



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
MISCELLANEOUS APPLICATION NO. 43 OF 2016

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.65) TO PROHIBIT THE TRANSFER OR DISPOSAL OF OR OTHER DEALINGS (HOWEVER DESCRIBED) WITH EQUITY BANK ACCOUNT NUMBER 0020192678243, EQUITY BANK ACCOUNT NUMBER 0940197601341, EQUITY BANK ACCOUNT NUMBER 1180263423271, EQUITY BANK ACCOUNT NUMBER 0260192617892, AND CO-OPERATIVE BANK OF KENYA ACCOUNT NUMBER 01109416161300, KIMATHI BRANCH

-AND-

IN THE MATTER OF: AN APPLICATION BY THE ETHICS & ANTI-CORRUPTION COMMISSION FOR AN ORDER UNDER SECTION 556 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT (CAP.65) TO PROHIBIT THE TRANSFER OR DISPOSAL OF OR OTHER DEALINGS (HOWSOEVER DESCRIBED) WITH PARCEL OF LAND REFERENCE NUMBER L.R 210/14968

-BETWEEN-

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

VERSUS

CATHERINE NKIROTE MAINGI (Sued in her personal capacity and also trading as VENYTE

SUPPLIERS AND JOSKATE

SALES AND SUPPLIES).....1ST RESPONDENT

JOHN KAGO MURIMA.....2ND RESPONDENT

JANE MAKENA MAINGI T/A

RULING

1. By a Chamber Summons dated 21st December, 2016, brought under **Rules 3 (1) and 2 of the High Court (Practice and Procedure Rules), Section 10 of the Judicature Act, Cap 8. Laws of Kenya and Section 3A of the Civil Procedure Act**, the Respondents seeking the following orders:

- a) **THAT** the court do vacate, discharge, review or vary the decision to freeze the Bank Accounts belonging to the Respondents.
- b) **THAT** the court do order the Applicant to hasten the process of its investigations in the dealings of the Respondents in a maximum period of one week.
- c) **THAT** the costs of the Application and interests thereon be provided for.
- d) **THAT** the court do grant any other relief it deems fit and just in the circumstances.

2. The application is premised on the grounds that the Applicant has given counter directives to the Respondent's banks without any lawful court order or any express or implied authority from the Respondents. That the Respondents have been unable to access their bank accounts to their detriment and to the detriment of their dependants.

3. The application also alleges that the intended interested party has suffered tremendous losses occasioned by the Respondent's inability to access their bank accounts. That the Applicant has acted duplicitously by failing to bring the suits running contemporaneously with the present suit to the court's attention.

4. The Respondents therefore seek to have the court vacate, review or discharge the orders directing the freezing of their accounts for reasons that the Respondents were cleared of suspicion after an investigation conducted by the Anti-Banking Fraud Unit failed (hereinafter the ABFU) to produce any incriminating evidence against them. That no damage or inconvenience shall be occasioned by the grant of the orders sought and further delays in concluding the dissolution process will unnecessarily delay the paying of final dividends to the depositors.

Applicant's case

5. The Application was supported by Jane Makena Maingi (hereinafter the 3rd Respondent), in her Supporting Affidavit filed on 21st December, 2016. The 3rd Respondent is the sole proprietor of Qsetters Investment a business ran by Catherine Nkirote Maingi (hereinafter the 1st Respondent) of whose bank account with Equity Bank Kenya Ltd the 3rd Respondent is sole signatory.

6. The 3rd Respondent avers that the business was run by the 1st respondent with her consent, during which she keenly observed the transaction of the business' bank account. She contends that she has been subject to multiple court proceedings and multiple duplicitous investigations conducted by multiple state agencies acting ultra vires the rule of law and natural justice by instituting various suits in courts and seeking court orders without disclosure of the existence of these concurrent suits.

7. The 3rd Respondent argued that the Applicant acted deceitfully in the present matter by failing to reveal that it had moved to the Chief Magistrate's Court in **Criminal Miscellaneous Application No.43 of 2016** and obtained orders to have the homes and businesses of the Respondents searched. That the Applicant filed a separate application seeking freeze Orders rather than filing the same orders in **Miscellaneous Criminal Application No.2668 of 2015** at the Milimani Chief Magistrates Court which

had already been filed by the ABFU.

8. It is the 3rd Respondent's contention that even though the orders seeking the freezing of the Respondent's bank accounts were granted on 16th December, 2016, the aforementioned bank accounts were frozen without any such order having been served on the banks on Friday, 16th, Saturday 17th, and Monday 19th December, 2016. She thus argues that the Applicant has caused the specific banks to act illegally as neither they nor the Respondents nor any other relevant parties have been served with the court Order.

9. The 3rd Respondent further contends that the ABFU had previously filed a matter in court regarding the 3rd matter in the present suit, during which similar investigations as those being carried out in the present suit were done with the same accounts being frozen during the investigations. On 31st March, 2016 the court vacated the orders freezing the Respondent's accounts and cleared them of all and pending charges out of the aforementioned investigations. She argues that the Respondents have been found innocent and have already suffered sanctions of a competent court in a bid to give the authorities leave to investigate their claims and that investigations must come to an end.

10. It is the Respondent's prayer that the court do vacate the Court Order of 16th December, 2016 in all related matters, that the court do dismiss the Applications from the other adjoining matters with costs to the Applicants and the court do institute a ban on the Applicant, the ABFU and any other investigating Agency from putting the Respondents through any further investigations on matters already dealt with in **Miscellaneous Criminal Application No. 2668 of 2015**.

11. In his submissions during the hearing on 10th January, 2017 learned Counsel Mr. Omari appearing for the Respondents argued that none of the two applications instituted at Kibera Magistrates Court to investigate the bank accounts were served upon his clients and have instead been cleverly hidden from the courts. Counsel stated that where there is an ex parte application there should be full disclosure to the court, of facts known by the applicant and. He relied on **Miscellaneous Application No.291 of 2015** to compound his argument.

12. Counsel opined that the Applicant erred in attempting to attribute their actions to the Respondent's suspected role in the National Youth Service corruption scandal. He contended that the Respondents should not be treated differently just because of their suspected involvement in a high profile corruption case as this goes against the principle of equality enshrined in **Article 27 of the Constitution, 2010**.

13. Counsel argued that learned State Counsel Mr. Kagucia erroneously advanced the argument that investigations are not an administrative function. He in opposition stated that **Article 47 of the Constitution** demands notice in furtherance of fair administrative action. Counsel further supported his argument by relying on the opinion of Lenaola, J in **Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 Others [2016] eKLR** where he stated that investigation is an administrative function, if this is so, Counsel averred that investigations done by the Applicant must thus subscribe to the **Fair Administrative Act of 2015** and **Article 47 of the Constitution**.

14. Mr. Omari further contended that the Ethics and Anti-Corruption Commission is a creature of the Constitution. It is thus bound by the Constitution in the exercise of its powers, and that **Article 10** provides for the principles and values of governance, that apply to all state officers and the Applicant cannot therefore be seen to act in an opaque manner. Counsel reflected that the opposing Counsel's explanation that the purpose of the preservation orders was to prevent the Respondents from transferring the money. He relied on the statement of Lenaola J, in the Tom Ojienda case stating that the right to a fair hearing cannot be negated by such fears or threats as the state is granted powers to deal with such fears and threats.

15. Counsel urged the court to lift the preservation orders and invoke **Article 165 of the Constitution** to protect the Respondents and should the court not grant this prayer, he urged that it should instead vary the

period of the investigations and allow the ABFU three days to complete their investigations, as the matters investigated by the Applicant are identical.

Respondent's Case

16. The Applicant opposed the Chamber Summons in their Grounds of Opposition by learned Counsel Mr. Philip Kagucia filed on 23rd December, 2016. Counsel argued that it was erroneous for the Respondents to presume that they could freely transact in the subject bank accounts while the respective banks had been served with an application to investigate the accounts on the basis of reasonable suspicion of holding proceeds of corruption and economic crimes. Subsequently there were court orders prohibiting any transactions in the named bank accounts, in light of bank's obligation to prevent money laundering.

17. He averred that there is nothing in the application that proves that the banks acted contrary to this obligation as provided for under **Sections 4, 5 and 11** of the **Proceeds of Crime and Anti-Money Laundering Act, 2009**, mandating banks with the statutory duty to maintain the integrity of the financial sector by, among others, preventing money laundering and reporting suspicious transactions.

18. Counsel argued that the Respondent's contention that the Applicant had acted erroneously in pursuing cases and investigations previously canvassed by the ABFU was founded on a misconception of the Applicant's mandate. He argued that the applications made by the Applicant fall within its statutory mandate to investigate corruption and economic crimes as well as to institute and conduct proceedings in court for the purposes of the recovery or protection of public property and to freeze or confiscate proceeds of corruption or the payment of compensation under **Section 11 (d) and 11 (j)** of the **Ethics and Anti-Corruption Commission Act, 2011**.

19. Counsel further contended that the investigations conducted by the Applicant are distinct from those conducted by the ABFU and that there is nothing in law barring more than one law enforcement agency from investigating a single transaction which may have breached a cross-section of penal statutes.

20. Counsel argued that the Applicant could not have been party to the applications made by the ABFU, as the scope of the Applicant's investigation is much wider, cutting through many more issues than those investigated by the ABFU. Additionally, the special procedure for preserving suspected proceeds of corruption under **Section 56 (3)** of the **Anti-Corruption and Economic Crimes Act** is incompatible with the application to freeze the accounts made by the aforementioned agency.

21. Counsel argued that the subject proceedings are not the appropriate forum to challenge the regularity of the warrants obtained and that the Respondents have failed to demonstrate that they earned funds in the accounts other than irregularly gaining access to public funds through engagement in fraudulent transactions with public officers. He also argued that it is in the public interest that investigations into the loss of funds be done meticulously and objectively over a period of six months and that the application seeking the review of the preservation orders be dismissed as it does not meet the threshold for grant of such an application.

22. This opposition was further supported by the Replying Affidavit of Pascal Mweu, the Assistant Director of Forensic Investigations at the Ethics And Anti-Corruption Commission, hereinafter the EACC. Mr. Mweu contended that the Respondents are alleged to have acted in concert with public officials at the Ministry of Devolution and Planning to corruptly acquire public funds through circumvention of procurement procedures and/or highly inflated procurement contracts at the expense of the public.

23. Counsel stated that the Applicant sought for and obtained warrants to search business premises, offices and residences of the Respondents in **Misc. Application No.596 of 2016**. He avers that this was necessary in order for the Applicant to further its investigations and that the applications made in **Misc. Application No. 595 of 2016** seeking to investigate bank account No. 01109416161300 at Cooperative bank in the name of the 1st Respondent and **Misc. Application No. 594 of 2016** seeking to investigate bank account Nos. 0020192678143, 02060192617892, 0260191213354, 0940197601341 and

1180263423271 held in the names of the 2nd Respondent, the 1st Respondent and the 3rd Respondent at Equity Bank were directed to different banks and different bank accounts and the same could not have been filed together.

24. He argued that the Court gave orders prohibiting the transfer and disposal of the subject funds and property for a period of six months as provided for under **Section 56 (3)** of the **Anti-Corruption and Economic Crimes Act, 2003** as the investigations conducted by the Applicant are complex and involved fraudulent transactions related to public procurement.

25. In his submissions during the hearing on 10th January, 2017 Mr. Kagucia argued for the Applicant that the preservation orders were made with the intention of freezing the money in the accounts in question to prevent the Respondents from disposing of the money before investigations were completed. This application he urged, was different from the previous applications made and that there was therefore no duplicity. He relied on the case of **Kenya Anti-Corruption Commission v Republic and 4 others [2013] eKLR**, where the Court of Appeal held that nothing stopped the Applicant from getting a series of warrants.

26. Counsel argued that the Respondents have not proven that the Applicant broke the law as **Sections 27 and 28** of **ACECA** provides that the Applicant should give notice where it is believed that the Respondents have relevant information, an application is then made and served upon the Respondents for that information. It is Counsel's argument that the wording of the two sections illustrates that the sections are used in limited circumstances where the EACC believes that the suspects are in possession of certain records.

27. Counsel contended that investigations are not administrative processes to fall under **Article 47** of the **Constitution** or the **Fair Administrative Act of 2015**. He further argued that the Applicant is of the belief that the money in the accounts in question was received from NYS and land L.R. 210/14968 having been bought with these ill-gotten funds, urges the court should retain the preservation orders and allow the Applicant to complete its investigations.

Issues for Determination

28. Having considered the application, the response thereto, the submissions of the respective parties and the authorities cited, these are the issues I formed for determination:

1. Whether the actions of the Applicant warrant the variation of the preservation orders.
2. Whether the undue hardship the Respondents claim to have suffered outweigh the risk of transfer of the money in the account in question.
3. Whether the investigations to be conducted by the Anti-Banking Fraud Unit negate the need for the Applicant to continue with its investigation.

29. The Respondents argued that the Applicant contravened their right to fair administrative action by failing to serve the Respondents, or the banks with the preservation orders as espoused in **Article 47 (1)** of the **Constitution**. The said Article states that:

'Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.'

30. The Applicants argued that their actions were within the law as **Sections 4, 5 and 11** of the **Proceeds of Crime and Anti-Money Laundering Act, 2009** mandates banks with the duty to maintain integrity of the financial sector by preventing money laundering and reporting suspicious acts. Be that as it may, in the exercise of this duty institutions such as the EACC are required to heed the requirements of fair administrative justice.

31. 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. 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.

32. The right to fair administrative action, though a fundamental right is contextual and flexible in its application. It is not one of the non-derogable rights or fundamental freedoms under **Article 24(1)** of the **Constitution**. provides, can be limited by law. The said 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.

33. 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.

34. It is quite evident from the submissions that the Applicant’s actions were not procedurally just as the Applicant did not serve the bank, or the Respondents with notice of the preservation orders. In spite of this, it is my finding that the procedural mistakes made by the Applicant cannot occasion the rescission of the preservation orders as this would be contrary to public interest.

35. In my forgoing conclusion I am persuaded by the finding of Nyamu J as he then was, in **Kenya Anti-Corruption Commission v Lands Limited and 7 Others [2008] eKLR** where he stated that:

“It follows therefore that if a party were to be given notice, they are likely to obstruct or frustrate the ex-parte application and therefore subvert the public interest by either conveying or moving the asset in issue or convert it into untraceable form. In this regard, I find that any notice would subvert the objective of the ACECA and the greater public interest of recovering property which has been corruptly acquired and also subvert the roe of investigations as set out in the Constitution”

36. Mr. Omari argued that the freezing of the bank accounts for a period of six months would prejudice his clients as they would be unable to celebrate the Christmas and New Year holidays, or pay school fees for their children and would further inconvenience other companies that use the accounts as trading accounts.

37. **Section 89 (1) (a)** of the **Proceeds of Corruption and Anti-Money Laundering Act** provides that:

(1) A court which makes a preservation order-

(a) may, on application by a person affected by that order, vary or rescind the preservation order or an order authorizing the seizure of the property concerned or other ancillary order if it satisfied-

i. that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and

ii. that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred;

38. I have anxiously considered the pleadings and the rival arguments on this issue and find that the Applicants have failed to demonstrate the hardship they claim to have suffered as a result of the freezing of the accounts. Being precluded from partaking in Christmas celebrations hardly constitutes undue hardship.

39. It has thus not been demonstrated to the satisfaction of the court that the enforcement of the preservation orders has caused undue hardship to the Applicants that far outweighs the risk of the subject money being concealed or transferred. I find that it is in the interest of justice to retain the preservation orders.

40. The Respondents also argued that the Applicant acted duplicitously by failing to disclose to the court that the matters before this court had previously been canvassed in a case instituted by the ABFU, in which the Respondents were absolved of all fault. It is their prayer that the Court do bar the Applicant, the ABFU and any other Investigative Agency from further investigating the Respondents on the matters before this court as they were fully canvassed in **Misc. Criminal Application 2668 of 2015** at the Milimani Chief Magistrates Court.

41. Mumbi Ngugi J, stated in **Stephen Ndambuki Muli & 3 others v Director of Public Prosecutions & another [2016] eKLR** that:

“it must be observed that the decisions in which the Court has prohibited prosecutions have circumstances which clearly illustrate that for the prosecution to proceed would be an abuse of the Court process. This is certainly so in the case of Githunguri vs Republic, as well as that of Ronald Musengi vs DPP. In the case of George Joshua Okungu and Another vs Chief Magistrate Court Anti-Corruption Court Nairobi and Another, Petition Nos. 227 & 230 of 2009, the Court observed as follows:

[77.] “Whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations:

(1) where there is an abuse of discretion;

(2) where the decision-maker exercises discretion for an improper purpose;

(3) where the decision-maker is in breach of the duty to act fairly;

(4) where the decision-maker has failed to exercise statutory discretion reasonably;

(5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;

(6) where the decision-maker fetters the discretion given;

(7) where the decision-maker fails to exercise discretion;

(8) where the decision-maker is irrational and unreasonable.”

42. There is nothing in statutory law barring the Applicant and other Investigative Agencies from instituting suits such as the present one and those instituted at the Milimani Chief Magistrates Court. The actions of the Applicant as untidy and inconvenient as they may be are within the law and the Respondent has not sufficiently proven that the investigations currently being carried out by the Applicant are identical to those carried out by the ABFU.

43. Warsame J (as he then was), observed thus in the case of **Michael Monari & Another vs Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011:**

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

44. In sum I do not find that the application before me can pass muster if considered against the litmus paper test in the case of **Stephen Ndambuki Muli**, and must fail. In the premise, the Application dated 21st December, 2016 is hereby dismissed.

There are no orders as to costs.

SIGNED DATED this 2nd day of February, 2017

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L. A. ACHODE

JUDGE