



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CIVIL APPLICATION NO. 2 OF 2018

IN THE MATTER OF:

Anti Corruption and Economic Crimes Act No. 3 of 2003 & Ethics And Anti Corruption Commission Act, 2011

AND

An Application By Ethics And Anti Corruption Commission For An Order Of Preservation Of Kshs 2,500,000 Held In Account No. [Particulars Withheld] Opened And Operated With Kenya Commercial Bank, Maralal Branch Money Is Suspected To Have Been Acquired As A Result Of Corrupt Conduct

ETHICS & ANTI CORRUPTION COMMISSION (EACC).....APPLICANT

-Versus-

LYDIA NGINI LENTININA.....RESPONDENT

JUDGMENT

[1] There are two applications before me which are essentially the two sides of the same coin. I will handle them together. But, to avoid confusion, I will refer to EACC, and Respondent (in reference to LYDIA NGINI LENTININA). By Notice of Motion expressed to be brought pursuant to Section 56 of the Anti Corruption and Economic Crimes Act No. 3 of 2003 (hereafter ACECA) dated 17th January 2018, EACC has sought an order to prohibit the Respondent through herself or her agents or servants or any other person with an interest in the money held in Account Number [Particulars Withheld] Kenya Commercial Bank, from accessing, withdrawing, transferring or in any other way dealing with the money held in the said account for a period of six (6) months. EACC briefly stated its case, inter alia that, in exercise of its mandate under Section 11 of the Ethics and Anti Corruption Commission Act 2011 commenced investigations into corruption allegations against officers/staff of the County of Samburu upon reasonable suspicion that the money held in the account herein was acquired as a result of corrupt conduct and constituted unexplained assets. And that reason, the Applicant has a duty to have such assets preserve, pending the conclusion of investigations thereof. The Applicant stated that it was reasonably apprehensive that unless preserved, the Respondent may deal with the money in a manner prejudicial to the outcome of the ongoing investigations. The order was granted.

[2] Subsequently, the Respondent vide an Application dated 9th February 2018, applied for inter alia an order to vacate, discharge, review or vary the decision to freeze the bank accounts belonging to the Respondent The Respondent argued inter alia that she had been unable to access her bank accounts to her detriment; freezing of her bank accounts for 6 months was oppressive, draconian, unreasonable and unjust; and the decision to freeze the Respondents account was baseless, rashy, unreasonable and without merit.

[3] By another Application dated 16th July 2018, EACC sought an order for extension of orders granted on 18th January 2018, for a period of six months or such other period as the court may deem fit to grant. The major grounds for seeking extension of orders granted on 18th January 2018, as stated in the application and affidavit sworn by David Sangula Naibiei is;

1. That from the time the preservation orders were issued, EACC commenced investigations into the allegations leveled against the Respondent. But have been hampered by lack of full cooperation from the Respondent and her employer, the County Government of Samburu.

[4] During the hearing, Mr. Mwangi counsel for the Respondent emphasized that they have shown in the further affidavit filed the source of the funds in issue. And preservation order should only issue under section 56 of te ACECA if the court is satisfied that funds in question are proceeds of or obtained through corruption. He stated that EACC has not discharged that burden and so the orders issued should be discharged. In addition, he was convinced that EACC has had enough time to complete investigation and take put proceedings against the Respondent should they find evidence to charge her. They have failed to do so despite large amount of time passing by. He argued that, contrary to the allegation by EACC, the Respondent was entitled to receive a mortgage under the mortgage regulations annexed at pages 16A-19B. He urged the his client did not received Kshs. 20,000,000 as alleged. The records show she received only Kshs. 4,000,000. He insisted tat there was no evidence of non-cooperation by the Respondent or her employer. On this basis he asked the court to discharge the

preservation order herein.

[5] Mr Kyeli submitted that he relied on his replying affidavit filed by Leonard Njenga on 27th February 2018 and all annexure thereto but more specifically that investigation show that the Respondent was receiving huge amounts of money from her employer. This fact alone created reasonable suspicion on the funds. And upon investigations, they discovered that the Respondent received more than Kshs. 20million from her employer. The money was received to facilitate projects of the employer. But, the Respondent was not able to give proper documents or accounts for the money received. The activities involved in the projects are numerous and the culprits are many- about 60 persons- received the money. Interviewing these people requires a lot of time. This is one of the reasons for the delay in completing investigations. Mr Kyeli stated that despite the Respondent not being qualified to receive a mortgage, she received the mortgage money twice. He referred to the Circular No. SRC/ADM/CIR/1/13 Vol. 3(128) dated 17.12.2014 which he said clearly show that the Respondent was not qualified to receive a mortgage. The circular was made pursuant to the Finance Act and have the force of law. Mr. Kyeli concluded and stated that because of the complexity of the case, the amounts involved and the huge number of persons to be interviewed, they will need sufficient time to conclude the investigation.

ANALYSIS AND DETERMINATION

[4] 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 to fight corruption by enacting appropriate laws. Section 56 should therefore be seen within this important postulation.

The test

[5] 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.]

[6] 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? On 18th January 2018, this court issued orders for preservation of money held in the Respondent's account pending investigations into the propriety or otherwise of the acquisition of money held in that account. EACC reasonably suspected that the money was obtained through corruption or corrupt conduct or was proceeds of crime. EACC stated that the Respondent received mortgage money when she was not qualified to receive. EACC also alleged that she received mortgage money twice. In addition, the Respondent received money meant for projects for the County of Samburu. According to EACC, these monies were paid by the County of Samburu to the account of the Respondent. EACC says she received Kshs. 20 million. Mr. Mwangi refuted this and stated that records show she received a sum of Kshs. 4 million. The figures are dispute. But that is not the issue here. The issue is that the Respondent received money from the County for projects of the County of Samburu. According to financial management laws and regulations there is something amiss here. Therefore, for purposes of this application, there are reasonable grounds to suspect the money was received through corrupt conduct. However, EACC did not complete investigations within the original tenure of the preservation order herein. They have now applied extension of the said orders for a further period of 6 months or in the alternative an order for maintenance of status quo obtaining in this matter pending the hearing and determination of this Application. EACC has explained that the delay in completing investigations on the matter was *inter alia* caused by: (1) complexity of the case and numerous numbers of suspects to be interviewed who are about 60; and (2) the lack of full cooperation from the Respondent and her employer, the County Government of Samburu. Let me deal with the 2nd fact first. Other than submission from the bar, the Respondent did not expressly controvert the said fact. That notwithstanding, EACC has wide coercive powers to summon suspects and witnesses in an investigation. They did not show any effort made to procure cooperation from the County of Samburu. I expect the County government of Samburu not to impede corruption investigations as such would amount to a criminal offence in law. What about the other impediment? The investigation is said to involve about 60 persons who received the money. Identifying, locating and interviewing that number of persons take considerable amount of time. However, investigations as part of fair trial must be attended to by fairness and expedition as delay thereto will occasion injustice to the Respondent. It should be noted that freeze of accounts is a clog on the property at issue. And, in line with the principle of innocence, prolonged freeze of her account will be oppressive and unjustified. I note that close to ten months have passed by since the preservation order was issued. Even if the investigation involves 60 persons, it does not involve complex issues which would demand intense and grueling inquiry. Of concern to the court is that the representative of EACC Mr. Kyeli undertook during the hearing of the application to ensure that investigations herein are completed by the time of delivery of this decision. Further freeze must therefore be sufficiently justified.

[6] I am, however, perturbed by the claim by EACC that investigations in this matter were hampered by the lack of full cooperation by the Respondent and her employer. And this fact was has not been disputed by the Respondent. I am also aware that corruption is a cancer with insidious characteristics. And as I was satisfied that there are reasonable grounds for suspicion that the transactions may smack of corrupt conduct, strictly for those reason shall I permit an extension of the freeze order for only 30 days. If no criminal or civil proceeding is filed against the Respondent in relation to the account, the freeze will automatically be lifted without any need to apply. It bears repeating that preservation orders in section 56 of CECA should be time bound as they relate to clogging of property of individuals suspected of corruption. It is also a judicial tool in aid of investigations and should therefore be carefully regulated as to avoid unnecessary infringement of person's rights to property and fair trial. The major purpose of preservation is to prevent dissipation of assets. Orders accordingly.

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. Kyeli advocate for EACC

Mr. Mutegi advocate for Mwangi advocate for respondent

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F. GIKONYO

JUDGE