



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS APPLICATION NO. 465 OF 2016**

**IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT [CAP 65]  
AND ETHICS & ANTI-CORRUPTION COMMISSION ACT [CAP 65A] LAWS OF KENYA**

**AND**

**IN THE MATTER OF: AN APPLICATION BY ETHICS & ANTI-CORRUPTION COMMISSION  
FOR AN ORDER UNDER SECTION 56 OF THE ANTI-CORRUPTION AND ECONOMIC  
CRIMES ACT [CAP 65] AND SECTION 11(1) (J) OF THE ETHICS & ANTI-CORRUPTION  
COMMISSION ACT TO PROHIBIT THE TRANSFER OR DISPOSAL OF OR OTHER  
DEALING (HOWEVER DESCRIBED) WITH MALINDI EQUITY BANK LTD. ACCOUNT  
NUMBER [PARTICULARS WITHHELD]**

**BETWEEN**

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

**VERSUS**

**EQUITY BANK KENYA LIMITED .....1<sup>ST</sup> RESPONDENT**

**GEOTECH CONTRACTORS LIMITED .....2<sup>ND</sup> RESPONDENT**

**RULING NO. 2**

1. The applicant has moved the court through an application dated 15<sup>th</sup> December, 2016 brought under Section 56(3) of the Anti-Corruption and Economic Crimes Act, 2003 for the following orders:-

(i) Spent;

(ii) Spent;

(iii) This court be pleased to extend the existing preservation order issued on 17<sup>th</sup> June, 2016 for a period of four (4) months by prohibiting the transfer, disposal or any other dealing with respect to Kshs.22,302,363.95/= into account Number [particulars withheld] held by Geotech Contractors Limited in the Malindi Equity Bank Kenya Limited.

(iv) Spent; and

(v) There be no order as to costs.

2. The application is supported by the affidavit of Jacqueline Kimani filed on 16<sup>th</sup> December, 2016 and her supplementary affidavit filed on 25<sup>th</sup> January, 2017.

3. The 2<sup>nd</sup> respondent through its deponent Serah Musyimi on 18<sup>th</sup> January, 2017 filed a replying affidavit and a further affidavit on 30<sup>th</sup> January, 2017 opposing the application.

### **APPLICANT'S SUBMISSIONS**

4. Mr. Makori for the applicant submitted that his application has been brought under the provisions of Section 56 (3) of the Anti-Corruption & Economic Crimes Act. He sought for an extension of the preservative orders granted on 17<sup>th</sup> June, 2016 by four (4) months from the time of filing of the application. Counsel stated that investigations pertaining to the matter in issue are at an advanced stage and are likely to be concluded in three (3) months from the date of hearing of the application. He informed the court that investigators are yet to record statements from the 2<sup>nd</sup> respondent's Directors who have not yet reported to the applicant's offices in Malindi. The applicant invited them through a letter dated 29<sup>th</sup> September, 2016 to which their Advocate responded indicating that they cannot record statements for as long as this matter is in court.

5. Mr. Makori referred to paragraph 24 of the replying affidavit by the 2<sup>nd</sup> respondent. He also drew the court's attention to paragraphs 6, 7, 9, 10, 11, 12, 13 and 14 of the applicant's supplementary affidavit.

6. Counsel submitted that the 2<sup>nd</sup> respondent's Operations Manager had recorded a statement in which he stated that the issues that he was being asked about by the applicant can only be answered by Serah Musyimi.

7. Mr. Makori cited the case of **EACC vs Johncele Insurance Brokers Ltd.** [2015] eKLR at paragraphs 5 and 6 and stated that the onus is on the applicant to satisfy the court that there is a plausible reason to grant such orders.

8. He also relied on the case of the **DPP vs Nairobi Chief Magistrate's Court & Another** [2016] eKLR at paragraph 64 where the court held that the legal principle is that investigations on anti-corruption and economic crimes touch on public interest. Prosecution of those investigated for corruption and economic crimes is undeniably a matter concerning administration of justice.

9. It was submitted for the applicant that more investigations are required to be undertaken to finalize the case. He prayed for his application to be allowed.

### **2<sup>ND</sup> RESPONDENT'S SUBMISSIONS**

10. Mr. Mutinda, Learned Counsel for the respondent opposed the application by stating that in its replying affidavit, the 2<sup>nd</sup> respondent has denied the allegation that it was engaged in corrupt activities. Its deponent stated therein that the applicant had not shown the 2<sup>nd</sup> respondent's complicity to the alleged offence and that witness statements were recorded before 28<sup>th</sup> November, 2016.

11. Counsel submitted that in its replying affidavit the 2<sup>nd</sup> respondent has indicated that the project is complete and was commissioned by the Governor of Kilifi County and the residents of Magarini are enjoying flowing water. Counsel referred to the annexure marked SM7 attached to the 2<sup>nd</sup> respondent's replying affidavit which is an inspection and acceptance certificate from the procuring entity showing that it was satisfied that work had been done. He added that there was no allegation that the said certificate was a forgery.

12. Counsel stated that the allegations contained in paragraph 14 of the supplementary affidavit had been

countered in paragraph 12 of the 2<sup>nd</sup> respondent's further affidavit. He added that the documents which were alleged to have been forged were not annexed to the applicant's affidavit. He indicated that the 2<sup>nd</sup> respondent had denied uttering the said documents. He also argued that the witness statements recorded in September and December, 2016 and filed as annexures JK9 and JK10 were not signed. He further stated that the statements do hold enough evidence to convince this court to extend the orders.

13. On the issue of the Tender the subject of this application, Mr. Mutinda stated that it was an open Tender through IFMIS and that the 2<sup>nd</sup> Respondent submitted its documents to the County Government of Kilifi. He referred the court to the annexure marked SM13 of the replying affidavit confirming that the Tender documents were collected by the Ethics and Anti-Corruption Commission from the said County Government. He stated that the 2<sup>nd</sup> respondent had asked for a copy of the contract because on 21<sup>st</sup> March, 2016 its offices were broken into and several documents were stolen. A police abstract was issued on 21<sup>st</sup> March, 2016 to that effect. In his view, extension of the orders will be prejudicial to the 2<sup>nd</sup> respondent and will be tantamount to economic sabotage as project is now complete.

14. On the issue of recording of statements by Directors of the 2<sup>nd</sup> respondent, Counsel indicated that he sought from the applicant to be told of the nature of the information required. He informed the court that he was ready to accompany his client at any time to record a statement. He added that the Tender was above board.

15. In regard to the first authority cited by the applicant's Counsel, Mr. Mutinda urged the court to exercise its discretion judicially and dismiss the application to extend freezing orders. He stated that the second authority relied upon by the said Counsel was distinguishable from the present case as it raised issues on the personnel of the procuring entity. In his view, the extension of the orders by four (4) months is unreasonable and urged the court to vacate the orders.

### **APPLICANT'S REJOINDER**

16. Mr. Makori responded by stating that completion of a project done outside the Public Procurement and Disposal Act (PP&DA) does not sanitize the project. In reference to the copies of photographs showing that the project is complete, he referred the court to paragraph 20 of the applicant's supplementary affidavit which states that they do not meet the provisions of Section 106(B)(4) of the Evidence Act. Counsel submitted that the issues at hand touch on the award of the Tender and payment for the same.

### **ANALYSIS AND DETERMINATION**

The issue for determination is if the court should confirm or vacate the preservative orders on record.

17. Section 56 of the Anti-corruption and Economic Crimes provides as follows:-

***“(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.***

***(2) An order under this section may be made against a person who was involved in corrupt conduct or against a person who subsequently acquired the property.***

***(3) An order under this section shall have effect for six months and may be extended by the court on the application of the commission.” (emphasis added).***

18. On the application of the applicant, this Court on 16<sup>th</sup> December, 2016 granted *ex parte* orders extending the preservative period by four (4) months. The court also ordered the applicant to serve the application on the respondent for hearing *inter partes*.

19. I have carefully gone through the supporting and supplementary affidavits sworn by Jacqueline Kimani. She has given an account of the progress made in the investigations which includes interviewing and recording of statements of several potential witnesses as well as obtaining numerous documentary evidence. The statements so far recorded were attached to her supplementary affidavit filed on 25<sup>th</sup> January, 2017. In paragraph 14 of the said affidavit she has given an account of the information that has been established by the said investigations. Apart from observing that some statements were recorded within the six months that the preservative orders were in force, this court has no duty to look into the merit of the information contained therein.

20. In paragraph 15 of the said supplementary affidavit, the deponent states that on 17<sup>th</sup> December, 2016 the 2<sup>nd</sup> respondent's Operations Manager recorded a statement but indicated that he was not involved in the financial matters of the 2<sup>nd</sup> respondent and he could not comment on the issues of the Tender being investigated by the applicant. A copy of his statement was attached to the said affidavit and marked as JK11.

21. In the supporting affidavit filed on 16<sup>th</sup> December, 2016 in paragraph 7, the deponent states that on 29<sup>th</sup> September, 2016 the applicant's Malindi office invited the Directors of the 2<sup>nd</sup> respondent to provide information so as to facilitate conclusion of investigations by the applicant. The invitation letter was attached to the said affidavit and marked as JK 2.

22. In reference to paragraph 8 of the said affidavit, the deponent attached a letter marked as JK3 dated 10<sup>th</sup> October, 2016 written by the 2<sup>nd</sup> respondent's Advocate stating that the said Directors cannot honour the summons in regard to a matter still pending in court and therefore they have to await the outcome of the said pending case.

23. The deponent states in paragraph 17 of the supplementary affidavit that it is reasonable for all Directors of the 2<sup>nd</sup> respondent to record statements and provide information to the applicant's investigations.

24. This court's interpretation of the wording of the letter by the applicant's Advocate is that as long as allegations of irregular procurement by the County Government of Kilifi during the FY 2015-2016 to Geotech Contractors Ltd., is subsisting, the applicant should not expect the 2<sup>nd</sup> respondent's Directors to avail themselves for interview at the applicant's office in Malindi or to provide any information pertaining to the subject Tender. It is my view that had the 2<sup>nd</sup> respondent's Directors honoured the invite, they would have known the nature of the information that was required. As at the time of the hearing of this application, the said Directors had not visited the applicant's offices in Malindi for interview as requested. The said Directors therefore by the hard stance they have taken have contributed to the delay of the conclusion of investigations in the matter the subject of this application.

25. A perusal of the letter dated 29<sup>th</sup> September, 2016 does indeed reveal that the applicant requires information about irregular procurement by the County Government of Kilifi during the FY-2015/22016 to the 2<sup>nd</sup> respondent. The finer details of the further and better particulars that are required by the applicant from the 2<sup>nd</sup> respondent's Directors can only come out during the interview that the applicant proposed.

26. In paragraph 7 of the replying affidavit filed by Serah Musyimi on 18<sup>th</sup> January, 2017, she denies that the 2<sup>nd</sup> respondent is engaged in any corrupt activities with any Officer of the County Government of Kilifi County. In paragraph 9, she deposes that the applicant has failed to establish any reasonable basis upon which investigations of the 2<sup>nd</sup> respondent's bank account have to be carried out for a further four (4) months which period she terms as draconian and amounts to economic sabotage of the 2<sup>nd</sup> respondent.

27. In paragraphs 12 and 20 of the said affidavit, the deponent states that the extension of the orders will be tantamount to infringing the 2<sup>nd</sup> respondent's constitutional rights under article 50(2)(a) of the

Constitution of Kenya which presumes one innocent until proved to the contrary.

28. The said deponent in paragraph 16 of the replying affidavit denies any involvement of the 2<sup>nd</sup> respondent in forgery of documents. In paragraph 24, she states that the 2<sup>nd</sup> respondent was awarded the Tender in issue through a letter of notification of award dated 2<sup>nd</sup> December 2015. Paragraphs 25 to 30 thereof disclose the processes that followed the award of the Tender up to the stage when repayment was made.

29. In paragraphs 31 and 32 of the said affidavit, the deponent states that the project was completed and commissioned on 10<sup>th</sup> January 2017. Various documents were attached thereto, including the letter of notification of award, acceptance of the offer, a local service order, request for payment of Kshs.27,258,930/=, and several other documents relating to the payment and copies of photographs depicting the commissioning of the project.

30. Counsel of the applicant objected to the said copies of photographs being relied on as they had not been submitted to the court under the provisions of section 106B(4) of the Evidence Act and are therefore inadmissible. I do find that a proper basis was not laid for reliance on the said photographs by the 2<sup>nd</sup> respondent and for the said reason, I hereby expunge the annexure marked as SM12 from the replying affidavit filed on 18<sup>th</sup> January, 2017. Counsel also stated that a project procured through a flawed procurement process is legally untenable according to the provisions of the PP & DA.

31. In paragraph 15 of the further affidavit, the deponent states that the applicant is in full custody of all Tender documents of the 2<sup>nd</sup> respondent with respect to the subject Tender as per the letter of the County Secretary of Kilifi County Government, thus there are no good reasons why the applicant failed to annex the said uttered documents to either of its affidavits.

32. In my view, most of the issues that the 2<sup>nd</sup> respondent's deponent has brought forth in her replying affidavit are the same issues she and her fellow Director ought to have disclosed to the applicant by honouring the invite for an interview. They would have had the opportunity to inquire about the alleged uttered documents that they are said to have submitted to the County Government of Kilifi and about the documents that were collected from the Kilifi County Government offices by the applicant.

33. I am satisfied that the applicant has discharged its onus of proof by showing that considerable progress has been made in investigating this case but more time is needed to finalize investigations. I am persuaded by the authority cited by counsel for the applicant in **DPP vs Nairobi Chief Magistrate's Court & Another** (supra) that investigations on corruption and economic crimes touch on public interest. I am of the considered view that it is in the interest of Kenyans to know if indeed due process was followed in the award of the Tender in issue and if the 2<sup>nd</sup> respondent is culpable of any corruption or economic crime or if it is not. That can only be determined if the applicant is given an opportunity to complete its investigations. This court notes that the Directors of the 2<sup>nd</sup> respondent company are presumed innocent until proved guilty. Inasmuch as the 2<sup>nd</sup> respondent has stated that the project in issue was completed, the underlying issue that needs to be unraveled is if the award of the contract was undertaken in a transparent and accountable manner as provided under procurement law.

34. It is my finding that the purpose of the investigations will be defeated if this court fails to grant the orders sought. In the circumstances, I make the following orders:-

- (i) The *ex parte* orders issued on 16<sup>th</sup> December, 2016 extending the preservation order issued on 17<sup>th</sup> June, 2016 by a period of four (4) months prohibiting the transfer disposal or any other dealing with respect to Kshs.22,302,363.95 in Account No.[particulars withheld] held by Geotech Contractors Limited in Malindi Branch of Equity Bank Limited are hereby confirmed.
- (ii) Each party shall bear its own costs.

**DELIVERED, DATED and SIGNED at MOMBASA on this 6<sup>th</sup> day of March, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the applicant

No appearance for the 1st respondent

Mr. Mutinda for the 2nd respondent

Oliver Musundi - Court Assistant