



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

MISCELLANEOUS APPLICATION NO. 1 OF 2017

IN THE MATTER OF: ANTI-CORRUPTION AND ECONOMIC CRIMES ACT (CAP.65)

-AND-

IN THE MATTER OF: AN APPLICATION BY ETHICS AND ANTI-CORRUPTION COMMISSION FOR AN ORDER UNDER SECTION 56 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT TO (CAP.56) TO PROHIBIT THE TRANSFER OR DISPOSAL OF OR OTHER DEALINGS (HOWEVER DESCRIBED) WITH KENYA COMMERCIAL BANK ACCOUNT NUMBERS 1202807267 AND MM 1634228664 AND EQUITY BANK ACCOUNT NUMBERS 0150270856370 AND 0150371108352

-BETWEEN-

ETHICS & ANTI-CORRUPTION COMMISSION.....APPLICANT

VERSUS

NJAGE MAKANGA1ST RESPONDENT

ESTAMA INVESTMENTS LIMITED.....2ND RESPONDENT

BUSINESS CAPITAL ACCESS LIMITED.....3RD RESPONDENT

R U L I N G

1. By a Notice of Motion dated 17th January 2017, brought under Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Section 56(4) of the Anti-Corruption and Economic Crimes Act 2010, the Respondent/Applicants sought the following orders:

a. THAT pending the hearing and determination of the application inter partes, the orders given by Ong’undi J on 4th January 2017 prohibiting the Respondents either by themselves or through their agents or servants from transferring, disposing of, wasting or in any other way dealing with Kenya Commercial Bank Account No. **1202807267 and MM 1634228664, and Equity Bank account numbers 0150270856370 and 0150371108352** for a period of six (6) months be stayed.

b. THAT the orders in (a) above be set aside and/or discharged forthwith.

c. THAT the Applicants’ application dated 3rd January 2017 and filed herein on even date be

dismissed with costs.

d. THAT the Respondents be allowed unconditional access to the frozen account.

2. The application is premised on grounds that under **section 56(4)** of the ACECA an aggrieved party to an ex-parte order granted under this section is permitted to apply to court for discharge of the said ex-parte Orders within fifteen (15) days of service of the same.

3. That the Respondents are aggrieved by the said order on grounds that the monies in the aforesaid accounts were not acquired as a result of any corrupt dealings as alleged or at all, since the monies arose out of valid and lawful contractual payments rightfully made out to the 2nd Respondent by the Ministry of Health for the supply of portable medical clinics containers in accordance with a contract signed with the Ministry of Health on 17th July 2015.

4. That the said contract was awarded to the 2nd Respondent following a competitive procurement process which has never been challenged before the Public Procurement Administration Review Board. Neither has it been declared irregular pursuant to the provisions of the Public Procurement and Asset Disposal Act No. 33 of 2015, but has indeed been substantially discharged and/or performed by the 2nd Respondent.

5. Further that the said orders were obtained through suppression and misrepresentation of facts and by further concealment of fundamental material facts by the Applicant.

6. The Applicant was granted preservation order prohibiting the Respondents by themselves or through their agents or servants from transferring, disposing of, wasting or in any other way dealing with subject frozen accounts.

Respondent/Applicant case

7. The Application was supported by the affidavit of Njage Makanga (herein the 1st Respondent) filed on 17th January 2017. The 1st Respondent is the director of the 2nd and 3rd Respondent companies and is the alter ego of the two companies which are related in business, in which they borrow and lend each other funds in their usual course of business.

8. The 1st Respondent avers that preceding the said contract, the Ministry of Health invited bids in respect of supply and installation of fully equipped portable medical clinic for the urban slum upgrading project MOH/HQS/RT/019/2014-2015. That at its meeting No. MOH/MTC/29/2014-2015, the Ministerial Tender Committee (MTC) of the Ministry of Health approved the use of Restricted Tendering Methods. It also approved the list of 10 suppliers that had been recommended by its clinical services department. These approvals were as a result of an internal process of the MTC and the Respondents were never involved.

9. The 1st Respondent deposes that in any event, restricted tendering is not illegal in any manner and is provided for under **Section 102** of the **Public Procurement and Asset Disposal Act 2015 (PPADA 2015)**, either because of the complex or specialized nature of the goods, work or services to be procured, or if there is evidence that there are only a few known suppliers in the market of goods, works or services causing the tender to be restricted. These determinations were made by the tendering body and not the respondents or through influence on their part.

10. It is the 1st Respondents contention that at the close of the tender on 11th June 2015, bids received were opened and read out in a public forum as evidenced in annexed Minutes of the Ministry of Health number MOH/MTC/037/2014-2015.

11. The 1st Respondent further averred that bidders were subjected to a tendering process that included

providing evidence of tax compliance among other parameters as required by the **PPADA 2015**. Upon meeting every requisite qualification and having the lowest bid among the bidders, by a letter dated 29th June 2015, the Principal Secretary of the Ministry notified the 2nd respondent that its quoted tender of Kshs. 10,000,000 per container for the tender supply 100 No.(Restricted Tender) under Tender Reference MOH/HQS/RT/019/2014-2015 had been accepted. They were issued with an offer to supply at the quoted price.

12. The 2nd Respondent communicated acceptance by a letter dated 1st July 2015 and entered into a contract with the Ministry on 17th July 2015, and like any other tender applicant, was not privy to the evaluation of bids or other internal processes leading up to the award of the tender.

13. The Respondents argue that the restricted tender was never challenged before the Public Procurement Administration Review Board and/or declared irregular pursuant to provisions of the PPDA 2015 were as to warrant any investigations by the Applicant.

14. The Respondents assert that the Ministry has never been investigated by the Public Procurement Regulatory Authority with respect to procurement of this particular project whether on its own institution, or on request in writing by any public institution such as the applicant or any other person as envisaged by **Section 35 of the PPADA No. 33 Of 2015**.

15. The 1st Respondent contends that the Applicant placed reliance on a valuation report dated 28th November 2016, prepared by persons who are not suppliers of medical equipment and are not versed with the incidentals appurtenant thereto and therefore are unqualified to issue a valuation for the said project. That the report is unreliable and should not be relied upon to their detriment.

16. The 1st Respondent further argues that the report was only acknowledged and signed by one of the two valuers who prepared it and as such it is wanting in veracity. He stated that **clause 1.0(3)** of the report provided that where market values are assessed, they reflected the full market value without taking into account liability on the attendant statutory taxes, the costs involved in effecting a sale or purchase in the ordinary business transactions and the profit margins for the project. That the contract was not only for the supply of portable medical clinics, but also involved the distribution, assembling, installation and commissioning of the entire contract project which costs have not been factored in the said report.

17. The 1st Respondent argued that the Public Procurement Regulatory Authority Market Price Index is the applicable market reference point in the absence of the tender having required the procuring entity to undertake its own market survey. It is an objectively determined, pre-existing and prevailing price nameable at the time the subject tender award is made and is not a subjective one after the tender award.

18. That the 2nd Respondent has received Kshs. 800,000,000/= from the ministry so far as part payment for the deliveries made. He contends that the payments and the basis thereof have been highlighted in the Interim Audit Report for Procurement and payments for 2015/2016 for the Ministry dated 31st October 2016. That the said sum was transmitted in part payments depending on the progress of compliance with the 2nd Respondents contractual obligations and upon issuance of the requisite purchase orders in lots of 20 containers, as provided in **Clause 5** of the contract project for ease of management in the sum of Kshs.200,000,000/=.

19. The first delivery was on 8th January 2016 and was inspected by the ministry on 21st December 2016. Thereafter payment for the next 40 containers of Kshs.400, 000,000 was received in the ministry on 24th June 2016 and was inspected on 27th May 2016. The last 40 containers were delivered in April 2016.

20. On 30th June 2016, the 2nd Respondent received Kshs.200,000,000/= from the ministry and the balance of Kshs.200, 000,000/= is yet to be paid. The respondents contend that the money received so far was in the usual, normal and ordinary course of business and on account of contractual obligations with the ministry without any element of corruption as alleged.

21. The 1st Respondent avers that any transfer of funds to and from Kenya Commercial Bank a/c numbers 1202807267 and MM 1634228664 and Equity bank a/c numbers 0150270856370 and 0150371108352 is not irregular, peculiar and unlawful since the funds are for business dealings between the two companies. That the money was paid out in respect of valid purchase orders issued to the 2nd Respondent for deliveries to the ministry as per their contract and that the manner and style of applying the sums is irrelevant and of no concern to 3rd parties including the Applicant.

22. The Respondents aver that Kshs.179,211,500/= and Kshs.154,050,000 transferred from the 3rd Respondents KCB a/c No. 1202807267 to bank a/c No. 44014131600229770001 which the Applicant alleges was an unidentified bank in an unidentified jurisdiction, was a transfer to the 2nd Respondent's suppliers Messrs Guangzhon Moneybox Steel Structure Engineering Company Limited carrying out business in China. The transfer was effected to the said supplier's bank, China Construction Guangdong Branch in honor of a commercial invoice No. 2015WM071 issued on 17th October 2015 and Proforma Invoice Number 2016WM118 issued on 18th July 2016 among others.

23. The Respondents argue that the Kshs.420,000,000/= transferred from the 3rd Respondents a/c held at Family bank a/c No. 012000019014 to KCB a/c No. 1202807267 on 5th December 2016 was so transferred in view of the negative media reports concerning Family bank's stability at the time so as not to jeopardize the performance of its obligation under its contract with the ministry, in the event the funds got entangled if the bank was placed under statutory management. The transfer was therefore normal.

24. The Respondents further contend that the originating motion dated 3rd January 2017 is actuated by ulterior motives with a view of achieving certain extraneous goals other than those legally required under the constitution, in view of the fact that it does not disclose any evidence of corrupt dealings by the Respondents.

25. The application is said to contain unsubstantiated suspicions and unfounded allegations and that since no complaint or review has ever been lodged by any person(s) allegedly aggrieved by the award of the tender, the allegations are irrational, unreasonable, malicious and in bad faith. That the Applicant's misguided apprehensions and suspicions cannot in any event override the requirements of the **PPADA 2015** which provides for the mode and manner of resolving any procurement anomalies.

26. The Respondents urge that unless the orders sought are granted, the Respondents' funds will remain frozen and thereby continue to subject the Respondents to extreme hardship on financial and contractual obligations. The project is still ongoing and the funds are required for execution and full completion and the investigations by the Applicant should not be used to block the Respondents from accessing the monies held in the said accounts, since the source of money has been disclosed.

27. The Respondents assert that the Applicant has not established, that the funds held in the frozen accounts were acquired as a result of any corrupt conduct and as such its application does not meet the threshold for the grant of conservatory orders under ACECA therefore pray that the Originating Motion dated 3rd January 2017 be dismissed with costs in the interest of fairness and justice.

Applicants/Respondents'

28. The Applicants opposed the Notice of Motion and the Supporting Affidavit in their Replying Affidavit sworn by Abdulhamid F. Low a forensic investigator appointed under Section 23 of the Anticorruption and Economic Crimes Act filed on 24th January 2017. The Applicants argued that **Article 252(1) (a) and (d) of the Constitution and Section 11(d) and (1) of the Ethics and Anti-Corruption Commission Act 2011** mandate them to investigate corruption, economic crimes and related offences. Further thereto, to institute and conduct proceedings in court for purposes of the recovery, or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption.

29. The Applicants contend that the tender was awarded contrary to the provisions of the **PPADA (2005)**

and the **PPDR (2006)** and that the contract executed by the aforesaid company with the ministry, was founded on a substratum of fraud and illegality.

30. The Applicants aver that the procuring entity commenced the aforesaid procurement process without ensuring that sufficient funds had been set aside in the ministerial budget, to meet the obligations of the resulting contract, contrary to the mandatory provisions of **Section 26 (3) (a) and (b) and Section 26 (6) of the PPDA(2006)**. The relevant contract was awarded to the 2nd respondent on the 29/06/2015 vide Ministerial Tender Committee Minute No. MOH/MTC/037/2014-2015 with only 200 million being confirmed available.

31. That the said **MTC** approved the use of restricted tendering method under circumstances which did not meet the mandatory requirements of **Section 73** of the **PPDA (2005)**. The purported reason relied on by the committee in approving the use of the aforesaid alternative procuring method during its meeting No. MOH/MTC/029/2014-2015 was that it had been approved by the Permanent Secretary on 13/5/2015 following a request from the Director of Medical Services vide his memo dated 12th May 2015.

32. This is not among the conditions and grounds provided for in law under **Section 73 PPDA (2005)** for the use of the restricted method. Further that the purported approval to use the restricted tendering method that was given by the committee was for procurement of 20 portable clinics and not 100 clinics as was subsequently awarded to Estama Investment Limited by the Ministry on the basis of the aforesaid purported approval.

33. The Applicants also contend that it is not enough for the Respondents to argue that they were not involved in the Ministry's internal processes when it has been proved that the committee did not authorize procurement of 100 clinics. The payment of public funds amounting to Kshs. 800 million made to the Respondents on the basis of the tender as evidenced by the annexures attached was clearly fraudulent.

34. The Applicants further state that the 10 firms invited to tender by the Ministry were not selected from the list of prequalified suppliers for the 2014-2015 financial year contrary to **Section 73 (2) (a) PPDA (2005)** and **Sections 8(3) and 54 (3) and (4) of the PPDR (2006)**.

35. The tender opening process was flawed as one of the people in attendance was a stranger not having been appointed by the accounting officer to the tender opening process. Only one of the three members appointed to the tender opening process signed the bid documents contrary to **Section 60 (7) (a), (b), 8 (a), (b) and (9)**. Further to that none of the 6 companies that bid for the tender had specialized skills in the fabrication of shipment containers into portable clinics to warrant use of restricted tendering.

36. The Applicants contend that the relationship between the persons money was transferred to, the directors of the companies and the public officers at the ministry is still being actively investigated and that the fact that the relevant tender has not been investigated by the Public Procurement Regulations Authority, does not stop the EACC from investigating it. The functions of the Public Procurement Oversight Authority do not include conducting criminal investigations.

37. The Applicants opine that the EACC does not require permission or invitation of the **PPRA** to investigate suspected acts of corruption, committed in the public procurement process, as it is vested with the legal mandate of investigating corruption and economic crimes by the **ACECA (2003)** and the **EACCA (2011)**.

38. The Applicants urge that they did not obtain the conservatory orders through suppression or misrepresentation of facts, nor did they fail to disclose material facts as alleged. The orders were obtained upon satisfying the court that there were reasonable grounds to suspect that the property was acquired as a result of corrupt conduct. The Respondents have not demonstrated which facts were not disclosed nor have they demonstrated how the said facts would have been material to the decision making process of the court.

39. The Applicants contend that the investigations into this particular tender form part of the broader

investigations, into the loss of Kshs.5 billion at the ministry through procurement and financial irregularities which are still ongoing. Further that it is in the interest of justice that the preservation order granted be affirmed to enable the EACC complete its investigations and prevent the said public funds and other evidence from being disposed of, destroyed or otherwise being dealt with in a manner that would defeat any subsequent criminal prosecution or civil recovery processes.

40. The Applicants asserts that the valuation report relied on by the commission in its application for the preservation order in issue is binding under the provisions of **Section 59 (1) of the Anti-Corruption and Economic Crimes Act (2003)** in the absence of any evidence to the contrary.

41. The Applicants contended that the investigations are a matter of public interest to allow exhaustive investigations and prevent further loss. That the orders sought by the Respondents in their notice of motion are misconceived as **Section 56 (4) of the Anti-Corruption and Economic Crimes Act** does not provide for stay of preservation orders.

42. It is also their argument that malice is only attributable to individuals and the Respondents have not identified, or provided evidence of any officer who is allegedly motivated by malice in the conduct of the aforesaid investigations and therefore, the Respondent's application lacks merit and should be dismissed.

43. Both counsels, Miss Okeno appearing for EACC and Mr. Mbarak appearing for the Respondents made oral submissions in which they rendered summaries of the averments in the respective affidavits of their clients. In addition Mr. Mbarak submitted that the element of criminality where mens rea and actus reus are anticipated, in order for an offence of corruption to be alleged to have been committed to warrant investigations, did not arise as set out in **Section 3 of the Interpretation and General Provisions Act (Cap 2) Laws of Kenya** in defining offence.

Issues for Determination.

44. Having considered the pleadings the submissions of the respective parties and the authorities relied on, the singular issue emerging for determination is whether the Respondents/Applicants have established on a balance of probabilities, that the funds in the frozen accounts were not acquired as a result of corrupt dealings.

Analysis and determinations

45. The Respondents/Applicants in bringing the present application have invoked the provisions of **Sections 56(4) ACECA** which Provides that;

“4. A person 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.”

The wording of **Section 56 (4)** does not provide for stay of preservation orders as prayed by the Respondents/Applicants and the said Section but gives the court power to vary or discharge such preservation orders.

46. Under **Section 56(5)** the court may discharge or vary an order under made under **56 (4)**, only if the court is satisfied on a 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.

47. In the case of **EACC v Equity Bank Kenya Limited & another [2016] eKLR** to which the Respondent/Applicant referred the court, Njoki Mwangi J opined that the provisions of **Sections 56(4) and (5) of the Anti-Corruption and Economic Crimes Act** should be read together with Sections 107-109 of the Evidence Act.

The provisions of **section 107 to 109 of the Evidence Act** state that:

Section 107 “1. Whoever desires the Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108 “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Section 109 “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The burden of proof as articulated under the provisions of section 56(5) of the **Anti-Corruption and Ethics Act** is on a balance of probabilities and in this case it lies with the Respondents/Applicant.

48. The Respondent/Applicants have claimed that the EACC obtained preservation orders through suppression and misinterpretation of facts but have not demonstrated to the court which facts were not disclosed and how the said facts would have been material to the decision making process of the court regarding the said orders.

49. The EACC has established on a balance of probabilities first, that the ministry commenced the procurement process without ensuring that sufficient funds had been set aside in the ministerial budget to meet the obligations of the resulting contract. This is contrary to the mandatory provisions in **Sections 26 (3) (a),(b) and 26 (6) of the Public Procurement Disposal Act (2006)**.

50. Secondly, that the restricted tendering method, raises suspicion as it did not meet the mandatory requirements set out in **Section 73 of the Public Procurement Disposal Act (2005)** which provides as follows:

Section 73(1) A procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed.

(2) A procuring entity may use restricted tendering if the following conditions are satisfied –

(a) competition for contract, because of the complex or specialised nature of the goods, works or services is limited to prequalified contractors:

(b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; and there is only a few known suppliers of the goods, works or services as may be prescribed in the regulations.

There is no proof that any of those conditions apply in this case. Instead the court was told that the restricted tendering method was used because it was approved by the Principal Secretary, which is not one of the conditions provided for.

51. Thirdly, the purported approval to use the restricted tendering method that was given by the committee was for procurement of 20 portable clinics and not 100 clinics as was subsequently awarded to Estama Investment Limited by the Ministry on the basis of the aforesaid purported approval.

52. The Respondents also relied on the case of **Professor Tom Ojienda T/A Tom Ojienda and Associates Advocates v EACC and 5 others (2016) eKLR (Petition no. 122 of 2015)** on the ground that the Applicant in obtaining the orders from the magistrates court to investigate the four accounts was carrying out an administrative action and was required to afford the Respondent an opportunity to be cleared under Article 47 of the Constitution.

53. In the case of **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR**, Githinji JA opined that fair administrative action refers broadly to administrative justice in public administration and it is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations.

54. The right to fair administrative action therefore, though a fundamental right, is contextual and flexible in its application. It is not one of the illimitable rights, or fundamental freedoms, under **Article 24(1)** of the **Constitution** and can therefore be circumscribed by law. The Article provides for circumstances in which rights and fundamental freedoms can be limited as follows:

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

55. According to Githinji JA, in the JSC case, fair administrative action encompasses several duties such as, duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in **Article 47(2)** of the **Constitution**, duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refer to the substantive justice of the decision, whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice.

56. I see no evidence that the EACC’s allegation of procurement and financial irregularities are merely speculative and without any basis nor, that the investigations are oppressive, actuated by ulterior motives and malice, and has been urged. I have no basis upon which to find that the said investigation is an abuse of the criminal justice system aimed at crippling the Respondents’/Applicants’ business operations.

57. The Respondents/Applicants were served with the preservation orders and had the opportunity to return to court to be heard. The complaint that they have suffered extreme hardship in meeting their obligations under the contract should have come under the provision of **Section 89 (1) (a)** of the **Proceeds of Corruption and Anti-Money Laundering Act** to show cause that the extreme hardship suffered far outweighs the risk of interference or disposal of the money in the account.

58. I therefore find that it is in the interest of justice to affirm the Preservation orders granted by this Honorable Court on the 5th of January 2017 as I hereby do to allow the EACC to conduct exhaustive investigations into the tender appurtenant to the supply and installation of fully equipped portable medical clinics for the urban slum upgrading project at the Ministry of Health.

It is so ordered.

SIGNED DATED this 14th day of **February, 2017**

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L. A. ACHODE

JUDGE