



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO.24 OF 2017

FORMERLY MISC. APP. NO. 2 OF 2017 (MOMBASA)

**IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT NO.3 OF
2003**

**[CAP 65] AND ETHICS & ANTI-CORRUPTION COMMISSION ACT [CAP 65A] LAWS OF
KENYA**

AND

IN THE MATTER OF: SECTION 180 OF THE EVIDENCE ACT [80] LAWS OF KENYA

AND

**IN THE MATTER OF: AN APPLICATION BY THE ETHICS AND ANTI-CORRUPTION
COMMISSION FOR**

**AN ORDER UNDER SECTION 56 OF THE ANTI-CORRUPTION AND ECONOMIC CRIME
ACT [CAP 65]**

**LAWS OF KENYA,TO PROHIBIT THE TRANSFER OF OR DISPOSAL OF OR OTHER
DEALINGS**

**CONNECTED AND/OR INCIDENTAL TO NATIONAL BANK OF KENYA LIMITED,PORT
WAY**

HOUSE MOMBASA BRANCH,ACCOUNT NUMBER 01285118994000

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION.....APPLICANT

VERSUS

NATIONAL BANK OF KENYA.....1ST RESPONDENT

GEOTECH CONTRACTORS LIMITED.....2ND RESPONDENT

R U L I N G

Introduction

1. The application before the court is an Originating Motion brought ex-parte vide a Certificate of Urgency filed on the 12th of January 2017 **under Section 118 of the Criminal Procedure Code, Cap 75 Laws of Kenya, Section 23[3] and Section 29 of the Anti-corruption and Economic Crimes Act, No.3 of 2003.**
2. The Applicant sought an order of the Court to freeze account number: [particulars withheld] in the name of Geotech Contractors held at National Bank Kenya Limited, Port Way House Mombasa Branch, thereby prohibiting the Respondents by themselves or through their agents, servants or arising from transferring, disposing of, wasting or dealing with the account in any other way a sum of Kshs. 5,788,663 for a period of six months.
3. In addition, the Applicant sought an order Court to stop any dealing with regard to a sum of Kshs. 5,788,633 in account number [particulars withheld] in name of Charity Mueni Musyimi held at Equity Bank Kenya Limited, Malindi Branch pending the hearing and determination of this application.
4. On 13th January, 2017 the matter was certified as urgent in the High Court at Mombasa. In addition, the court issued orders freezing the account number [particulars withheld] in the name of Geotech Contractors held at National Bank Kenya Limited, Portway House Mombasa Branch so that the Respondents, by themselves or through their agents, sergeants or assigns are prohibited from transferring disposing of wasting or in any way dealing with the account. By the same order the court also stopped any dealing with regard to the sum of Kshs. 5, 788,633 in the account pending inter-partes hearing and determination of the application.

Background

Applicant's Case

5. The Applicant has filed an ex-parte Originating Motion dated 11th January 2017 seeking to freeze Bank Account Number: [particulars withheld] in the name of Geotech Contractors held at National Bank Kenya Limited, Port Way House Mombasa Branch, prohibiting the Respondents, by themselves or through their agents, servants or assigns from transferring, disposing of, wasting, or in any way dealing with Kshs. 5,788,633 the said account for a period of six months.
6. The Applicant also sought orders that there be no dealings with regard to Kshs. 5,788,633 in the Account Number: [particulars withheld] in the name of Charity Mueni Musyimi held at Equity Bank Kenya Limited, Malindi Branch pending the hearing and determination of this application.
7. The Applicant's ex-parte Originating Motion dated 11th January 2017 is supported by an Affidavit sworn by Lucy Wanjiru Njeru on 11th January 2017. The deponent is an investigator of the Applicant who confirms that investigations are on-going in which she intends to prove that public funds amounting to Kshs. 5,788,633 were transferred to account number [particulars withheld] in the name of Charity Mueni Musyimi held at Equity Bank Kenya Limited, Malindi Branch from the Kilifi County Government. In addition, the Applicant intends to prove that public funds amounting to Kshs. 5,788,633 were transferred into account number [particulars withheld] in the name of Geotech Contractors held at National Bank Kenya Limited, Port Way House Mombasa Branch.
8. The Applicant filed a Supplementary Affidavit sworn by Jacqueline Kimani on 30th January 2017. The deponent testifies on the on-going investigations which are intended to establish a complex money movement proving fraudulent payment of public funds from the Kilifi County Government. The deponent swears that the Applicant intends to prove that the 2nd Respondent corruptly acquired public funds amounting to Kshs. 5,788,633 through bank account number [particulars withheld] in the name of Geotech Contractors held at National Bank Kenya Limited, Portway House Mombasa Branch. She supports the Applicant's prayer to freeze the 2nd Respondent's bank account.

9. The Applicant filed its Submissions on 17th March 2017 in which it argues first that under **Section 56(1) of the Anti-Corruption and Economic Crimes Act** the Court has the Jurisdiction to issue orders prohibiting a party from accessing, disposing of or preventing the said party from engaging in other dealings with the property which has been acquired by corrupt means. The Applicant relied on the case of ***Director of Public Prosecutions V Nairobi Chief Magistrate's Court & Another (2016)*** in which Lenaola J (as he then was) stated that the fight against corruption, including being tried for corruption related acts such as bribery is a public interest issue.

10. Secondly, the Applicant argues that by virtue of **Section 56(1)** of the **ACECA** it has the power to seek prohibitory orders to preserve suspected property vide an ex parte application. The Applicant the case of ***Kenya Anti-Corruption Commission V Lands Limited & 7 Others (2008)*** in which it was stated that:

“it is clear to the court that section 56 with inspired by the identification, tracing, freezing and seizure of property provisions of Article 31 and 59 of the UNITED NATIONS CONVENTION ON ANTI-CORRUPTION since as will shortly be apparent after countries or comparable jurisdictions have enacted almost similar provisions modeled on the Convention has been duly ratified by Kenya and is also notable that Kenya was among the first signatories on the notification list.”

11. The Applicant contends that the application before the Court has merit because of the following reasons:

- i. Investigations on the 2nd Respondent's bank accounts of corrupt payment and fraudulent acquisition of public funds are currently underway.
- ii. The Applicant has established reasonable grounds to suspect the 2nd Respondent of acquiring public funds fraudulently, unlawfully and corruptly from the Kilifi County Government.
- iii. The Applicant intends to conduct exhaustive investigations and thereafter promptly recover public funds unlawfully acquired by the 2nd Respondent from Kilifi County Government amounting to Kshs. 9,735,485.
- iv. The 2nd Respondent's objection to the Applicant's Originating Motion is legally premature because the Applicant has sought preservation orders under section 56(1) of the Anti-Corruption and Economic Crimes Act which can only be made under 56(4) of the Anti-Corruption and Economic Crimes Act.

Hence, in the interest of justice and public interest the 2nd Respondent's Bank Account number: [particulars withheld] in the name of Geotech Contractors held at National Bank Kenya Limited, Portway House, Mombasa Branch should be preserved pending the Applicant's exhaustive investigations.

Respondents' Case

The 1st Respondent

12. The 1st Respondent bank filed a response vide a Replying Affidavit on 5th April 2017 deposed by Hellen M. Kavinya. It confirms that it was served on 14th Jan 2017 by the Applicants with a Court Order dated 13th January 2017 issued before Justice D.O. Chepkwony. The contents of the Order required the 1st Respondent to freeze the funds contained in account number [particulars withheld] in the name of Geotech Contractors who are the 2nd Respondents.

13. The 1st Respondent noted that according to the Applicant's Miscellaneous application dated 11th January 2017 and the Court Order dated 13th January 2017, there are ongoing investigations by the Applicants on suspicion of irregular payments being made in the subject account number [particulars

withheld] held at the 1st Respondent's Port Way Branch in Mombasa. The 1st Respondent does not dispute any facts raised by the Applicant and is ready to adhere to any orders issued by the Court.

2nd Respondent

14. The 2nd Respondent filed a Replying Affidavit on 21st February 2017 deposed by Sarah Musyimi. The deponent asserts that the Applicant misled this Court to grant the prohibitory orders dated 13th January 2017, freezing the 2nd Respondent's bank account on allegation of fraudulent receipt of public funds from Kilifi County Government. She avers that payment made to the said account is not connected to any corrupt engagements from Kilifi County Government.

15. The deponent contends that in response to the said Applicant's Supporting Affidavit and the Supplementary Affidavit, the EACC has no factual basis at all to seek orders to freeze and investigate the 2nd Respondent's bank account. That the EACC failed to establish any reasonable basis upon which the investigations of the 2nd Respondent's bank account have to be carried out, and there is no evidence upon which to conclude that the listed transactions in paragraph 5 of the Supplementary Affidavit were corrupt payments from Kilifi County Government.

16. The deponent also contends that the reasons disclosed in the Applicant's two Affidavits are not sufficient to warrant the granting of the orders sought. That under **section 107 of the Evidence Act Cap 80 Laws of Kenya** the Applicant must satisfy the Court on the necessity to freeze the 2nd Respondent's subject account for a period of six months and the Applicant has totally failed to discharge that burden of proof.

17. The 2nd Respondent further avers that paragraph 5 of the Applicant's Supplementary Affidavit is malicious and bad in faith as the 2nd Respondent has not been engaged in any corrupt dealings. The 2nd Respondent contends that it is a legally prequalified contractor having undertaken different tenders from the Kilifi County Government, hence, the monies received from the Kilifi County Government were lawfully acquired. Therefore, the actions by the Applicant go against Article 31 of the Constitution of Kenya which guarantees right of privacy.

18. The 2nd Respondent also argues that the EACC has not demonstrated the nature of the corrupt transactions alleged in paragraph 6 and 9 of the Applicants said Supplementary Affidavit, nor has it indicated the exact amount of the alleged illegal payments paid to the 2nd Respondent's subject account by the Kilifi County Government which is under investigation. That the EACC has not attached any payment receipts or bank statements of the alleged illegal payments and the court ought not to have granted the subject orders. Failure to produce the forgoing documents to demonstrate corrupt conduct on the part of the 2nd Respondent, amounts to unsubstantiated statements or claims by the Applicant which should not be entertained by the court. The 2nd Respondent contends that the Applicant has failed to provide sufficient evidence to prove that the Kshs. 5,788,633 is public funds corruptly acquired by the 2nd Respondent.

19. The 2nd Respondent urges that the Applicant has not sufficiently demonstrated to the Court why it should be granted the orders it is seeking as it has not tendered any evidence to warrant the Court to freeze that 2nd Respondent's subject account for a period of 6 months. The Money Movement Chart which is annexed as JK-2 in the Supplementary Affidavit has no evidential value as it is not signed or dated, nor is the maker of the said chart known. The Court cannot therefore use it as a basis for consideration to grant the Applicant the orders it is seeking as the subject annexure offends the provisions of the Evidence Act Cap 80 Laws of Kenya.

20. The 2nd Respondent in its Submissions argues that the Applicant has not met the threshold for having its bank account frozen. The Applicant has not discharged the burden of proof to warrant the issuance of the orders to freeze the 2nd Respondent's bank Accounts under Sections 107 and 109 of the Evidence Act.

21. Secondly, the 2nd Respondent asserts that for the Applicant to succeed in seeking an order under **Section 56(1)** of **ACECA**, it must provide evidence.

22. The 2nd Respondent cited the case of *Manfred Schmitt & Another V Republic and Another Criminal Revision No. 569 of 2012* on the duty of the court to establish whether reasonable grounds have been established.

23. Third, the 2nd Respondent states that **Sections 118** of the **Criminal Procedure Code** and **Section 180** of the **Evidence Act**, upon which the Applicant relies allow the court or magistrate to grant Orders sought if there is reasonable suspicion on the part of the Applicant that the Respondent has acquired property through corruption.

24. The 2nd Respondent has referred the Court to the Black's Law Dictionary definition of the phrase "reasonable suspicion" and as further described in the case of *Timothy Isaac Bryant & 2 Others V Inspector General of Police & 7 Others Misc Criminal Appeal No. 194 of 2014*, in which Achode J made reference to the case of *Rondo (2001) 126 A Crim R. 562*. In the foregoing case Achode J also associated herself with the definition provided in the case of *Emmanuel Suipanu Siyanga V Republic Criminal Appeal 124 of 2009(2013)*.

That for suspicion to be reasonable it must be founded on existent facts.

25. The 2nd Respondent raises a question on whether the Affidavits sworn by the two investigating officers, that is, Lucy Wanjiru Njeru who swore the Supporting Affidavit on 11th January 2017 and Jacqueline Kimani who swore the Supplementary Affidavit on 30th January 2017, lay a sound basis to raise a reasonable suspicion as to the commission of an offence by the Respondent herein.

26. The answer of the 2nd Respondent to the question it has raised is that the two investigating officers have given a narration of events with nothing to back them up. In addition, that from the above said Affidavits for the Applicant, there is no factual basis at all to seek the freezing Orders as the Applicant has failed to establish any reasonable basis to conclude that the money in the account was a product of corrupt payments from Kilifi County Government.

ANALYSIS

27. **Section 56(1)** of the **Anti-Corruption and Economic Crimes Act** to which both parties have referred provides that;

“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.”

28. It is important to note at this point that the Kenya Gazette Supplement No. 197 (Acts No. 47) **Section 24 of the Bribery Act, 2016** amended **Section 56(1)** of the **Anti-Corruption and Economic Crimes Act, 2003** by deleting the words **“on evidence”** contained in the section there before and substituting therefor the words **“if it is satisfied that there are reasonable grounds to suspect.”**

29. The law stipulates that 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 and not on sufficient evidence as was the position earlier. The court must be shown that there are reasonable grounds to suspect that the property in question was acquired as a result of corrupt conduct?

30. The Applicant is therefore expected to provide reasonable grounds in support of their application to warrant the granting of the freezing orders. The Burden of Proof as articulated in **Sections 107** and **109** of the **Evidence Act Cap 180 Laws of Kenya** lies with the Applicant in this matter to prove on a balance of

probability that there are public funds in the 2nd Respondent's bank account and that these were irregularly and corruptly acquired.

Section 107 and 109 of the Evidence Act states as follows:

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.”

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.”

31. The Applicant has told the court that it is investigating allegations of corrupt payment and fraudulent acquisition of public funds by the 2nd Respondent and the circumstances and the basis under which the 2nd Respondent received payments from Kilifi County government. The Applicant prays that pending exhaustive investigations and conclusion it would be reasonable to preserve the funds held by the 2nd Respondent Bank Account number [particulars withheld] in the name of Geotech Contractors held at National Bank Kenya Limited, Port Way House, Mombasa Branch.

32. The Applicant has alluded to complex money movement which involves analyzing numerous documents, and interviewing and recording statements from suspects and witnesses for which reasons it would be in the interest of justice that the bank account remain to frozen for purposes of recovery of public funds corruptly acquired by the 2nd Respondent through the said bank account in the end.

33. The 2nd Respondent on the other hand has charged that the affidavits sworn by the investigating officers herein do not lay a sound basis to raise reasonable suspicion as to the commission of an offence by the Respondent. The court was told that the two investigating officers merely gave a narration of events with nothing to back them up.

34. The 2nd Respondent, besides opposing the application, and alleging that it undertakes tenders at the Kilifi County Government, has not provided the court with any reasonable explanation, regarding the genesis of the alleged corrupt payments from Kilifi County government. It has not demonstrated a prima facie case upon which this court can make a finding that there are reasonable grounds on a balance of probabilities to believed that the funds received from Kilifi county government were lawfully acquired in any capacity.

35. The 2nd Respondent had the opportunity to avail themselves for an interview on 16th January, 2017 (by the applicant) to rebut, on a balance of probabilities, the allegations of corruption and fraudulent acquisition of public funds. The 2nd Respondent could have provided to the investigators and/or the court, some documentary evidence to show that the Applicant's contention regarding the said funds received from Kilifi County government was baseless but they have not done. They have not provided any such prima facie evidence.

36. It is the responsibility of the court to uphold the public interest and where in doubt to always strive to strike a reasonable balance between the rights and fundamental freedoms of the individual and the public interest. The Court is not a conveyor belt for issuing orders when an application is made, nor must the court issue such orders as a matter of course.

37. When an application is made, the Court is required to address itself to the facts of the case and determine, in accordance with the statutory provisions, whether a reasonable case has been made to limit a person's rights and fundamental freedoms. On the other hand, the duty of the state and its agencies, in investigating and prosecuting crime, is to furnish the Court with facts upon which the Court can conclude

that there is reasonable evidence of commission of a crime by the person it seeks to implicate by the application for search and seizure. See – the decision of Majanja J in the case of **Manfred Walter Schmitt & another v Attorney General & 3 others [2014] eKLR**.

38. Article 24 of the **Constitution** makes an exception where a law (such as **ACECA**) may provide for the limitation of the rights and fundamental freedoms of individuals if it is necessary and such limitation is justifiable in a democratic society. The hardship caused to the applicant at this stage by the ex-parte order is temporary and is entirely justified when balanced against the public interest. It is not out of proportion with the objectives of the Act or the Constitution.

39. In the case of **Director of Public Prosecutions vs Nairobi Chief Magistrate's Court & Another (2016) eKLR** to which the Applicant referred, Lenaola J (as he then was), observed that the fight against corruption, including being tried for corruption related acts such as bribery is a public interest issue and prosecution of those investigated for corruption and economic crimes is undeniably a matter concerning the administration of justice.

40. Provided that there are some evidential facts at the ex-parte stage to enable the court in the exercise of its discretion, to find that reasonable grounds have been established there are no other valid preconditions to the grant of the ex-parte order. At the ex-parte stage the evidential facts need not answer the description of any specific offences of corrupt conduct provided they point to that probability.

41. The 2nd Respondent in its Replying Affidavit filed on 21st February 2017 sworn by Sarah Musyimi also contended that the EACC misled the court into granting the freezing Orders dated 13th January 2017 on allegations of fraudulent payment of public funds from the Kilifi county government, when in fact and in the truth the 2nd Respondent had not engaged in any corrupt business dealings with the Kilifi county government. That the application itself is legally defective, draconian and oppressive and ought to be struck out.

42. The application complained of is enabled by the law. **Sections 11(d) and (j), 13(2)(c) of the Ethics and Anti-Corruption Commission Act 2011** and **Section 23 of the ACECA 2003** mandates the Applicant herein to investigate corruption and economic crimes and to freeze or confiscate proceeds of corruption. In particular **Section 56(1) ACECA** allows the Applicant to move the court ex-parte in the initial stages as adverted to earlier in this ruling.

43. What amounts to “Reasonable Suspicion” was defined in the case of **Timothy Isaac Bryant & 2 Others V Inspector General of Police & 7 Others Misc Criminal Appeal No.194 of 2014**. In which Achode J borrowed from the definition provided in the case of **Rondo (2001) 126 A Crim R. 562**, where it was held that:

“.....reasonable suspicion involves less than a belief but more than a mere possibility. There must be some factual basis for the suspicion; reasonable suspicion is not arbitrary.”

44. Achode J further observed thus:

*“Therefore, even where the basis for seeking the warrants to inspect and freeze a bank account is reasonable suspicion of commission of a crime, there needs to be a bank upon which the police officer moves to court. This is because a reasonable suspicion is not arbitrary. However, in my view, the test for establishing reasonable suspicion is not a matter of strict evidence, that is, proof beyond reasonable doubt. In this respect, I associate myself with the expressions of the court in the case of **Emmanuel Suipanu Siyanga V Republic Criminal Appeal 124 of 2009(2013)** which states:*

“.....and it follows that the factual basis which would make any suspicion which is actually formed a reasonable one must also exist at the material time: a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If

there are not grounds which then made suspicion reasonable, it was not a reasonable suspicion. Whether grounds actually existed at the time it is to be testes objectively. Consequently a suspicion may be reasonable even though subjectively it was based on unreasonable suspicion, it must of necessity be recognized that a reasonable suspicion never involves certainty as to the truth. Where it does, it ceases to be suspicion and becomes fact.....There must be a satisfactory account.....”

45. The court will grant Orders sought if there are reasonable grounds for the suspicion on the part of the Applicant that the Respondent has property acquired through corruption. In other words the suspicion must be reasonable. Black’s Law Dictionary defines Reasonable Suspicion as:

“A particularized or objective basis, supported by specified and articulated facts, for suspecting a person of criminal activity.”

46. The Commission is mandated by **Article 252 of the Constitution** to conduct its own investigations in relation to Economic Crimes. The grant of Order(s) sought in the application before the court against the 2nd Respondent would therefore be necessary for the EACC to carry its statutory obligation to investigate the allegations of corruption as well as to institute proceedings for purposes of recovery or protection of public property.

47. The averments by the 2nd Respondent in their supplementary affidavit that the Applicant was malicious and acted in bad faith in seeking the freezing order is not founded on any facts and is therefore without basis. The Applicant submitted that on 16th January, 2017 they invited the 2nd Respondent in writing record a statement and to provide particulars on the circumstances in which they acquired public funds from Kilifi County government amounting to 72,365,156.40/=. The 2nd Respondent was yet to provide the requested information and supporting documents to the Applicant at the time of the *interpartes* hearing of this application.

DISPOSITION:

48. In the premise I find that the 2nd Respondent has not provided sufficient material to controvert the reasonable ground raised before the High Court at Mombasa and which led to the orders that froze the account in question. In the absence of any reasonable explanation by the 2nd Respondents there cannot be any good ground for the court to interfere with the preservatory orders issued by the court at Mombasa.

49. Section 56 has inbuilt safeguards. First, it provides for a hearing on merit at the earliest opportunity. Second, the Court has the power to vary or discharge the *ex-parte* orders in deserving situations. Third, the freezing orders do not operate in perpetuity. A suspect who cannot therefore provide prima facie evidence of how he acquired the property which is the subject matter of the litigation gives the court no basis on which to make a finding that there are reasonable grounds to discharge the *ex-parte* orders. The sufficiency of the evidence is a matter for the Court to consider during the hearing of the main application.

50. In sum, the Respondent/Applicant’s averments that application is ripe for dismissal lacks merit and is therefore dismissed.

There are no orders as to costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 4th DAY OF May, 2017.

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L. A. ACHODE

JUDGE