicant and the respondent, the applicant will suffer more than the respondent hence the balance of convenience tilts in favour of the applicant. To support that proposition reliance was placed in the case of **James Opiyo Wandayi v Kenya National Assembly and 2 others (2016)eKLR** where the court held that harm against the public is of so grave a character that no other interest, private or otherwise can be allowed to prevail.

25. Mr. Kagucia went further to submit that public interest is one of the functions the court must take into consideration before granting an order of injunction. That in this case tax-payer's money was misappropriated hence public interest should prevail over private interest.

26. Lastly, counsel submitted that, as an alternative prayer pleaded at page six, an order be made for the sale of motor vehicle KCQ 004U by public auction and proceeds thereof be kept in a joint interest earning account.

Submissions by the 1st – 8th Respondents

27. The firm of Migos Ogamba and Waudo Advocates appearing for the respondents filed their submissions on 20th May 2020 challenging

the application. Counsel submitted that the applicant has not satisfied the principles set out in the case of Giella v Cassman Brown (supra) and Mrao Ltd v First American Bank of Kenya Ltd and 2 Others (2003)eKLR.

28. It was the defendant's submission that allegations of fraudulent acquisition of funds were not proved to the required degree as held in Emfil Limited v Registrar of Titles Mombasa and 2 others (2014)eKLR where the court held that:-

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.”

29. Mr. Waudu adopted the averments contained in the affidavit in reply to the application. Counsel further submitted that the two motor vehicles the subject of these proceedings had been supplied to the County Government of Wajir before this suit was instituted and that non-disclosure of that information amounts to curtailment of a just determination of justice. To support this argument, counsel made reference to the decision in the case of Kenleb Cons. Ltd v New Gatitu General Station and Another (1990)eKLR where the court stated that, for an order of injunction to issue, a party must make full disclosure of all relevant facts to the just determination of a matter but subject to prove of entitlement to a right, legal or equitable.

30. As to the transfer of the funds to a third party, counsel contended that the 5th defendant having won a contract and received payment, the County Government had no business following on how the money was spent. To support this position, counsel made reference to this court's decision in the case of Ethics and Anti-Corruption Commission vs Catherine Nkirote T/A Venyte Suppliers and Joscate Sales and Supplies and 2 Others ACEC Civil Suit No. 6/2016 (unreported) where the court held that once goods are supplied to a procuring entity its none of the procurement entity's business to know or follow on how the money paid was or is spent.

31. Mr. Waudu submitted that prayers 4 and 5 cannot issue as the respondents are not owners of the motor vehicles and that the registered owners are not parties to this suit. That sale of the motor vehicle is a general order which cannot be applicable at this stage. Learned counsel urged the court to apply its discretionary powers on the basis of evidence and sound legal principles. To fortify this position reliance was placed in the case of Njenga v Njenga (1991)KLR 401.

Analysis and determination

32. I have considered the application herein, respondents' responses and rival counsel's submissions. The only issues that arise for determination are;

a. Whether the applicant has met the requisite threshold for grant of injunctive relief.

b. Whether this court can order for sale of the subject motor vehicle by public auction and then deposit the sale proceeds in an interest earning account pending hearing and determination of the suit.

33. An injunctive relief is an equitable remedy which is only granted upon factual proof of clearly defined parameters under the law and principles settled in judicial precedents.

34. Grant of injunction as an equitable remedy is provided for under Order 40 rules 1 and 2 of the Civil Procedure Rules. It is intended to protect or preserve any property that is in dispute in a suit which is at risk of being wasted, damaged, alienated, interfered with, disposed of or removed by any party to the suit.

35. Under Order 40 Sub-rule two, an order of injunction may issue at the discretion of the court on such terms as the court may deem fit. The court has therefore unfettered discretionary powers in the grant of injunctive relief if it is in the interest of justice. It is not a discretion to be exercised unreasonably, whimsically or capriciously. (see UBA Kenya Bank Limited v. Sylvia Mututi Magotsi (2015)eKLR).

36. The principles governing grant of injunction orders have succinctly been settled in various case law decisions. In the celebrated and commonly referred to case of Giella v. Cassman Brown and Company Limited (supra), the court set out key ingredients to be considered before issuing an injunction as follows;

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

37. Similar position has been espoused in the case of Mrao Ltd v First American Bank of Kenya Ltd and 2 Others (supra) which went further to elucidate on what constitutes a prima facie case as follows;

“A case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

38. It is incumbent upon the applicant to prove to the court that the facts of his case are such that no reasonable Judge or Magistrate or presiding Officer exercising judicial function would hesitate on the face of it to grant an injunction for the ends of justice to be met.

39. From the facts of this case already outlined above, the applicants' claim is that the process leading to the award of the impugned contract

was riddled with corruption considering that the 5th defendant who won the contract did not deserve it given that the advertisement period was shortened to favour him and that the bid document was amended in his favour. The respondents urged that the alleged amendment affected 11 tenders and not only the two tenders the subject of these proceedings. To that extent, I do agree with Mr. Waudu that there is no prima facie evidence adduced to prove that the amendment of the bid document or shortening of the advertisement period was skewed in such a way as to favour the 5th defendant.

40. As regards forged documents submitted by the 8th defendant among them letters of experience in supplying similar motor vehicles to other counties and the bid bond from KCB, the respondents did not challenge the evidence adduced by way of letters from KCB, Kitui and Kisii County Governments disputing the authenticity of those letters. Mr. Waudu only submitted that the evaluation committee and the defendants were not aware of that position.

41. How would a bidder not be aware that the letters he or she was submitting were not genuine? Indeed, what that means is that, the 5th defendant did win the contract through trickery or forgery thus defeating the essence of competitive bidding.

42. The claim that nobody confirmed the claim of fraud or forgery of letters from Kisii and Kitui Counties or KCB is a matter of evidence. Prima facie, a reasonable jury would be convinced that without such fraud or forgery, the 5th respondent could probably not have won the contract for the supply of the motor vehicles. Further details will be a matter of evidence subject to cross examination.

43. Regarding the argument that the subject motor vehicles were not budgeted for in the financial year 2017-2018 for the executive department to buy them, counsel have disagreed on what constitutes a procuring entity and whether the executive arm of government would qualify to be a procuring entity. Section 2 of the PPDA 2015 defines a procuring entity as including government or any department of government. The issue to be determined is whether in the context of this case the department of the executive was under the procurement plan supposed to buy motor vehicles during that financial year.

44. The issue at hand will be determined after hearing evidence as to whether there was a budget for the motor vehicles in question for the office of Governor or whether any expenditure generally within the County Government was allowed and under what circumstances. It would be prejudicial to make a final determination on that issue at this stage as it would jeopardize the hearing and fair determination of the main suit. I do not want to pre-empt the final decision at this point. However, on the face of it and from material placed before court, there was no specific budget for the purchase of the two motor vehicles for the governor's office. Whether the purchase of the M/vs was budgeted for or not will be a matter of evidence.

45. Based on the above analysis, it does not matter whether some elements or allegations do not raise a prima facie case. As long as one claim meets the threshold, then a court will be bound to grant an injunction in the interest of that one issue. In this case I am convinced that the applicant has established a prima facie case on a number of issues with a probability of success.

46. Whether the applicants are likely to suffer irreparable damage which cannot be compensated in monetary terms, one would have to look at the issue in a broader sense. The applicant is an eye and ear of the public. Any act or omission resulting to or perpetuating plundering of government or public resources is a great injustice to the Kenyan citizen and in particular tax payers. Society therefore expects stringent treatment against the perpetrators so as to deter similar acts. That public interest cannot be quantified in monetary terms.

47. Although the claim involves monetary element, the broader injury is how to restore public confidence. If the funds held in the impugned bank accounts were to be withdrawn, it will jeopardise or prejudice the applicant and by extension the public by expending further costs in seeking to recover the withdrawn funds incase the applicant's case succeeds.

48. I am in agreement with the persuasive authority in the case of **Konway v Limmer (1968) I All ER 874** as quoted with approval in the case of **James Opiyo Wandayi v Kenya National Assembly and 2 Others (supra)** where the court held:-

“that there is the public interest that harm shall not be caused to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.”

49. Concerning whether the prayers sought on a balance of convenience tilts in favour of the applicant, the answer is in the affirmative. Having found the first two principles positive in favour of the applicant, the 3rd principle is automatically applicable. The scales of justice in all respects are favourable to the applicants.

50. I must however state at this point that, prayer 5 which seeks restraining orders against disposition of motor vehicle KCQ 004U, is no longer applicable in this case as it was compromised by consent on 8th July 2020 after parties agreed to have the same transferred to the County Government of Wajir hence the injunctive orders are not applicable. Based on that consent, prayer 6 is spent and will not apply in so far as sale of the motor vehicle KCQ 004U is concern. With the consent at hand, sale by auction is out of question. However, even if such consent were not in existence, I could not have made such orders as it would have technically and prematurely disposed of the suit in favour of the applicant before proving their case. Unlike perishable goods, a motor vehicle can await determination of a dispute.

51. In view of the above finding, it is my holding that the plaintiff has established a prima facie case to the required degree in respect of prayer 4 which I do hereby grant. Regarding costs, same shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF JULY, 2020.

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J. N. ONYIEGO

JUDGE