



REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

MISC APPLICATON NO.55 OF 2016(CONSOLIDATED WITH NO. 68 OF 2016)

ETHICS & ANTI-CORRUPTION COMMISSION.....APPLICANTS

VS

COUNTY GOVERNMENT OF MARSABIT.....RESPONDENT

RULING

By an applications dated 1st July 2016 brought under section 56(1) of the Anti-corruption and Economic crimes Act, the applicant commission sought presevatory orders to be issued against the respondent by itself its agents/officers/employees/ servants, its bank account signatories and any other persons claiming through or under it from accessing, transferring with drawings, utilising, using and / or in any other manner dealing in and / or with the funds in A/C no 1010262897906 held and/ or operated at Equity Bank (K) Ltd Marsabit branch for a period of 6 months. The applications was based on the ground that applicant was conducting comprehensive investigations into the propriety or otherwise of transactions regarding A/C no. 1010262897906 held at equity Bank Marsabit branch. That the investigations were being conducted in allegations of corruption levelled against senior officers of Marsabit County Government. In a separate application No.68 of 2016 the Respondents sought to discharge orders made therein on 4th July 2016.

Hon Justice Gikonyo directed that the application in No. 68 of 2016 should be made in High Court Miscellaneous Application No.55 of 2016 to avoid duplicity. The 2 matters were consolidated on 29th September, 2016. The matter was fixed for hearing of preliminary objections and both applications on 17th November 2016 but it appears the same didn't proceed and date of 9th February 2017 was taken in the registry.

On 29.12.2016 applicants counsel filed another application seeking that orders made on 4th July 2016 which would have lapsed on 4th January 2017 be extended and orders were granted by duty judge during the vacations to the effect:

“Orders made on 4th July 2016 extended for a period of 60 days pending hearing and determination of the respondents application dated 13th September 2016 on 9th February 2017”.

When matter came up for hearing of applications to set aside orders obtained on 4th July 2016 and extended on 29.12.2016 applicants counsel Mr Kiyeli contended that the application dated 13th September 2016 had been overtaken by events for reason the respondents didn't move the court within the stipulated time as per the provisions of Sections 56(2) of Anti-corruptions and Economic crimes Act to set aside/vacate and/or discharge orders issued on 4th July 2016.

Secondly he argued that the orders issued on 4th July 2016 having lapsed on 4th January 2017, the respondents ought to have come to court 15 days after being served to challenge the application to extend orders of 4th July 2016. Mr Kiyeli argued that respondents ought to have sought the leave of court to file application to vacate orders out of time. He submitted the respondent have no right of audience having come to court without leave to challenge orders out of time. He argued that orders currently obtaining are those made on 29th December 2016 and respondents have to make an application specifically seeking to set them aside.

The issues in contention are;

1. Whether order made on 4th July 2016 having lapsed on 4th January 2017 is same as order for extensions granted on 29th December 2016;
2. Whether the Respondent failed to move the court within statutory period to set aside orders freezing the Account in question.
3. If the Respondents are time barred, whether they can go ahead and argue their response opposing the orders made on 4th July 2016 and extended on 29th December 2016.

The application brought by applicants herein was brought pursuant to sections 56 of Anti-corruption and Economic crimes Act No. 3 of 2003 which provides:-

“56 (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.”

The applicants came back to court pursuant to sections 56(3) to have orders made on 4th July 2016 extended and on 29th December 2016 the vacations Duty Judge extended the order for a further 60 days pending the hearing of application by the Respondents.

The applicants counsel Mr. Kiyeli argued that Section 56(4) allowed respondents to apply for discharge of the orders within 15 days and failure to do so within stipulated period barred them from seeking that the orders of 4th July 2016 be varied and/or discharged. My reading of sections 56(4) is that it is not a mandatory provision and therefore the courts discretion can be sought or exercised suo moto to enable the ends of justice to be met.

On 29.12.2016 the Duty Judge extended the orders pending hearing and determination of the applications. The applicants counsel didn't bring to the attention of the judge that the Respondents application had been overtaken by events.

In any event, the argument by applicants counsel is based on a procedural technicality which cannot be used to deny the respondents their day in court. Provisions of Article 159(2) (a) which advocate for substantive justice rather than reliance on procedural technicalities to do adjudicate legal issues in court.

The 2nd issue is whether the order of 4th July 2016 lapsed so that applications by respondents is again overtaken by events.

The order sought to be extended by the applicant is that of 4th July 2016. Therefore, the order still subsisting is that is of 4th July 2016 having been extended on 29th December 2016.

From the records it is true that Respondents didn't, file an application to vary or discharge order made on 4th July 2016 within 15 days and that may explain why they filed a separate application No. 68 of 2016 which Judge Gikonyo ordered to be consolidated herein.

However in the interest of justice and particularly natural justice this court hereby allows the respondents leave to challenge the order made 4.7.2016 and deems applications already filed as such. The application by Respondents to be set down for hearing forthwith.

Ruling Signed Delivered and Dated this 17th Day of February 2017.

A.ONG'INJO

JUDGE