



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**MISCELLANEOUS APPLICATION NO. 79 OF 2017**

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

**VERSUS**

**JARED PETER ODOYO OLUOCH KWAGA.....1<sup>ST</sup> RESPONDENT**

**ERNEST OMONDI OWINO.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**JORAM OPALA OTIENO.....3<sup>RD</sup> RESPONDENT**

**PATROBA OCHANDA OTIENO.....4<sup>TH</sup> RESPONDENT**

**JANTO CONSTRUCTION COMPANY LTD.....5<sup>TH</sup> RESPONDENT/APPLICANT**

**MAROWA STORES LTD.....6<sup>TH</sup> RESPONDENT/APPLICANT**

**MBINGO ENTERPRISES LTD.....7<sup>TH</sup> RESPONDENT/APPLICANT**

**HELLEN ADHIAMBO ODIE.....8<sup>TH</sup> RESPONDENT**

**BEATRICE AKINYI OGUTU.....9<sup>TH</sup> RESPONDENT**

**KENNEDY ODHIAMBO AKELLO.....10<sup>TH</sup> RESPONDENT**

**KENNEDY ONYANGO ADONGO.....11<sup>TH</sup> RESPONDENT**

**RULING**

1 The Applicants are the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents in the matter before this court. They filed the application dated 23<sup>rd</sup> October 2018 by way of Notice of Motion. The application is supported by the affidavit of Humphrey Odhiambo Obach their counsel plus the grounds on the face of the application.

2 The Applicants are seeking an order discharging the preservation orders issued herein on the 27<sup>th</sup> June 2018 freezing the bank accounts and properties of the Applicants.

3 The main grounds for the application are two fold namely:

(i) The Applicant/Respondent has had sufficient time to carry out its investigations.

(ii) The extended orders have expired and that the court upon extending the period of the preservation orders had made it clear that it would not extend them again upon their expiry.

4 The deponent averred that the preservation orders extended on 27<sup>th</sup> June 2018 have expired and have not been renewed. Further that the Applicants were in dire need of the funds held in the frozen accounts.

5 In his submissions Mr Obach stated that the extended preservation orders expired on 19<sup>th</sup> October 2018 and there had been no application for extension of the said orders. He argued that the court had in its ruling made it clear that there would be no extensions.

6 He submitted that they had received a late request for documents from the Applicant/Respondent, and that they tried their best and supplied the documents within seven (7) days. That there was no allegation against the 6<sup>th</sup> Respondent whom he refers to as the 3<sup>rd</sup> Respondent.

7 He submitted that the Applicant/Respondent had not shown why the properties were still held onto. He however stated that the Applicants were more interested in the money in the accounts more than the properties listed.

8 The Applicant/Respondent opposed the application and relied on the replying affidavit of Catherine Ngari a forensic investigator with EACC. She explained that the Commission had issued two notices to the Applicants in respect to the properties in issue. The notices are dated 7<sup>th</sup> May 2018 and 31<sup>st</sup> July 2018 respectively.

9 That the Applicants on 16<sup>th</sup> June 2018 forwarded to the commission some documents in response to the first notices. Not being satisfied the commission sent them the second notice. Some documents were sent by the Applicants vide their letters dated 13<sup>th</sup> August 2018. Later on 19<sup>th</sup> October 2018, the commission received more documents from the Applicants and the documents are still being sorted out. She added that the commission is in the process of filing suits for recovery of the properties.

10 Mrs Odipo for the Applicant/Respondent opposed the application saying the late presentation of documents by the Respondents had caused the delay in finalization of this matter. That the respondent needed time to analyze the documents in order to complete their investigations. She said it was the commission's intention to visit the sites and so requested the court for more time to complete investigations.

11 In a rejoinder Mr. Obach submitted that the court was being asked to extend the preservation orders without a formal application.

### **Determination**

12 The Applicant/Respondent herein filed an originating motion dated 27<sup>th</sup> November 2017 which was brought under 56 of ACECA. The motion was against the Respondents/Applicants and seven (7) others. The court issued preservation orders in respect to several bank accounts and numerous immoveable properties stated in the application. The said orders were to last for six (6) months from 30<sup>th</sup> November 2017 and were to expire on 30<sup>th</sup> May 2018.

13 On 18<sup>th</sup> May 2018 the Applicant/Respondent filed another originating motion seeking an extension of the said preservation orders for 6 months. The main reason was that the investigations were not complete due to unforeseen circumstances. The court heard the parties and delivered its Ruling on 21<sup>st</sup> June 2018 through which it extended the preservation orders by another four (4) months.

14 In actual fact the Applicant/Respondent enjoyed an extension of five months i.e from 30<sup>th</sup> May 2018 since it was not disrupted in its work pending the hearing and determination of the Application.

15 The 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> Respondents/Applicants have promptly filed this application dated 23<sup>rd</sup> October 2018 seeking to have the orders discharged since there is no extension of the orders issued on 21<sup>st</sup> June 2018.

16 The record is clear that the Applicant/Respondent has upto date not filed any application seeking an extension of the preservation orders. It's upon being prompted by the application filed by the present Applicants that such application is being made orally before this court.

17 The preservation orders herein expired on 21<sup>st</sup> October 2018. The truth of the matter is that there was nothing to extend as at 23<sup>rd</sup> October 2018 when the current application was made. It is not lost to this court that an earlier application for release of funds had been made by the 5<sup>th</sup> Respondent/Applicant on 5<sup>th</sup> July 2018 seeking release of funds deposited in Account No \*\*\*\*\* KCB Migori branch.

18 This court in its ruling of 9<sup>th</sup> October 2018 disallowed the application clearly indicating that the orders issued on 21<sup>st</sup> June 2018 would be lapsing in three (3) weeks' time. The Applicant/Respondent should have taken a hint from this and prepared itself for any eventuality. The orders the Applicant/Respondent seeks to have extended are substantive in nature and cannot be orally sought in the manner the Applicant/Respondent wishes to have it done.

19 There is nothing that stopped the Applicant/Respondent from seeking an extension before the expiry of the said preservation orders as it was well aware of the expiry date.

20 The Applicants have indicated that their major concern involves the funds in the various accounts since it is business money which they need for their various activities. The original application herein shows that the Applicants own immoveable properties. It is not therefore the Applicant/Respondent's case that the funds in the bank accounts are the only assets belonging to the Applicants.

21 The Applicant/Respondent has had more than sufficient time to conduct its investigations herein. A civil case ACEC Civil Suit No 32 of 2018 has been filed involving some of the respondents herein i.e. 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The Applicants in this application are not parties therein.

22 In all fairness I have not found any good reason that would make this court continue freezing the Applicants' funds. I therefore allow the application and discharge the orders of preservation issued herein on 30<sup>th</sup> November 2017 and extended on 21<sup>st</sup> June 2018.

Orders accordingly.

**Dated, signed and delivered this 8<sup>th</sup> day of November 2018 in open court at Nairobi.**

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**HEDWIG I. ONG'UDI**

**JUDGE**