



'REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CIVIL APPLICATION NO. 65 OF 2017

IN THE MATTER OF:

**ANTI CORRUPTION AND ECONOMIC CRIMES ACT NO. 3 OF 2003 & ETHICS AND ANTI
CORRUPTION COMMISSION ACT, 2011**

AND

APPLICATION BY ETHICS AND ANTI CORRUPTION COMMISSION FOR

**AN ORDER OF PRESERVATION OF KSHS 3,226,352.40 HELD IN ACCOUNT NO.
10071206000479 OPENED AND OPERATED WITH CONSOLIDATED BANK OF KENYA LTD
HEAD OFFICE BY BEATRICE KAGWIRIA MUGAMBI WHICH MONEY IS SUSPECTED TO
HAVE BEEN ACQUIRED AS A RESULT OF CORRUPT CONDUCT.**

ETHICS & ANTI CORRUPTION COMMISSION (EACC)APPLICANT

-Versus-

BEATRICE KAGWIRIA MUGAMBI RESPONDENT

JUDGMENT

[1] By Notice of Motion Application brought pursuant to Section 56 of the Anti Corruption and Economic Crimes Act No. 3 of 2003 dated 20th December 2017, the Applicant had sought an order to prohibit the Respondent through itself or through its agents or servants or any other person with an interest in the money held in Account Number [Particulars Withheld] Consolidated Bank of Kenya Limited from accessing, withdrawing, transferring or in any other manner dealing with the money held in the said account for a period of 6 months.

[2] The Applicant stated inter alia that in exercise of its mandate, under Section 11 of the Ethics and Anti Corruption Commission Act 2011, was investigating corruption allegations against officers/staff of the County Assembly of Meru. One of the allegations being investigated was that officers/staff of the County Assembly of Meru had income way beyond their known sources of income and that it was reasonably suspected that money held in the account herein was acquired as a result of corrupt conduct and/or constitutes unexplained assets for which the Applicant had a duty to preserve pending the conclusion of investigations thereof.

[3] On 20th December 2017, the court allowed the said Application after it was satisfied that there exist reasonable grounds to suspect that the property was as a result of corrupt conduct. The court further scheduled an inter parte hearing on 24th February 2018. Subsequently, the Respondent filed application dated 21st February 2018 and sought the discharge of the preservation orders issued on 20th December 2017. The Respondent in the supporting affidavit contended inter alia that she felt harassed by the Application and order granted on 20th December 2017 as it was issued without her knowledge yet they prohibit her from accessing her money and the money held in her said account had been obtained through legal means. She saw no reason to continue freezing her account as she had explained the source of the funds.

[3] EACA in a Replying Affidavit sworn by Anastacia Rono averred that there was nothing unlawful in obtaining the orders of preservation ex parte as by law such an order was supposed to be obtained ex parte in the 1st instance. In any event, in the circumstances of this case, there was more than reasonable grounds for believing that the money contained in the Respondent's account was a result of corrupt conduct as the account received huge amounts only to be removed from the account and re-directed in the account.

[4] As investigations had not completed, EACC filed yet another Application dated 14th June 2018, seeking extension of the preservation orders granted on 20th December 2017 for a further period of 6 months. The major reason for applying was that investigations had not been

completed due to lack of cooperation from the Respondent and her employer the County Assembly of Meru.

[5] During the hearing on 19th July 2018, Mr. Mutegi counsel for the Respondent argued the Respondent's Application dated 21st February 2018 and urged the court to unfreeze the account for reason that Kshs 3,000,000 in dispute was a mortgage by the County Assembly of Meru. he argued that EACC is not interested in the source of money but how the Respondent would use the said money. But, it had now been 8 months without any legal action having been taken.

ANALYSIS AND DETERMINATION

[6] I have considered the two applications with judicious alertness to the facts of the case and the dictates of law. The **Anti-Corruption and Economic Crimes Act** was enacted before Kenya ratified the **UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC)**. The statute constitutes a major leapfrog development of the law in Kenya in the ant-corruption regime. Thus, section 56 of ACECA became an important judicial tool in the identification, tracing, freezing and seizure of property obtained through corruption or corrupt conduct or proceeds of crime envisaged in Article 31 and 59 of the UNCAC. The statute therefore sanctifies Kenya's commitment to international obligations under the international instruments particularly UNCAC, by enacting appropriate laws to fight corruption. Section 56 should therefore be seen within this important postulation.

The test

[6] Coming back to the main. The legal threshold for this application is provided for in section 56 of ACECA. The section provides as follows:-

56. Order preserving suspect property, etc.

(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. [Act No. 47 of 2016, s. 24.]

[7] From section 56 of the ACECA, EACC should satisfy the court that there are reasonable grounds to suspect that the property in question was acquired as a result of corrupt conduct. The standard of proof is on a balance of probabilities as these proceedings are civil in nature. What are the facts of this case?

[8] By an affidavit sworn by Benson Wambua Kyeli in support of the application for extension of orders granted on 20th December 2017, it has been contended inter alia that pursuant to the warrant to investigate the Respondent's bank account and interview conducted on the Respondent, the Applicant established that the Respondent operates the following bank accounts:

i. Family Bank Account No. [Particulars Withheld] Meru Branch

ii. Equity Bank Account No. [Particulars Withheld] Meru Branch

iii. Consolidated Bank Current Account No. [Particulars Withheld]

iv. KCB Bank Savings Account No. [Particulars Withheld] - Meru Branch.

[9] He further deposed that upon review of the Respondent's bank accounts, the Applicant established that from the time of inception of County Governments in 2013 to November 2017, the Respondent had received in her bank accounts more than 40 million shillings from the County Government of Meru. and despite being accorded an opportunity, the Respondent failed to account for deposits in her account amounting to Ksh 9.2 million . These entire allegations remained uncontroverted by the Respondent.

[10] From the circumstances of this case and as was rightly contended by the Applicant in their further affidavit filed in court on 9th March 2018, a cursory perusal of the Respondent's bank account indeed shows that from April 2013 to November 2017, the Respondent's account had received approximately Kshs 35 million from her employer. Without commenting on the propriety or otherwise of these transactions, I note that no attempt has been made by the Respondent to explain the deposits. In the circumstances, I find that the Respondent has shown reasonable grounds to suspect that the funds were as a result of a corrupt conduct. the question now iss this: whether the orders should be extended?

Mandate of EACC

[11] In addition to functions under **Article 252 of the Constitution** to EACC is mandated under EACC Act and ACECA to conduct investigations in relation to corruption and Economic Crimes. It also has the mandate to preserve and recover assets acquired through corruption or corrupt conduct. See section 11 of EACC Act. Upon completion investigations, EACC makes a report to the DPP with appropriate recommendations thereto. Therefore, preservation orders of assets under investigations are not only necessary in, but are judicial trusted companion of investigation. Preservation of assets serves an important purpose of preventing dissipation of assets under investigations. Therefore such orders are necessary for the EACC to carry its statutory obligation to investigate the allegations of corruption. Nonetheless, investigations are part of fair trial and must be attended to by fairness and expedition. Prolonged investigations may cause life drowsiness, create a feeling of gauntness and dreariness in the Respondent, but, worse, become an infringement of right. Whereas I take judicial notice of the fact that in the recent past, the country has witnessed sustained and persistent efforts to fight graft/corruption, this court is also alive to the fact that freezing orders cannot be issued in perpetuity. Too much time has passed by and there has been no proceeding, criminal or otherwise has been filed against the Respondent. But, for one reason only, that EACC may require little time, I extend the orders issued on 20th December 2017, only for a further period of 1 month. If nor proceeding is commenced against the Respondent in relation to matter herein by EACC- criminal or civil- the freezing orders will lapse without the necessity to apply in that respect. It is so ordered.

Dated, signed and delivered in open court at Meru this 9th day of October, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Mutegi advocate for Mr. Laichana for Respondent

Mr. Kyeli advocate for EACC.

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F. GIKONYO

JUDGE