



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA, AT NAIROBI
ANTI-CORRUPTION & ECONOMICS CRIME DIVISION
ACEC MISC. CIVIL APPLICATION NO. 41 OF 2017

ETHICS & ANTI-CORRUPTION COMMISSION APPLICANT

VERSUS

EQUITY BANK KENYA LIMITED1ST RESPONDENT

ALEX MUKHWANA KHISA2ND RESPONDENT

RULING

1. The Ethics and Anti-Corruption Commission (the Applicant) has filed the Originating Motion dated 6th April 2017 seeking the following orders;

*1. An order do issue freeze account No. [particulars withheld] in the name of **Alex Mukhwana Khisa** held at Equity Bank of Kenya Limited Kawangware Branch thereby prohibiting the Respondents, by themselves or through their agents, servants or assigns from transferring, disposing of, wasting or in any other way dealing with the said accounts for a period of six (6) months.*

2. There be no orders as to costs.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of Philip G. Kagucia an investigator with the Applicant.

3. The Applicant's case is that the 2nd Respondent, an employee of Kenya Revenue Authority (KRA) operates A/c No. [particulars withheld] Equity Bank Kawangware Branch. This account currently holds a credit in the sum of Kshs.467,566.71. The Applicant contends that there are investigations in respect of the 2nd Respondent's conduct which involves corruption practices and it is believed he has abused his office by soliciting and receiving bribes.

4. The Applicant is apprehensive that if the money in the above mentioned account is not preserved, the 2nd Respondent will dispose of it before the Applicant concludes its investigations.

5. **Mrs. Ndungu** for the Applicant in her submissions argued that even if the money in the said account was legitimately gotten, they would still go for it if their investigations confirmed the allegations against the 2nd Respondent. Annexed to the application are the 2nd Respondent's bank statements running from 2013-2017 (PGK 2).

6. The 2nd Respondent filed a replying affidavit and annexed his full bank statements covering the year 2013-2017. He denied all the allegations by the Applicant and states that all the credits into this account are his salary from KRA which amount has accumulated with time.

7. **Mr. Odoyo** for the 2nd Respondent submitted that the application was an abuse of the Court process and was frivolous and added that there was no basis for the orders sought. No evidence of the allegations of corruption had been tabled before the Court. He referred to paragraphs 1 and 2 of the Certificate of Urgency. He submitted that all the deposits in the said account were from the 2nd Respondent's employer KRA and it had not been shown anywhere that the deposits are from other sources.

DETERMINATION

8. The Applicant has filed this application under Section 56 of the Anti-Corruption & Economic Crimes Act (ACECA) and Section 11 (1) (j) of the Ethics and Anti-Corruption Commission Act (EACCA)

Section 56 of ACECA provides;

(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 on evidence 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 the 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.

(4) A person served with an order under this section may, within fifteen days after being served, apply to the Court to discharge or vary the order and the Court may, after hearing the parties, discharge or vary the order or dismiss the application.

(5) The Court may discharge or vary an order under subsection (4) only if the Court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.

(6) A person who is served with an order under this section and who contravenes it is guilty of an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.

(7) In this section, "corrupt conduct" means—

(a) conduct that constitutes corruption or economic crime; or

(b) conduct that took place before this Act came into operation and which —

(i) at the time, constituted an offence; and

(ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

Section 11 (1) (j) of EACC Act provides;

"(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—

(j) institute and conduct proceedings in Court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.”

9. When this matter was filed under Certificate of Urgency, the reasons given for the urgency were;

a. The 2nd Respondent, a KRA officer who is currently being investigated by the Applicant is using his bank account as a conduit for depositing and transferring money from proceeds of crime.

b. The 2nd Respondent has an Account No. [particulars withheld] domiciled with the 1st Respondent and the same is currently holding the sum of Kshs.467,566.71 believed to have been received from the proceeds of corruption.

10. From the onset, the Applicant had to satisfy this Court that indeed there are deposits and transfers on this account which would cause some suspicion of illegal activities going on. I must point out that annexure (PGK 2) are selected bank statements of the above account for the years 2013 – 2017. On the other hand, annexures (AMK – 1) is a full bundle of all the banks statements in respect of the said account during the same period. These have been produced by the 2nd Respondent. One would wonder why the Applicant who had full access to the account could not table all those bank statements before the Court.

11. A perusal of the bank statements (PGK 2 and AMK – 1) reveals that the deposits on this account have come from KRA, save for a deposit of Kshs.202,120/- on 21st November, 2013 and the source is shown as 8224. There is also a deposit of Kshs.1,047,192/= on 28th November, 2014 and the source is Ushuru Sacco. The KRA deposits are on a monthly basis which is presumed to be the officer’s monthly salary. All these deposits are from known sources.

12. The record also shows that when this application was first placed before this Court, it was observed and noted that there is already another case involving the 2nd Respondent (HC ACEC No. 40 of 2017) where account Nos. [particulars withheld] and [particulars withheld] have already been frozen by the Orders of this Court.

13. The other two accounts having been frozen, the Applicant cannot say it has nothing to hold onto in the event of a positive result in the investigations. Secondly, and above all, there is nothing tabled before this Court to show that indeed proceeds of crime have been deposited into this account or transferred through it. The issue of freezing the account for proceeds of crime yet to be established is too speculative. It will be to the detriment of the 2nd Respondent if this account were frozen when there is no scintilla of evidence to show illegal deposits and transfers. He has a right to his salary.

14. In conclusion, I find that the Applicant has failed to satisfy this Court in the slightest way that the money in the 2nd Respondent’s account no. [particulars withheld] Equity Bank Kawangware Branch is proceeds of crime or linked to proceeds of crime. I find no merit in the application which is dismissed with costs.

Orders accordingly.

Delivered, signed and dated this 14th day of June, 2017 at Nairobi.

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HEDWIG I. ONG’UDI

HIGH COURT JUDGE