



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**

**ACEC MISC APPLICATION NO 26 OF 2019**

**ETHICS & ANTI CORRUPTION COMMISSION.....APPLICANT**

**VS**

**DENNIS NJAU KIMANI.....RESPONDENT**

**CONSOLIDATED WITH**

**ACEC MISC APPLICATION NO 25 OF 2019**

**ETHICS & ANTI CORRUPTION COMMISSION.....APPLICANT**

**VS**

**FUSHA TRADE CREDIT CO. LIMITED.....RESPONDENT**

**RULING**

1. The respondents/applicants in this case, Dennis Njau Kimani and Fusha Trade Credit Co. Limited challenge the issuance of preservation orders to the applicant/respondent, the Ethics and Anti-corruption Commission, by the High Court sitting in Meru in Misc. Civil Application No. 45 of 2019-EACC v Dennis Njau Kimani and Meru High Court Misc. Civil Application No. 50 of 2019-EACC v Fusha Trade Credit Co. Limited and Dennis Njau Kimani. As the applications relate to the same matters and the same parties, they were consolidated and the applications challenging the orders issued were heard together before me. For the purposes of this ruling and in the interests of clarity, I shall refer to the initial applicant as EACC and the two respondents, Dennis Njau Kimani and Fusha Trade Credit Limited as the 1<sup>st</sup> and 2<sup>nd</sup> applicants respectively.
2. EACC had filed Misc. Civil Applications Nos. 45 and 50 of 2019 before the High Court in Meru. In the first application, EACC sought an order to prohibit the withdrawal, transfer, disposal of or other dealings with the sum of Ksh. 10,500,000/- or any amount thereof held in bank account number [...] at Consolidated Bank, which Account is operated and held in the name of the 1<sup>st</sup> respondent.
3. In the second application, EACC sought and was granted orders prohibiting the withdrawal, transfer, disposal of or other dealings howsoever described with the sum of Kshs. 2,500,000/= or any amount held in bank account number[...] at the Kenya Commercial Bank Ltd operated and held in the name of Fusha Trade Credit Co. Limited. Pursuant to the requirements of section 56(3) of the Ethics and Anti-Corruption Act, 2003 (ACECA), the orders were sought for a period of six months as provided for under the said section.
4. The orders in both applications were sought on the basis that the EACC has the legal mandate under section 11(1) (k) of the Ethics and Anti-Corruption Act 2011 to, inter alia, institute and conduct proceedings in court for the purposes of the recovery or protection of public property or for the freezing or confiscation of proceeds of corruption or related to corruption. It had, in pursuit of its mandate, commenced investigations into allegations of corrupt conduct and irregularities in procurement of construction works for two oxygen production plants at Isiolo County Government hospitals under tender Nos. ICG/018/2018 and ICG/019/2018.
5. Its preliminary investigations had established that the tenders were awarded to a company known as Hitmax Co Ltd at an inflated cost of Kshs. 79,853,738.80 and that the entire procurement process was tainted with illegality. The County Government of Isiolo had already paid Hitmax Co. Ltd the total amount of Kshs. 79,853,738.80 through Hitmax Co. Ltd Bank account number [...] at Co-operative Bank on 2<sup>nd</sup> July 2018. Dennis Njau Kimani, the respondent in Civil Application No. 45 of 2019 (Nairobi ACEC No. 26 of 2019) was a director of Hitmax Co. Ltd and a signatory of the company's bank account no. [...] at Co-operative Bank. He was also a director of Fusha Trade Credit

Co. Ltd (the 1<sup>st</sup> respondent in Meru Misc, Civil Application No. 50 of 2019 and ACEC Misc. No. 25 of 2019) and a signatory of Fusha Trade Credit Co. Ltd's bank account number [...] at Kenya Commercial Bank Kenya Ltd.

6. The 1<sup>st</sup> applicant, Dennis Njau Kimani had, on 12<sup>th</sup> July 2018, transferred Ksh. 15.2 million from Hitmax Co. Ltd's account to his personal bank account no. [...] at Co-operative Bank and had further withdrawn KShs 3 million in cash from the said company's account. Thereafter, between 16<sup>th</sup> and 18<sup>th</sup> July 2018, he had transferred KShs 13 million from his personal bank account no. [...] at Co-operative Bank to his other personal bank account no. [...] at Consolidated Bank.

7. The EACC alleged further that between 18<sup>th</sup> July 2018 and 6<sup>th</sup> May 2019, he had transferred a total of KShs 10.5 million from his personal fixed deposit account No. [...] at Consolidated Bank, and on 6<sup>th</sup> May 2019, he had transferred a total of KShs 2.5 million from his personal bank account No. [...] at Consolidated Bank to the Fusha Trade Credit Co. Ltd's bank account number [...] at Kenya Commercial Bank Kenya Ltd. The EACC's position in its application for the orders before the High Court in Meru was that the actions of the present applicants clearly point towards a case of attempted money laundering of illicit funds obtained from the Isiolo County Government illegally.

8. It expressed the apprehension that if the orders that it sought were not granted, the respondents might transfer, withdraw, dispose of or otherwise deal with the funds in a manner that would frustrate on-going investigations and defeat the intended recovery proceedings and prosecution of any persons who may be found culpable for any corrupt conduct.

### **The applicants' case**

9. It is the orders granted for preservation of funds by the High Court in Meru which are the subject of the application dated 21<sup>st</sup> June 2019. The applicants ask this court to issue orders to unfreeze bank account number [...] held at Consolidated Bank in the name of the 1<sup>st</sup> applicant, Dennis Njau Kimani, and account number [...] in Kenya Commercial Bank held in the name of the 2<sup>nd</sup> applicant, Fusha Trade Credit Co. Ltd. The application is supported by an affidavit sworn by Dennis Njau Kimani. It is expressed to be brought under Article 40 of the Constitution, section 56 (4) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003, Order 51 of the Civil Procedure Rules and all enabling provisions of law.

10. The application is based on the grounds, first, that the preconditions for the grant of the freezing orders in which EACC must demonstrate, through evidence, that the property against which it seeks to obtain orders against was acquired through corrupt conduct were not met. The second ground is that the monies in the bank accounts against which freezing orders were granted were not obtained through corrupt conduct but through lawful and legal processes known in Kenyan law.

11. It is further argued that the proceeds in the said bank accounts were the proceeds of legal and legitimate business through public procurement and other legitimate businesses, and there is no tangible evidence of corrupt conduct that has been established to warrant the grant of the orders of 28<sup>th</sup> May 2019. Finally, the applicants contend that EACC did not afford them an opportunity to explain the monies in the said account or any other matter connected with any of the issues raised in the suit.

12. The applicants further argue that the notice required under section 27 of ACECA was not issued to them, and accordingly, the orders issued to investigate the accounts were improper and therefore void.

13. In submissions on behalf of the applicants, Learned Counsel, Mr. Juma, reiterated the orders sought in the applications. He submitted that the notice under section 27 of ACECA was not issued to the applicants and the warrants to investigate the accounts were improper and therefore void.

14. Mr. Juma further submitted that the EACC did not disclose the pre-conditions for the orders freezing the accounts. Further, that it had misrepresented facts in order to be given the orders. The applicants submit that EACC had alleged that tender numbers ICG/018/2017 -2018 and number ICG/0192017-2019 had been awarded to the applicant after corrupt conduct, and that there were suspicions that the tender amounts were inflated. They argue that the allegations were made in generalities as evidenced in paragraph 14 of the affidavit of Leonard Njenga Mungai. It was not shown how the EACC arrived at the inflated amount, nor had there been a comparison as to what the proper amount was or what was inflated. EACC had also not indicated what the illegalities in the tenders were.

15. According to the applicants, the tenders were for construction and installation of oxygen production plants at Isiolo and Garba Tula sub county hospital. The completion for the first was 2018, while the completion date for the second was 2019. Mr. Juma contended that EACC had said that the tender process, which was through open tendering, was inflated, but had not told the court how many bids were responsive and how many were not. His case was that such vague and generalized allegations were only made so as to suppress the real picture on the ground.

16. The applicants further contended that in the affidavit sworn by Dennis Njau Kimani on 22<sup>nd</sup> July 2019, the applicants had presented independent valuations by Infracost Consultants. The valuer had visited the ground on 20<sup>th</sup> July 2019 and had presented reports that are clear that the applicant's company has moved to the site and installed the equipment. They contend that it is clear that the work was done as required by the County Government of Isiolo; that on Garba Tula, 63% of the work has been done despite there being freezing orders, and that work was still ongoing, with work worth only KShs 10m remaining.

17. Mr. Juma conceded that the EACC has the mandate to investigate; that it has already preserved a house belonging to the 1<sup>st</sup> applicant in Embu ELC Misc. Appln. No. 8 of 2019 worth, in their estimation, KShs 50m, and had annexed a sale agreement with a company known as Oceanic. The 1<sup>st</sup> applicant was willing to concede that they should continue holding the house, and the applicants' only wish is that they complete the project.

18. It was their submission further that the Isiolo hospital project is worth Kshs 50,990,000; that Garba Tula was in the region of Kshs 27,000,000, and the total tender amount was Kshs 79m. Further, that both the project and the house are worth in the region of Kshs 100m, the implication being that there was no loss if the orders freezing the accounts were lifted. Mr. Juma submitted that it is not in the interest of justice that the common man in Garba Tula should suffer for lack of oxygen, and he urged the court to allow the application.

19. In submissions dated 17<sup>th</sup> July 2019 filed on behalf of the applicants, reliance was placed on section 26-28 of ACECA for the submission that the sections require that persons under investigation are given an opportunity to comply with the sections and supply information required by EACC before other means of obtaining information are used. They submit that the EACC had not tried to reach the applicants, and allegations to the contrary by EACC were untrue.

20. The applicants relied on Article 47 of the Constitution, as well as the Fair Administrative Actions Act, the decision of the High Court in Meru in **Ibrahim Wako Boru v EACC (2018) eKLR** and the decision of the Court of Appeal in **Director of Public Prosecutions v Tom Ojienda T/A Prof. tom Ojienda & Associates Advocates & 3 others (2019)eKLR** to submit that the failure by the EACC to request the applicants to respond to its queries before proceeding to obtain court orders amounts to flouting of procedures. In a submission that is somewhat confusing given that the application before the court relates to the orders issued in the High Court, the applicants argue that the orders obtained in Isiolo Chief Magistrate's Court in Misc. Criminal Applications Nos. 14 and 15 of 2019 on 18<sup>th</sup> January 2019 were obtained irregularly and in violation of the applicants' rights.

21. The applicants further submitted that the pre-conditions for the grant of the orders of 28<sup>th</sup> May 2019 by the High Court were not met. Detailed submissions are made with respect to the tendering process that resulted in the grant of the tenders to the 1<sup>st</sup> applicant's company, Hitmax Company Limited, which had undergone the preliminary, technical and financial evaluation and had emerged the successful bidder.

22. It was further submitted that the 1<sup>st</sup> applicant's company performed the contract in accordance with the tender. A valuation by Infracost Consultants, a company contracted by the 1<sup>st</sup> applicant, indicates that the work under the contract is done save for a 'small maintenance works' (sic) and the project will be completed in accordance with the contract between the parties. Further, that the project was commissioned on 12<sup>th</sup> February 2019 after the procuring entity was satisfied that the work was properly done.

23. The applicants relied on the decision of Odunga J in **EACC v Ministry of Medical Services & Another (2012) eKLR** to submit that the requirements for the grant of freezing orders under ACECA had not been met. It was their case that the court had been misled, the submission being that there was no evidence to show that the tender amounts were inflated and that the valuation had shown that the value of the works is in order. Further, that no *prima facie* case was established to warrant the grant of the orders. In this regard, it was submitted that the process of tendering was flawless, and the quantity surveyor had evaluated the works and shown that the projects are almost complete.

24. The applicants urged the court to grant the orders to unfreeze the accounts. They submitted that the 2<sup>nd</sup> applicant, Fusha Trade Credit Co. Limited, is a micro-finance company in the business of money lending and freezing its account number [...] held at Kenya Commercial Bank is very detrimental to the business and may lead to putting the company out of business. With regard to the funds held in [...], the submission is that the funds are supposed to be utilised in the execution of the project hence the urgency of the application to unfreeze the account.

### **The Case for EACC**

25. In her submissions in response, Ms. Kilimo for EACC relied on an affidavit sworn on 3<sup>rd</sup> July 2019 by Leonard Njenga Mungai, written submissions dated 23<sup>rd</sup> July 2019 and a bundle of authorities in support. She submitted that the matter before the court was the applicants' application dated 21<sup>st</sup> June 2019, not the orders issued by the High Court in the matter.

26. With regard to the allegation that EACC had misrepresented facts before the High Court that issued the preservation orders, Ms. Kilimo submitted that the EACC had explained extensively in the affidavit in response the basis on which they had sought the orders. It was her submission that considering that these are the early stages of the investigations, the purpose of the order is to preserve the monies in the accounts. It was her submission that all that is required of EACC under section 56 (1) of ACECA as amended by section 24 of the Bribery Act is to prove that there was reasonable suspicion that the money in the account was acquired through corrupt conduct. They had done so by showing that the tenders were obtained through illegal and unprocedural means.

27. In this regard, Ms. Kilimo highlighted the forged statement of account of Hitmax Company Limited which was used to get the tender (annexure LM4(i) in the replying affidavit of Leonard Njenga Mungai) and LM4(ii), a letter from Co-operative Bank, both of which showed the applicants' conduct. It was her submission that the deposit in the account was made by the County Government of Isiolo on 4<sup>th</sup> April 2018, while the forged bank statement intimated that the applicant had been operating the account since August 2017, which is untrue.

28. Ms. Kilimo submitted that under section 72 of the **Public Procurement and Asset Disposal Act**, the responsibility of complying with the Act lies on all parties, and the applicants could not therefore say they did not have any role in the tender award.

29. As regards the valuation report annexed to the 1<sup>st</sup> applicant's further affidavit, she noted that the report stated that the Isiolo project was 92% complete and the other 63%. However, the fact was that the County Government of Isiolo had issued a completion certificate dated 21<sup>st</sup> June 2018 (LM7(iii) (a) and (b) annexed to the affidavit of Leonard Njenga Mungai dated 3<sup>rd</sup> July 2019. The funds had been transferred directly to the applicants' account when the applicants received the contractual sum from the County Government of Isiolo. The sum was directly transferred to individual accounts, and the 1<sup>st</sup> applicant had the house reserved.

30. Ms Kilimo submitted that a perusal of the Hitmax Company Limited account showed that the company received the funds on 4<sup>th</sup> April 2018 and on 5<sup>th</sup> April 2018, the same amount was transferred to Hamilton Harrisons and Mathew Advocates for the purchase of the house, being Kshs 39,925,869 (LM4(iv)). Some of the funds had also been transferred to the account of Fusha Trade Credit Co. Ltd at KCB in which the 1<sup>st</sup> applicant is a signatory.

31. Ms. Kilimo further submitted that apart from obtaining the tenders irregularly, the 1<sup>st</sup> applicant had transferred the money to individual accounts which was contrary to section 148 of the **Public Procurement and Asset Disposal Act 2015**. This section, according to Ms Kilimo, provides that a successful tenderer shall use the amount paid only for the activities related to the tender and not for any other purpose. She therefore urged the court to dismiss the application dated 21st June 2019 as the applicants had not satisfied the conditions for varying or setting aside the orders issued by the High Court.

32. In its written submissions, EACC reiterated the averments in its affidavit sworn on 3<sup>rd</sup> July 2019 in opposition to the application that the orders issued on 28<sup>th</sup> May had been served on the applicants' then advocates, Kimani & Muriithi, on 4<sup>th</sup> June 2019.

33. EACC observed that the application presently before the court is the one dated 1<sup>st</sup> June 2019, not the Misc. Criminal Applications Nos. 8 and 14 of 2019 dated 18<sup>th</sup> January 2019 and 31<sup>st</sup> January 2019 respectively which had been filed by the EACC in the subordinate court in Isiolo and had been dealt with by the Magistrate's Court. However, the position of the EACC in regard to these two applications was that the orders had been sought under the provisions of sections 180 of the Evidence Act and section 118 of the Criminal Procedure. EACC submitted that neither sections 26-28 of ACECA and section 118 of the CPC are unconstitutional and none is inferior, and that any steps taken under either provisions was lawful.

34. It was also EACC's case that, as emerged from its replying affidavit, the monies received from the County Government of Isiolo meant for the subject project was irregularly and illegally transferred to individual accounts. It was therefore justified in obtaining orders freezing the affected accounts for the sake of preserving the funds before investigations are complete. Its submission was that, as was held by the court in the case of **Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2018] eKLR**, applications under section 180 of the Evidence Act and section 118 CPC are filed *ex parte* before a magistrate and issuance of notice is not necessary.

35. EACC relied on the decision in **Ambrose Dickson Otieno Rachier and Others v EACC and 2 others (2019) eKLR** and **Omwanza Ombati t/a Nchogu, Omwanza & Nyasimi Advocates v Director of Criminal Investigations Department Emmanuel Kanyungu & 3 others [2017] eKLR** and **Mape Building & General Engineering v Attorney General & 3 others [2016] eKLR** with respect to the logic for applying *ex parte* for orders freezing an account in which funds suspected to have been obtained from corrupt practices are held.

36. It was also the case for EACC that the pre-conditions for grant of preservation orders under section 56 of ACECA were met in the case of the applicants, its contention being that all that was required of it was reasonable suspicion. Reliance for this submission was placed on the case of **Timothy Isaac Bryant & 2 others v Inspector General of Police Misc. Criminal Appeal No. 194 of 2014** and **Andrew Biketi Musuya t/a Musuya Petroleum Dealers (2019)eKLR**.

37. In support of its contentions that there was reasonable suspicion, EACC pointed out that the applicants have not disputed that Hitmax Company Limited submitted a forged bank account statement as part of the requirements of the bid documents, purporting to have been operating the account at Co-operative Bank since August 2017; and that it had imported the two medical oxygen equipment from Turkey on 27<sup>th</sup> June 2018 at a self-declared cost of Kshs 12, 278,570 and had sold them to the County Government of Isiolo at a cost of Kshs 79, 853,738.80. Further, that the County Government officials had been involved in corrupt practices which included preparation of incomplete bills of quantities without cost estimates; subsequently giving inflated costs without basis purporting to inspect the oxygen plant on 14<sup>th</sup> June 2018 and give a completion certificate on 21<sup>st</sup> June 2018 while the plant machinery did not arrive from Turkey till 27<sup>th</sup> June 2018.

38. The EACC noted that while the valuation report annexed to the 1<sup>st</sup> applicant's further affidavit sworn on 18<sup>th</sup> July 2019 alleged that the work on the two plants was 93% and 63% complete, the County Government of Isiolo had issued a completion certificate on 21<sup>st</sup> June 2018. It submitted that it had established reasonable suspicion in applying for the preservation orders and the orders issued were therefore properly issued. It was, in its view, in the public interest that the said orders are not lifted; that the public interest in the preservation of the funds meant to provide critical health facilities to citizens far outweighed the applicants' interest in the funds which had been used for personal gain; and the court should dismiss the application dated 21<sup>st</sup> June 2019.

### **Applicants' Submissions in Reply**

39. In his reply to the submissions by EACC, Mr. Juma argued that if, as contended by the EACC, the company had presented a forged statement of account in order to obtain the tenders, section 56(7) of ACECA defines what criminal conduct is. His position was that if EACC believed that there had been criminal conduct, then criminal prosecution should be instituted.

40. To the argument that the County Government of Isiolo had issued completion certificates dated 21<sup>st</sup> June 2018, his response was that the work under the tender was to be done in phases, including the plant housing the oxygen and the installation. His contention was that the completion certificate was in respect of the plant housing which were 100% done.

41. As regards the Kshs 39m sent to a law firm, the position of the applicants was that it was the amount that can be frozen as the EACC conducts its investigations.

42. As for the EACC contention that the provisions of section 148 of the Public Procurement and Asset Disposal Act had been flouted by the transfer of funds, Mr. Juma's response was that the purpose of the section was to ensure that projects do not stall. In this case, in the estimation of the valuer, the project was on course, and the court should therefore grant the orders sought by the applicants.

## Analysis and Determination

43. I have read and considered the application dated 21<sup>st</sup> June 2019 as well as the submissions and authorities in respect thereto. I have also read the application pursuant to which the orders sought in the application before me were issued, and the reasons presented before the High Court in Meru on the basis of which the preservation orders sought to be lifted in the present application were issued.

44. The application was lodged and the preservation orders issued under the provisions of section 56 of ACECA which, following the amendments to the Act wrought by section 24 of the Bribery Act, 2016, provides that:

**(1) On an ex parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.**

**(2) An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.**

**(3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission.**

**(4) A person served with an order under this section may, within fifteen days after being served, apply to the court to discharge or vary the order and the court may, after hearing the parties, discharge or vary the order or dismiss the application.**

**(5) The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.**

**(6) A person who is served with an order under this section and who contravenes it is guilty of an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.**

**(7) In this section, “corrupt conduct” means—**

**(a) conduct that constitutes corruption or economic crime; or**

**(b) conduct that took place before this Act came into operation and which—**

**(i) at the time, constituted an offence; and (ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.**

45. ACECA was enacted to provide for the “*prevention, investigation and punishment of corruption, economic crime and related offences*”. The provisions of section 56 are thus intended to assist in the preservation of public assets acquired corruptly.

46. The applicants have identified three issues for determination as follows:

**i. Whether the warrants used to investigate the bank accounts numbers 10181101000120 at Consolidated Bank in the name of the 1<sup>st</sup> applicant and Bank Account No. 1254796606 Kenya Commercial Bank Ltd operated by Fusha Trade Credit Co. Limited were irregularly obtained;**

**ii. Whether the pre-conditions for the grant of the orders of 28<sup>th</sup> May 2019 were met;**

**iii. Whether the orders sought by the applicants in the present application should be granted.**

### **Whether the warrants to investigate the accounts were irregularly obtained**

47. With regard to the first issue, I note the submissions by EACC that the question of the warrants to investigate the applicants’ accounts is not before the court. I believe this is the correct position. It appears that the EACC had sought orders from the Magistrate’s Court in Isiolo in January 2019. The warrants were issued in two cases, Misc. Criminal Applications Nos. 8 and 15 of 2019 according to EACC, though the applicants made reference to Misc. Criminal Application Nos 14 and 15 of 2019.

48. These applications and orders seem to appear for the first time in the applicants’ submissions, no reference having been made to them or orders sought with respect thereto earlier. The orders of the Magistrate’s Court in Isiolo, as correctly submitted by EACC, are not before me. What is before the court is the application dated 21<sup>st</sup> June 2019 in which the applicants seek orders in relation to the preservation orders issued in these matters by Gikonyo J sitting in the High Court in Meru. The orders sought in the application before me are as follows:

1. (Spent)

2. An order be issued setting aside, varying and or completely or partially discharge (sic) the freezing orders granted by the Hon.

Mr. Justice F. Gikonyo on 28<sup>th</sup> May 2019 prohibiting the withdrawal, transfer of or other dealings howsoever described with the sum of Kshs. 10, 500, 000/- or any amount thereof held in Bank Account No. [...] at Consolidated Bank which account is in the name of the Respondent.

4. Costs be provided.

49. In the circumstances, the applications made or orders issued in the Magistrate's Court in Isiolo in respect of the applicants' accounts not being before me, I will not enter into a consideration of or make orders with respect thereto. Suffice to say, however, that there are clear provisions under section 121 of the Criminal Procedure Code with respect to the manner in which a party who wishes to challenge orders issued pursuant to section 118 of the CPC should proceed.

#### **Whether the pre-conditions for the grant of the orders of 28<sup>th</sup> May 2019 were met**

50. The parties do not express very divergent opinions with respect to the conditions to be met in order for the court to issue orders under section 56 of ACECA. The applicants speak of the need to establish a *prima facie* case, while the EACC alludes to the need to show 'reasonable suspicion'.

51. The facts before me show the following. The 1<sup>st</sup> applicant's company, Hitmax Co. Limited, applied for a tender floated by the County Government of Isiolo. One of the documents it presented was a bank statement which purportedly showed that it had been operating a bank account with Co-operative Bank since 2017. However, an inquiry with the bank resulted in a letter from the bank indicating that no such account was held in the bank. The applicants have not disputed this averment by the EACC which is set out in the replying affidavit of Leonard Njenga Mungai. A copy of the letter from the bank is annexed to the said affidavit.

52. The second issue on the basis of which EACC states that there was reasonable suspicion to investigate the applicants' accounts and apply for freezing orders is with respect to the value of the tenders. The 1<sup>st</sup> applicant's company apparently obtained the tender to supply the machines at a cost of Kshs 79,853,738.80. It however, obtained the machines from Turkey at a self-declared cost of Kshs 12, 278,570. While the project was allegedly inspected on 14<sup>th</sup> June 2018 and a completion certificate issued on 21<sup>st</sup> June 2018, the machinery did not arrive from Turkey until 27<sup>th</sup> June 2018. This has also not been controverted by the applicants.

53. A third issue relates to the manner in which the funds paid out to Hitmax Company Limited by the County Government of Isiolo were utilised. It is not disputed that the County Government of Isiolo paid the total amount of Kshs 79,853,738.80 through the company's bank account No. [...] at Cooperative Bank by 2<sup>nd</sup> July 2018. On 12<sup>th</sup> July 2018, the 1<sup>st</sup> applicant transferred Ksh 15.2 million from the account of Hitmax Co. Ltd to his personal bank account number [...] at Cooperative Bank; Kshs 13 million on 26<sup>th</sup> July 2018 by RTGS from his personal bank account number [...] at Cooperative Bank to his other personal bank account number [...] at Consolidated Bank; that between 18<sup>th</sup> July 2018 and 6<sup>th</sup> May 2019, he transferred Kshs 10.5 million from his personal bank account number [...] at Consolidated Bank to yet another of his personal bank accounts, fixed deposit account No. 1[...] at Consolidated Bank.

54. Finally, on 6<sup>th</sup> May 2019, the 1<sup>st</sup> applicant transferred Kshs 2.5 million from his personal bank account number [...] at Consolidated Bank to the account of the 2<sup>nd</sup> applicant, Fusha Trade Credit Co. Ltd bank account number [...] at Kenya Commercial Bank Kenya Ltd, to which he is a signatory. Copies of the documents evidencing these transactions have been annexed to the affidavit of Leonard Njenga Mungai and they have not been controverted by the applicants.

55. If anything, the applicants tacitly concede that there was conduct that did not accord with the procurement laws, but contend that such conduct does not amount to the corrupt practices at which the provisions of ACECA are directed. In this regard, the 1<sup>st</sup> applicant concedes that out of the monies paid to Hitmax Company Limited, 39 million was sent to Hamilton Harrison and Mathews for purchase of a house. He submitted that this is the amount that should be frozen. Further, that since there is a freezing order in respect of the house purchased with the funds sent to Hamilton, Harrison & Mathews issued by the High Court in Embu, there is no danger of loss of public funds, if I understand the submissions of his Learned Counsel correctly. Finally, he avers and it is submitted on his behalf that the purpose of section 148 of the Public Procurement and Asset Disposal Act is to prevent projects running out of funds, which has not happened in this case.

56. Taking all the above matters into consideration, I am satisfied that the EACC had established a very strong *prima facie* case for the grant of the preservation orders by the High Court.

57. The question is whether, as the applicants argue, the orders issued by the High Court should be lifted, set aside or varied on the basis that the EACC had not issued a notice under sections 26-28 of ACECA. The applicants have placed reliance on the decision of the Court of Appeal in **Director of Public Prosecutions v Tom Ojienda T/A Prof. Tom Ojienda & Associates Advocates & 3 others** (supra). Their position is that the EACC should have issued a notice under sections 26-28 of ACECA before proceeding to investigate their accounts and obtaining the preservation orders. The position of EACC is that it properly used sections 180 of the Evidence Act and section 118 of the CPC.

58. Section 26 of ACECA states as follows:

#### **26. Statement of suspect's property**

**(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property—**

(a) enumerating the suspected person's property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

59. Section 27 ACECA relates to associates of a person persons suspected of corruption and provides, so far as is relevant for present purposes, as follows:

**27. Requirement to provide information, etc.**

1. The Commission may apply ex parte to the court for an order requiring an associate of a suspected person to provide, within a reasonable time specified in the order, a written statement stating, in relation to any property specified by the Secretary, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

2. In subsection (1), "associate of a suspected person" means a person, whether or not suspected of corruption or economic crime, who the investigator reasonably believes may have had dealings with a person suspected of corruption or economic crime.

3. The Commission may by notice in writing require any person to provide, within a reasonable time specified in the notice, any information or documents in the person's possession that relate to a person suspected of corruption or economic crime.

60. Section 28 of ACECA authorises EACC, in the course of its investigations, to seek orders from court to compel the production of records in the following terms:

**28. Production of records and property**

(1). The Commission may apply, with notice to affected parties, to the court for an order to—

a. require a person, whether or not suspected of corruption or economic crime, to produce specified records in his possession that may be required for an investigation; and

b. require that person or any other to provide explanations or information within his knowledge with respect to such records, whether the records were produced by the person or not.

(2) A requirement under subsection (1)(b) may include a requirement to attend personally to provide explanations and information.

(3) A requirement under subsection (1) may require a person to produce records or provide explanations and information on an ongoing basis over a period of time, not exceeding six months.

(4) The six-month limitation in subsection (3) does not prevent the Commission from making further requirements for further periods of time as long as the period of time in respect of which each requirement is made does not exceed six months.

61. In its decision in **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others [2019] eKLR** the court observed as follows:

**"301. The Petitioner asserts that counts I and II are offences initiated pursuant to ACECA, and that they can only be sustained and justified under that Act. She argues that the DPP and DCI must demonstrate compliance with sections 26-28 of the Act which we have set out above. Our reading of these provisions, however, does not support this contention. Section 26 is, in our view, intended to aid EACC to expedite investigations by requiring certain information from a person suspected of corruption or economic crimes, after giving of due notice. We do not read this to mean that EACC is under an obligation to give that notice to all persons under investigation. The effect of section 27 is similar to that of section 26, but with respect to third party associates of a person suspected of corruption or economic crimes.**

**302. Section 28 provides a mechanism for EACC to access records and information with prior sanction of the court, but upon notice to the affected parties. Like sections 26 and 27, section 28 is intended to assist EACC when investigating corruption and economic crimes. To our understanding, all these provisions, which are in Part IV of ACECA which covers investigations, provide the tools and processes that EACC may use in the course of conducting investigations. We do not understand the sections to impose an obligation on EACC to use a particular method of investigation, and whether or not the provisions are applied will depend on the circumstances of each case."(Emphasis added)**

62. In dealing with a similar issue in **Ambrose Dickson Otieno Rachier, Jotham Okome Arwa, Francis Olalo and Stephen Ligunya t/a Rachier & Amollo Advocates v Ethics and Anti-Corruption Commission & 2 others [2019] eKLR**, Onyiego J expressed the following view:

“...Section 26 of ACECA envisages a scenario where investigations into commission of an offence have commenced and the commission secretary is satisfied that some information would be necessary to assist or expedite such investigations. In such circumstances, the secretary is empowered to invite anybody reasonably suspected to be involved in any criminal conduct to supply some information. That is to say, some investigation must precede issuance of the notice for some information by the commission secretary.

56. In that context, it is the preceding investigation that informs the operation of Section 26, 27 and 28 of ACECA. Thus, it was not mandatory or necessary for the 1st respondent to have applied Sections 26, 27 & 28 of ACECA. It is within the discretion of the commission or investigating officer to choose the most suitable or relevant statute to apply in investigating a crime depending on the nature and circumstances of each case. To that extent, the petitioner’s contention that Sections 26, 27 and 28 of ACECA should have come first is a misrepresentation of facts.”

63. With regard to the question whether notice should have been issued, the Learned Judge stated as follows:

“57. Was notice necessary under Section 180 of the EA and 118 of the CPC? The wording of the two provisions presupposes institution of the application *ex parte*. The logic behind this is to safeguard the integrity and objective of the intended investigation to avoid jeopardising or prejudicing the intended outcome. If notice were to issue in advance to a suspect of a crime under investigation where money involved is in a bank, the result would be obvious in that, the suspect would interfere or tamper with all necessary evidence including concealment or removal or transfer of such monies from the said bank account. It would not serve any purpose if such notice were to be issued and by the time the application is being canvassed the subject of the investigation ceases to exist. It will not be in the interest of justice if such a scenario were to arise especially where huge sums of money is involved and worse still public funds. In this case money was admittedly transferred to the petitioner’s account under unclear circumstances which is not denied hence reasonable suspicion that a crime had been or was about to be committed.”

64. I agree with the sentiments expressed in the above matters. The EACC accessed the accounts cited in this matter through applications made pursuant to sections 180 of the Evidence Act and section 118 of the CPC. The warrants on the basis of which the accounts were accessed are not under challenge in the application now before me, which seeks to challenge the orders issued by the High Court in Meru. Given the findings above with respect to the reasonable suspicion and *prima facie* case established to warrant the granting of the orders, I see no basis for impugning the orders on the basis that sections 26-28 of ACECA were not complied with.

65. I must observe also that a reading of these sections suggests that they were intended to deal with documentation pertaining to real property. The use of the words “whether the property was acquired by purchase, gift, inheritance...” suggests that the section was not intended to refer to funds held in bank accounts, for clearly such funds cannot have been “acquired” by way of purchase. In my view, sections 26-28 of ACECA were not intended to apply to cases involving investigations of funds held in bank accounts and to require prior notice before investigations into such accounts was undertaken. To require notice in such cases would result in the situation that Onguto J described so graphically in *Mape Building & General Engineering v Attorney General & 3 others* (supra):

“71. The Respondents insist that they have observed the law.

72. I do not doubt them.

73. The 2<sup>nd</sup> Respondent moved the court. Statute law under Section 118 of the Criminal Procedure Code and Section 180 of the Evidence Act allowed them to do so. The application could be made ex parte for very obvious reasons. To hold otherwise would not be in the public interest. It would indeed destroy the very fabric of forensic investigations. No suspect or offender, knowing that there existed evidence which if not destroyed or vanquished would lead to his guilt or liability, can be expected to sit back once notified of possible investigations. The suspect would rid the evidence out of sight and reach. Consequently, the investigator must where there is a foundational basis be allowed and be in a position to seize and secure the evidence.

74. To avoid arbitrary infringement of a citizen’s privacy or property through entries or searches or services, the Criminal Procedure Code provides a simple yet effective mode of obtaining authority through the court. The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of the investigations. The order or warrant is never to be granted as a matter of course.

75...

76. In the circumstances of this case, the warrants and freezing orders were evidently necessary for the purposes of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations the 2nd Respondent was, in my view, justified in making the application for both the warrants and freezing order ex parte.”

(Emphasis added)

66. I have considered the decision of the Court of Appeal in *Director of Public Prosecutions v Tom Ojienda T/A Prof. Tom Ojienda & Associates Advocates & 3 others* relied on by the applicants. In that decision, the Court expressed the view that in its investigations, EACC is “*inflexibly bound to comply with the provisions of those sections*”. I agree that with respect to the matters and the circumstances covered under section 26-28 of ACECA as emerges from the decisions set out above, EACC may be required to comply with the provisions of these sections. I observe, however, and with the greatest respect to the Court of Appeal, that perhaps the word ‘inflexibly’ does not quite accord

with the words used in section 26, which suggests that application of the provisions of the section is not mandatory given the use of the word 'may'.

67. Nonetheless, having found that the requirements of section 56 had been met in this case, I need say no more on the subject as the application before me was a challenge of the preservation orders, not the orders issued by the magistrate's Court in Isiolo on the basis of which the applicants' accounts were investigated.

**Whether the orders sought by the applicants should issue**

68. The final issue identified for determination is whether this court should grant the orders sought by the applicants in their application dated 21<sup>st</sup> June 2019. I believe that the response to this issue must be in the negative, given my findings and conclusions above. A basis for the issuance of the orders has been laid, and a *prima facie* case and reasonable suspicion established. Section 56 provides for the issuance of preservation orders for a period of six months to allow for investigations as a precursor to recovery proceedings. I have not found fault with the basis for applying for the impugned orders, or for the issuance of the orders. In the circumstances, I find no merit in the application dated 21<sup>st</sup> June 2019 and it is hereby dismissed with costs to the EACC.

69. The orders issued by the High Court in Meru on 28<sup>th</sup> May 2019 shall remain in force in accordance with the provisions of section 56 of ACECA.

**Dated and Signed at Nairobi this 2<sup>nd</sup> day of October 2019**

**MUMBI NGUGI**

**JUDGE**

**Dated Delivered and Signed at Nairobi this 2<sup>nd</sup> day of October 2019**

**JOHN ONYIEGO**

**JUDG**