



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ACEC MISCELLANEOUS APP. NO. 38 OF 2017

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

-AND-

M/S NYANDORO AND COMPANY ADVOCATE.....1ST RESPONDENT/APPLICANT

M/S CO-OPERATIVE BANK OF KENYA LIMITED.....2ND RESPONDENT

R U L I N G

1. The Applicant filed an Ex-parte Originating Notice of Motion under a certificate of urgency dated 31st March 2017 pursuant to **Section 56(1), Section 56(2) and Section 56(3)** of the **Anti-Corruption and Economic Crimes Act, 2003, Section 1(2), Section 3 and Section 3A** of the **Civil Procedure Act (Cap 21)** and **Order 51** of the **Civil Procedure Rules, 2010**. The Applicant sought orders that the court be pleased to issue orders for preservation prohibiting the 1st Respondent his agents, servants or any other person from withdrawing, transferring, disposing or in any other way dealing with the money in Account Number 01136092868400 in the name of the 1st Respondent domiciled at Co-operative Bank of Kenya Ltd, Kitengela Branch. That the money be preserved for a period of 6 (six) months.

2. The application was based on the grounds that;

a) The Applicant was carrying out investigations into allegations of corruption and embezzlement of public funds from the County Government of Kajiado.

b) The Applicant was executing its legal mandate pursuant to the provisions of the Constitution of Kenya, the Anti-Corruption and Economic Crimes Act, 2003 and the Ethics and Anti-Corruption Commission Act, 2011.

c) There was reasonable suspicion that a large amount of money was deposited into account number 01136092868400 held in the name of the 1st Respondent and domiciled in the 2nd Respondent.

d) Preliminary investigations raised reasonable suspicion that the monies were illegally and irregularly paid since there was no evidence of any services rendered to the County government of Kajiado by the 1st Respondent,

e) To protect the interests of the public and public funds, it was imperative that monies in the said account 01136092868400 in the name of the 1st Respondent domiciled at Co-operative bank of Kenya Limited be preserved for a period of six months pending conclusion of the investigations.

f) **Section 56(1)** of the **Anti-Corruption and Economic Crimes Act, 2003** vested the Court with authority to hear and determine the Application ex-parte.

g) It was the Applicant's considered view that this was a case pitting private interests against public interest, where the latter ought to triumph over the former and that;

h) It was in the public interest as well as the interests of justice that the Application be allowed.

3. Arthur Opilli, a forensic investigator with the Ethics and Anti-Corruption Commission (EACC) swore a Supporting Affidavit dated 31st March 2017 to the application. In it he deposed that the EACC was carrying out investigations into allegations of corruption and embezzlement of public funds involving public officials at the county government of Kajiado in which the 1st Respondent was alleged to have been paid a huge sum of money by the county government of Kajiado for services not rendered. Mr. Opili averred that preliminary investigations indicated that out of the Respondents corrupt conduct, he had amassed unexplained monies banked in the aforesaid bank account.

4. Mr. Opilli also deposed further that there was prima facie evidence of collusion, fraud, illegality and generally corrupt conduct involving the 1st Respondent and other unknown public officers from the County government of Kajiado leading to loss of public funds. The deponent averred that to protect the interests of the public and safeguard public funds, it was imperative that the 1st Respondent's bank account number 01136092868400 held at the 2nd Respondent be preserved for a period of six months pending conclusion of investigations.

5. Pursuant to **Section 56(1) of ACECA** orders for the preservation of the subject matter in bank account number 01136092868400, held in the name of Nyandoro & Co Advocates domiciled at Co-operative bank limited, Kitengela Branch, were issued by the court for a period of 90 days on 3rd April 2017.

6. The 1st Respondent moved the court through a Notice of Motion dated 6th April 2017 pursuant to **Section 56 (4) and (5) of the Anti-Corruption and Economic Crimes Act, 2003, Article 159 (2)(a) and (e) of the Constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act** seeking orders that:

a. there be a stay of execution of the ex-parte orders issued by the Court on 3rd April 2017 and all consequential orders thereto, pending the hearing and determination of the application inter parties.

b. the Court be pleased to discharge, vary and/or set aside the ex-parte orders issued on 3rd April 2017 and all other consequential orders thereto, allowing the 1st Respondent/Applicant to access funds held at its account number 01136092868400, in the name of Nyandoro & Co. Advocates held at the 2nd Respondent, Kitengela Branch, pending the hearing and determination of the application inter parties.

c. a permanent order of Injunction do issue against the Applicant, prohibiting either by itself, its servants, agents and/or assigns from investigating or further investigating, inspecting or further inspecting, or howsoever interfering with the general operation of account no. 01136092868400 pending the hearing and determination of the application inter-parties

d. the 1st Respondent/Applicant be awarded costs of the Application.

The Application was premised on the Supporting Affidavit of Yabesh Nyandoro dated 5th April 2017 and on grounds and further evidence to be presented at the hearing.

APPLICANT/1ST RESPONDENT'S SUBMISSION:

7. In a Replying Affidavit dated 12th April 2017 by the 1st Respondent/Applicant, Mr. Arthur Opili

deponed that the Commission received intelligence reports that there was serious embezzlement of public funds from the County government of Kajiado. That preliminary investigations conducted by the Commission indicated that huge sums of money had been paid to the Applicant/1st Respondent's account domiciled at the 2nd Respondent for non-existing claims. That as a stop-gap measure, the Commission filed an application on 31st March 2017 pursuant to Section 56 of the ACECA to preserve the said funds which orders were granted by this court on 3rd April 2017.

8. Mr. Opilli averred that the Commission moved to the Chief Magistrate's Court vide Misc. Criminal Application No. 1159 of 2017 for warrants to investigate the accounts of the Applicant and the court granted the Orders sought on 3rd April 2017. Thereafter the Commission proceeded to lift copies of the documents it sought, among which was the bank statement for account number 01136092868400 operated by the applicant.

9. Mr. Opilli asserted that the Applicant did not deserve any of the orders prayed for, for reasons that the Commission was only but dutifully discharging a constitutional as well as a lawful mandate, in investigating the Applicant and that the Commission complied with the law in so doing. He urged the court to protect the interest of the law as well as the overriding public interest which demanded that public funds ought to be jealously guarded against any form of pilferage.

10. Mr. Opilli argued that the order for a permanent injunction to prohibit the Commission from investigating, inspecting or howsoever interfering with the general operation of account number 01136092868400 in the name of Nyandoro & Co. Advocates, could not be granted to the Applicant as this would only serve to fetter the operational mandate of the Commission, in the absence of any breach on the part of the Commission to warrant such drastic and far reaching orders.

11. Mr. Opilli contended that the veracity of the allegation that the amount of money that had been paid to the account above was legal fees payable with regard to **Nairobi ELC No. 393 of 2013; Church Commissioners for Kenya v. Kisaju Development Trust & County Council of Olkejuado** could only be established upon a full inquiry being conducted. The inquiry would ascertain how much money was paid to the Applicant, how much was still owing and in what respect the payments were being made. That a complaint of unlawful payments having been lodged the Commission was duty bound to investigate.

12. Mr. Opilli argued that parties could not purport to negotiate fees, subsequent to a bill of costs being filed vide ELC Misc. Application No. 20 of 2017, and have the fees paid to the firm of advocates when the bill of costs was yet to be taxed and was still pending hearing.

RESPONDENT/APPLICANT'S SUBMISSIONS:

13. Learned Senior Counsel Mr. Okongo Omogeni appearing for the 1st Respondent submitted that the funds ostensibly obtained by the 1st Respondent, constituting the foundation for investigations as averred in the application dated 30th March 2017 was part of legal fees lawfully earned for representation of Kajiado County government in **Nairobi E.L.C Case No. 393 of 2013; Church Commissioners of Kenya vs Kisaju Development Trust & Olkejuado County Council**, over property worth over Kenya Shillings Twelve Billion.

14. Counsel contended that the Applicant's constitutional rights to own property, to fair trial and dignity keep being eroded every second its only office account remains frozen over orders obtained unlawfully without full disclosure. He submitted that unless the orders sought herein by his client were granted, the 1st Respondent would suffer irreparable loss and harm to its business and reputation as a professional organization and that no other remedy would be convenient, beneficial or effectual.

15. Counsel submitted that while applying for the orders issued on the 3rd of April 2017, the Applicant/Respondent herein willfully elected not to disclose to the Court that the amount of money paid into account number **01136092868400**, in the name of **Nyandoro & Co. Advocates, Office** account held

at the 2nd Respondent, Kitengela Branch was legal fees payable with regard to **Nairobi ELC No. 393 of 2013; Church Commissioners for Kenya v. County Council of Olkejuado & Another.**

16. Mr. Okongo Omogeni submitted that the fees had been negotiated subsequent to a bill of costs being filed vide **ELC Misc. Application No. 20 of 2017.** That contrary to the express provisions of **Section 27 and 28 of the Anti-Corruption and Economic Crimes Act, 2003** the 1st Respondent/Applicant herein was never notified by the Applicant/Respondent to produce specified records in his possession, to aid in whatever investigations the Applicant/Respondent was engaged in.

17. Counsel contended that the 1st Respondent/Applicant's constitutional rights to privacy as enshrined under **Article 31** of the Constitution: right to acquire and own property and not to be arbitrarily deprived of it as provided under **Article 40** of the **Constitution of Kenya**; the right to fair administrative action as elucidated under **Article 47** of the Constitution of Kenya; and the right to a fair trial as constituted under **Article 50 (1)** of the Constitution were grossly violated as well as the provisions of the **Anti-Corruption and Economic Crimes Act, 2003.**

18. Mr. Omogeni averred that from the facts before the Court, the ex-parte orders were obtained anchored upon material non-disclosure and the only remedy was to discharge and/or set them aside. Counsel submitted that the net effect of the Preservatory ex-parte orders was that the 1st Respondent/Applicant herein is unable to access its only existing office account, the consequence of which was that it cannot pay its staff members, pending bills and/or maintenance costs, an endeavor that threatened its livelihood.

19. Counsel submitted that from the application before court, the Affidavit by Arthur Opili was merely speculative contrary to the express provisions of **Section 56** of the **Anti-Corruption and Economic Crimes Act, 2003** which required cogent evidence before the harsh orders therein could be granted. He argued that **Section 56 of the ACECA, 2003** provided in unequivocal terms that an ex-parte application by the Commission to the court for purposes of preserving 'suspect property' ought to be supported with evidence that the property was acquired as a result of corrupt conduct.

20. According to counsel this presupposed that first, an application could not and ought not to be brought before the Court during preliminary investigation stages and second, the application ought to contain some sort of proof that the property was acquired as a result of corrupt conduct.

21. Counsel submitted that no reasonable grounds had been provided by the Applicant to justify why the 1st Respondent/Applicant's fundamental rights and freedoms should be limited to the extent of closing down its business. That if the Court did not grant the orders sought herein, the 1st Respondent/Applicant would be at risk of closing down its business for merely carrying out its professional duties.

22. Counsel urged that the application before the court was laced with shockingly unfounded, inconceivable and malicious falsehoods and anchored upon material non-disclosure that was well within the Commissions knowledge, the effect of which was that the ex-parte orders granted ought to be discharged forthwith.

23. Counsel gave a chronology of events stating that the primary suit for which the 1st Respondent/Applicant rendered services and was paid had been in existence and pending in court for the last 14 years having first been filed in the Civil Division of the **High Court at Nairobi as Nairobi HCCC No. 72 of 2003 - Church Commissioners of Kenya vs Kisaju Development Trust & Olkejuado County Council.** Further that over the 14 years, the suit had various firms of advocates act for the various parties on different occasions. That M/s F.W Njoroge was one of the firms of Advocates to represent the County Government until sometime in 2012 when it fell out with the County Government on account of unpaid legal fees.

24. Counsel submitted that on 19th March 2012, the County Government formally instructed the 1st Respondent/Applicant to take over this matter from the firm of F.W Njoroge & Co. Advocates and pursuant to those instructions, the 1st Respondent/Applicant filed Notice of Change of Advocates in the

High Court on 20th March 2012. Upon coming on record, the 1st Respondent/Applicant attended Court several times on behalf of their client.

25. On 16th February 2017, after writing numerous letters requesting that their legal fees be paid, they wrote a letter of even date to the county Government informing it that they had reached the painful decision of taxing their bill of costs so as to rightfully get their legal fees. The said letter however, also urged the County Government to pay their legal fees to avoid taxing of the bill. On the same date they filed their Advocate Client Bill of Costs in the High Court.

26. On 13th March 2017, they attended court for Taxation of their bill of costs but in the absence of any county Government's appointed representative for purposes of the taxation, the matter was fixed for mention on 30th March 2017 to allow them to file their submissions on the bill. On 30th March 2017 they informed the court that the county government had initiated negotiations with a view of reaching an out of court settlement. The bill was fixed for mention on 2nd May 2017 to record a possible consent.

27. Counsel urged that the application by the Commission was largely vague, sketchy and replete with conjecture and speculation. It failed to disclose how much money had been paid into the Applicant's account. Instead it only speculated that 'a lot of money' had been paid into the applicant's account, without annexing any evidence that the said money had been deposited into the applicant's account.

28. The deponent had averred that he is an Advocate of the High Court of Kenya with over 20 years of experience in private legal practice and has never participated in any corrupt dealings, neither has he ever been implicated or been subject of any complaint on corruption allegations by any professional or investigative agency.

29. He deposed that unless lawful or just cause was demonstrated by the Applicant to warrant their interference or involvement, the affairs between an Advocate and his client in relation to legal fees and other issues were private matters protected by advocate/client confidentiality and any attempt to intermeddle ought to be zealously opposed.

30. In a further affidavit dated 12th April 2017 Mr. Yabesh Nyandoro Kambi deponed that having gone through the application dated 5th April 2017 and by dint of better access to documentation related to account number 01136092868400 subsequent to the order of the court issued on 7th April 2017, he further supports his application with facts hereunder.

31. That contrary to the malicious false allegations made in the Respondent/Commission's Affidavit dated 30th March 2017, the "huge sum of money" alleged to have been received illegally from the County government of Kajiado was a total of Kenya shillings five million eight hundred and thirty eight thousand, seven hundred and ninety three and ten cents (Kshs. 5,838,793.10) and not ten million shillings as was alleged.

32. That as is discernable from the bank statement attached, subsequent to the fulfillment of the firm's statutory obligations, loan deductions and other necessary firm expenditures, the amount of money that remained as at 3rd April 2017 when the preservatory order was issued was Ksh. 2,626,033.07. The order issued by the court on the 7th of April 2017 limiting the balance of the account number 01136092868400 at the 2nd Respondent bank was therefore in vain and should thus be discharged.

33. The deponent averred that by dint of valuation report the approximate value of the property the subject of litigation in **Nairobi ELC No. 393 of 2013; Church Commissioners for Kenya v. Kisaju Development Trust & County Council of Olkejuado** is collectively Kshs. 12,000,000,000. That under Schedule VI of the Advocates Remuneration Order 2009 the minimum fees an advocate could charge for property worth 12 billion is Kshs. 225,160,000/=, excluding disbursements and other incidentals which amount became due at the point of instructions and upon filing of the Notice of change of Advocates.

34. That the County only paid a total of Kshs. 9,800,000.00 staggered over years with a payment of Kshs. 1,400,000.00 in the year 2014, Kshs. 2,600,000 in the year 2015 and most recently Kshs. 5,800,000.00 on the 24th of March 2017. That on account of the foregoing, the 1st Respondent/Applicant filed a Bill of costs before the High Court for assessment of fees, which assessment was coming up for a hearing on the 5th of May 2017 for a possible out of court settlement.

35. Counsel urged that it was not the mandate of the Respondent/Commission to ascertain how much money an advocate of the High Court of Kenya could be paid as fees on account of work done, thus having an opinion as to what constituted being excessive, which mandate is given to a Taxing Master. That an Advocates client could always institute proceedings before the Advocates' Disciplinary Tribunal and/or the Advocates Complaints Commission if they were of the opinion that they paid fees excessively.

ISSUES FOR DETERMINATION:

36. Having considered the pleadings, the submissions of the respective parties and the authorities relied on, the main issues emerging for determination is whether the Respondent/Applicants have demonstrated reasonable grounds on a balance of probability, that the funds in the frozen accounts were not acquired as a result of corrupt dealings.

37. **Section 56(1) of the Anti-Corruption and Economic Crimes Act** 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 on evidence that the property was acquired as a result of corrupt conduct.”

The Court therefore has Jurisdiction to issue *ex parte* orders prohibiting a party from accessing, or disposing of and can also prevent the said party from engaging in other dealings with the property which is said to have been acquired by corrupt means.

38. **Article 24 of the Constitution** makes exceptions where a law (such as **ACECA**) can provide for the limitation of the rights or fundamental freedoms of individuals if it is necessary. Under ACECA such limitations may be necessary for examination, investigation, trial or inquiry and 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 with the public interest. It is not out of proportion with the objectives of the Act or the Constitution.

39. The Respondent Commission questioned the money received from Kajiado County said to be about Kshs. 13,433,062.06 from 2015 to 2017. They contended that as at 17th June 2016, the Applicant's interim fee note was Kshs. 26,000 which had not been paid and for which the bill of costs had been filed. In response the Applicant demonstrated that the amount of fees claimed in the bill of costs dated 16th February 2017 was anchored in law based on the value of the subject matter of the suit, being a parcel of land estimated to be worth about Kshs. 12 billion.

40. The 1st Respondent/Applicant has provided a chronology of the services provided to their client which gave rise to the fees which constitutes the money paid into their account. The 1st Respondent/Applicant has therefore provided a reasonable explanation on the nature of business it had with the County government of Kajiado to warrant the payments into their accounts which the EACC termed as “unexplained numerous payments.” Indeed the application is largely vague, and sketchy and does not disclose how much money is under scrutiny in the Applicant's account.

41. The 1st Respondent/Applicant has provided an elaborate and systematic illustration of the professional services rendered to the county government. These are matters that are easily verifiable from the county government of Kajiado and/or from the court registry at Nairobi. The amount of fees to be claimed by an advocate in a bill of costs is anchored in law and the value of the subject matter of the suit is pertinent. In this case the court was told that the subject matter is a piece of land whose current market value is

estimated to be about Kshs. 12 billion.

42. Unless lawful or just cause is demonstrated to warrant interference the relationship between Advocate and the client is a private matter protected by advocate/client confidentiality. Taxing the bill of costs is a mandate that belongs to the Taxing Master. In **Ouma v Warega [1982] KLR pg 288** Law JA held inter alia that the:

“Court of Appeal is always reluctant to interfere in questions of quantum in which the taxing officers have far greater experience unless a question of principle is involved and which was absent in this case.”

43. The County government of Kajiado, being a client, has relief through several avenues where it is not satisfied with the bill of cost. It can have the bill taxed with the further option of appeal to the High Court and the Court of Appeal. Alternatively it has recourse before the Advocates’ Disciplinary Tribunal and/or the Advocates Complaints Commission in any instance where it is of the opinion that the fees demanded was excessive.

44. This is not to say that the court cannot interfere with the Advocate client relationship where there is evidence that such relationship is in furtherance of illegal activity. I agree with the observations of Lenaola J (as he then was) in the case of **Director of Public Prosecutions vs Nairobi Chief Magistrate’s Court & Another (2016) eKLR** where stated 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.

45. 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 of individual and the public interest. In the case of **Manfred Walter Schmitt & another v Attorney General & 3 others [2014] eKLR Majanja J**, observed thus:

“.....The Court is not a conveyor belt for issuing warrants when an application is made nor must the court issue warrants of search and seizure as a matter of course. 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 a reasonable evidence of commission of a crime by the person it seeks to implicate by the application for search and seizure.”

46. Where the EACC seeks to rely on suspicion of corruption to freeze a suspected account, it should meet the threshold of reasonable grounds to suspect that an offence may have been committed or is about to be committed. That threshold is normally assessed from the cogency of evidence or information presented to the Court.

47. In prayer (c) the 1st Respondent/Applicant prayed for a permanent order of Injunction to issue against the Applicant, prohibiting either by itself, its servants, agents and/or assigns from investigating or further investigating, inspecting or further inspecting, or howsoever interfering with the general operation of account no. 01136092868400 pending the hearing and determination of the application inter-parties

48. The EACC is mandated by **Article 252 (1) (a)** of the **Constitution** as well as **Sections 11(1) (j) and 13(2) (c)** of the **Ethics and Anti-Corruption Commission Act** to conduct investigations against any person and institute court proceedings for purposes of recovery and/or protection of public property or for freezing or confiscation of proceeds of corruption or activities related to Corruption.

49. The Commission cannot be stopped from carrying out its mandate as set out above and therefore prayer (c) by the Applicant cannot succeed. To grant such an order would only serve to fetter the

Constitutional operational mandate of the Commission. Should the Commission come upon further evidence there is nothing to stop it from moving the court afresh. As it is now the orders granted on 7th April 2017 are incapable of execution as the funds in the subject account were already way below the Kshs.6.5 million which the court ordered to be held as the reserve.

50. In the end I find that the Applicant/1st Respondent's Notice of Motion dated 5th April 2017 has merit and order that the preservation orders issued by this court on the 3rd of April 2017 be and are hereby discharged and set aside. Accordingly, the freezing order placed upon Account Number 01136092868400 is hereby lifted and the Applicant is allowed to access the said account.

51. There no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3rd DAY OF May, 2017

L. A. ACHODE

JUDGE

In the Presence of: Mr. Opondo and M/s. Ndinda for EACC.