



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI LAW COURTS

ANTI-CORRUPTION MISCELLANEOUS CASE NO. 18 OF 2016

(FORMERLY HC MISC. APPLICATION NO. 156 OF 2006)

ETHICS AND ANTI-CORRUPTION COMMISSIONAPPLICANT

-VERSUS-

GLADYS GATHONI CHEGE T/A DIGIAGE AGENCY...RESPONDENT

RULING

1. The Applicant filed the Notice of Motion dated 15th December, 2016 under Section 56 (3) of the Anti-Corruption & Economic Crimes Act (ACECA) 2003 seeking the following orders:-

1. This Honourable Court be pleased to extend the existing Preservation Order issued on the 16th June, 2016 for a further period of six months in respect of Kshs.3,484,913.80 held by the Respondent in Account No. 0350167699551 at Equity Bank, KNUT Branch so as to prohibit the transfer, withdrawal or disposal of the said funds or any other dealings with the monies, pending conclusion of investigations and/or institution and prosecution of recovery proceedings, if any under the Anti-Corruption and Economic Crimes Act 2003.

2. There be no orders as to costs.

2. The Application is supported by the grounds on the face of the Application and the affidavit of one **James Kariuki**.

A summary of the Applicant's Application is that it seeks an extension of the Preservation Orders issued herein on 16th December 2016. This is in respect of Kshs.3,484,913.80 held in Account No. 0350167699551 at Equity Bank Knut Branch in the Respondent's name.

3. The claim over this money is in respect of alleged embezzlement of public funds at the Ministry of Devolution and Planning, through a procurement process tainted with illegality.

4. James Kariuki who swore the supporting affidavit states that upon receipt of the Preservation orders the Applicant embarked on carrying out investigations. From the investigations, it has been established that the antivirus software supplied to the Ministry pursuant to the aforesaid procurement was counterfeit and/or substandard.

The Respondent is therefore desirous of recording a statement from a representative of Kaspersky Lab Africa the Manufacturers of the software in issue, who are based in South Africa. Further, that the Respondent requires an expert's opinion on the said software from a Forensic Digital Examiner which is

yet to be done.

5. He averred that there was need to have the Preservation Orders extended to enable them complete the investigations. They were fearful that if the orders are not extended, the preserved money could be transferred, withdrawn, disposed off of otherwise dealt with in a manner which could frustrate the ongoing investigations. Non-extension of the Orders would also defeat the intended recovery proceedings and prosecution of any persons who may be found culpable for any corrupt conduct.

5. In her submissions, **M/s Kemboi** for the Applicant submitted that the Applicant required an extension of the Preservation Orders to enable it to complete investigations. That for the Applicant to obtain a Statement from a witness in a foreign jurisdiction, mutual legal assistance under the Mutual Legal Assistance Act Cap 75A was required. This legal assistance involved a long process, as the Applicant had to make a request through the Attorney General as provided for under Section 5 of the Act and upon laying a basis for the request as set out in Section 9 of the Act.

7. The investigations she said, involved recovery of public property which is a public interest affair. She submitted that public rights prevailed over private rights whenever there was a conflict as is in this case before Court. She referred to the case of **Susan Waithera Kariuki & 4 Others –vs- Town Clerk Nairobi City Council & 3 Others, High Court, Nairobi Petition No. 66 of 2010 [2013] eKLR** where the court stated:

“The enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights of fundamental freedoms of others.”

In **James Joram Nyagah & Another –vs- The Attorney General & Another, High Court Misc. Civil Application No. 1732 of 2004**, the court observed;

“Clearly, the rights and freedoms of the individual are not absolute but are subject to other people’s rights and the general public interest at large.”

8. Also referred to is the case of **Ethics & Anti-Corruption Commission –vs- Johncele Insurance Brokers Ltd. Kisumu. Misc. Civil Application No. 178 of 2014 [2015] eKLR** where the court held;

“My understanding of the above quotation is that it is the Commission to satisfy the Court on the necessity to extend the order for another period. There ought to be plausible reasons to permit extension. In short, it is the discretion of the court to exercise it if it deems it In the premise and taking into consideration the circumstances herein and the fact that the extension prayed by the appellant is discretionary and taking cognizance of the Respondent’s constitutional liberties and rights as well as the need to enjoy its economic rights, I do order as follows;

1. The Application dated 20th February, 2015 is allowed only to the extent the applicant is hereby granted 3 months (90 days) to conduct and conclude their investigations from the date of this ruling

9. The Respondent opposed the Application through her Replying Affidavit sworn on 20th January, 2017. In it, she depones that she is being punished for something she does not know. She has explained that she applied for a tender to the Ministry and she qualified and did supply. She annexed all the documents in her possession in respect of this questioned procurement (**GGC1 – 13**).

10. She has denied working in cahoots with Ministry officials. She decries the fact that the verification is taking too long and there is lack of concrete information by the bank.

11. Mr. Macharia for the Respondent submitted that there was no evidence adduced to show that there was collusion as claimed by the Applicant. He also pointed out that there had been allegations of want of supply but now its admitted that supply had been made. He contended that the Respondent had explained how she had got the tender and it is only the Ministry which could shed light on the issue of how the

tender was awarded.

12. Mr. Macharia submitted that the Respondent started communicating with the South African Company without involving the Attorney General, as provided for by the relevant Act. Furthermore, the report they expected from the expert was not annexed to the Affidavit. He therefore dismissed their request for extension of the Preservation Order as being groundless.

13. He ended by submitting that if the Court was inclined to extending the Preservation Orders, it should be from the time the interim Preservation Orders were granted i.e. 15th December, 2016.

DETERMINATION

14. The Applicant has brought this Application under Section 56 (3) of ACECA which provides;

“An order under this Section shall have the effect for six months and may be extended by the court on the Application of the Commission.”

The word used here is “**may**” which means it is discretionary. The burden is therefore on the Applicant to satisfy the Court that it is deserving of the Orders sought. The initial Preservation Order was issued on 15th June, 2016 for six (6) months. The Orders were to lapse on 15th December, 2016. The said Orders were temporarily extended on 15th December, 2016.

15. The effect of this is that the Respondent’s investigations into this matter have never been interfered with since the preservation orders have remained in force. It is now about 9 months since the Respondent’s bank account was frozen.

Considering the issues raised by the Applicant and the situation it finds itself in, it would be fair and just to allow it time to complete the investigations.

16. This does not however mean that the investigations will go on forever. Considering that the investigations have been ongoing for about nine (9) months, I find a period of one year to be sufficient for conclusion of these investigations.

17. I therefore allow the Application dated 15th December, 2016 limited only to one hundred (100) days to enable the Applicant conclude its investigations. The Preservation Orders are therefore extended for a further one hundred (100) days from the date of this Ruling.

No orders as to costs.

Delivered and Dated this 22nd day of March, 2017 at Nairobi

H. I. ONG’UNDI

HIGH COURT JUDGE