



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION)
MISCELLANEOUS APPLICATION NO. 11 OF 2017

**ETHICS & ANTI CORRUPTION AND
ECONOMIC CRIMES ACT.....APPLICANT**

-VERSUS-

FASTLANE FREIGHT FORWARDERS LIMITED.....1ST RESPONDENT
SPRINGBOARD CAPITAL LIMITED.....2ND RESPONDENT
MASH LOGISTICS.....3RD RESPONDENT
SILVERBERG ENTERPRISES.....4TH RESPONDENT
CREDIBLE HEALTH CENTRE.....5TH RESPONDENT
SINGAPORE MOTORS LIMITED.....6TH RESPONDENT
REUBEN MUNA.....7TH RESPONDENT
ELVIS EXCLUSIVE TEXTILE LIMITED.....8TH RESPONDENT
ASTROL PETROLEUM COMPANY LIMITED.....9TH RESPONDENT

RULING

1. Two applications were presented. The first filed by the 9th Respondent/Applicant is dated 1st February 2017, while the second filed by the 1st Respondent/Applicant is dated 15th February 2017. The applications were heard together and both sought primarily to review, set aside and/or discharge the order issued by the court on 16th January 2017 freezing various sums of monies held in the respondent’s bank accounts.

2. Pursuant to intelligence reports, the EACC commenced investigations into allegations of corruption and fraud involving public officials at the state department of Public Service and Youth under the Ministry of Public Service, Youth and Gender Affairs. Based on the findings from the investigations, the EACC through its originating Notice of Motion dated 16th January 2017 filed under certificate of

urgency, sought and was granted preservation orders prohibiting the respondents jointly and severally, from withdrawing, transferring or in any other way dealing with monies held in the various bank accounts in the names of the respondents. The order was to subsist for 6 months to enable the EACC complete its investigations.

1ST APPLICANT/ RESPONDENT'S

3. The 1st Applicant in their originating summons dated 15th February, 2017 prayed that the court do set aside and/or discharge its order made on 16th January, 2017 prohibiting Applicants by themselves or through their Agents or servants from transferring, disposing of, wasting or in any way dealing with:

- a) Kshs.1,592,847/= held in Giro Commercial Bank Ltd, account No. [particulars withheld], Kshs. 962,380/= held in Giro Commercial Bank account No. [particulars withheld] both in the name of Fastlane Freight Forwarders Limited.
- b) Kshs.1,398,100/= held in Equity Bank Account Number [particulars withheld] in the name of Springboard Capital Ltd.
- c) Kshs.2,864,905/= held in Equity Bank Account number [particulars withheld] in the name of Mash Logistics
- d) Kshs.3,044,000/= held in Equity Bank account number [particulars withheld], in the name of Silverberg Enterprises
- e) Kshs. 2,845,135/= held in Equity Bank Account number [particulars withheld], in the name of Credible Health Centre
- f) Kshs.12,396,500/= held in Equity Bank Account number [particulars withheld], in the name of Singapore Motors Ltd.
- g) Kshs.2,408,290/= held in Equity Bank Account number [particulars withheld], in the name of Reuben Muna.
- h) Kshs.3,900,000/= held in Nic Bank account [particulars withheld], in the name of Fastlane Freight Forwarders Limited.
- i) Kshs.2,160,000/= held in Bank of Africa Account number [particulars withheld], in the name of Elvis Exclusive Textile Ltd.
- j) Kshs.15,000,000/= held in Bank of Africa account number [particulars withheld], in the name of Fastlane Freight Forwarders Limited.
- k) Kshs.1,000,000/= held in Barclays Bank account number [particulars withheld], I the name of Astrol Petroleum co. Ltd.

4. The application was premised on grounds that the order freezing the Applicants bank accounts without affording them right to be heard was unconstitutional, unfair, draconian and unreasonable as the said accounts contain funds that are not the subject of the investigations by the Commission. That the Directorate of Criminal Investigations has already investigated the matter and reached a conclusion that the funds that are subject to the freezing order were legitimately paid to Fastlane Freight Forwarders Limited and were not acquired from corrupt conduct. That the said order has rendered the Applicants unable to meet their financial and contractual obligations and has caused them severe hardship and loss.

9TH APPLICANT/RESPONDENT'S

5. Their Notice of Motion Application is dated 1st February 2017 and is supported by the affidavit of James Mwangi Kamau and his further affidavit dated 13th February 2017. It is brought pursuant to Section 1A, 1B, 3A and 80 of the Civil Procedure Act, Order 45 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules and Section 56(B) of the Anti-Corruption and Economic Crimes Act (Cap 65).

6. The deponent submits that the funds paid to the 9th Applicant/Respondent were for payment for petrol and diesel supplied at the request of one of the Applicant's customers, a Mr. Kahenya on diverse dates between August 2016 and October 2016 out of which the balance of Kshs. 1,000,000/= was unpaid. On the 4th of January 2017, Mr. Kahenya settled his account making payment of Kshs. 1,000,000/= to their account.

7. The deponent contends that the Commission ought to have applied for payment to be frozen from the offending account and not the Applicant's account as there is no link between the Applicant and the institution suspected to have swindled public funds. Further that the Commission having failed to protect the funds from exiting the offending account they could not thereafter pursue payments made to legitimate creditors such as the Applicant. That the Applicant is a growing business and its being mentioned or associated with suspected corrupt dealings and the freezing of its funds has greatly tarnished its reputation.

8. The Applicant argues that their claim was legitimate and they would not reasonably be expected to know the source of each customer's funds and authenticate every purchase of fuel it being a Fuel Station. They are an innocent victim and ought not to be treated as an offender and it was incumbent upon the Commission to verify any information in their possession before taking drastic steps which have caused the Applicant great distress, ridicule and embarrassment in the public eye. They pray that the freezing be set aside.

9. In opposing the applications, the Respondent (Commission) relied on replying affidavits dated 7th February 2017 and 2nd March 2017 sworn by Makupe Chiwaya and Bonface Waweru respectively. The Commission puts forward the following issues for determination:

- a. Whether there was reasonable suspicion of corrupt conduct by the respondents?
- b. The extent of the freezing orders
- c. Whether the respondents proved to the required standard that the property subject of the preservation order was not acquired as a result of corrupt conduct?
- d. Whether Section 56 of the Anti-Corruption and Economic Crimes Act is unconstitutional?

10. On the issue of reasonable suspicion of corrupt conduct, it is submitted that the preservation orders that the 1st and 9th respondents seek to have reviewed, set aside, varied or discharged were obtained by the Commission after satisfying the court that there were reasonable grounds to suspect that the monies in the respondents bank accounts were acquired as a result of corrupt conduct. Counsel relied on **Section 56(1) of the Anti-Corruption and Economic Crimes Act**.

11. On the definition of reasonable suspicion the Commission referred to **Black's Law Dictionary 9th Edition at page 1585**, the case of **Timothy Isaac Bryant & 2 others -v- Inspector General of Police and 7 others (2014) eKLR**, the case of **Rondo (2001) 126 ACrim R.56** and the decision in **Emmanuel Suipanu Siyanga -v-Republic, Criminal Appeal 124 of 2009** respectively.

12. Counsel argues that the Commission has demonstrated to the court that the money in question was irregularly and fraudulently transferred to the 1st Respondent's bank account by the aforesaid state department. The 1st Respondent did not tender for those services during the 2015-2016 financial year, or execute any contract with the said state department pursuant to any such tender, or services rendered to

the said state Department to warrant the payments in question.

13. In addition, it is contended that the court was shown that the payment in question was made by the said public department to the 1st Respondent on the basis of suspicious documentation. Such as Payment Invoice No. [particulars withheld] dated **16th December 2014** which was received by the state Department from the 1st Respondent six months before the 1st Respondent was purportedly awarded the relevant tender.

14. On the extent of the freezing orders it was argued that the court was shown clear grounds of fear of dissipation of the monies, from the 1st Respondent's bank statement which shows that subsequent to receiving the sum of Ksh 209,315,427/= from the State Department of Public Service and Youth, the 1st Respondent transferred various amounts totalling Kshs.79,345,157/= between the 3rd to 5th January 2017, from its bank account Number [particulars withheld] domiciled at the National Bank of Kenya, Sameer Park branch, to the bank accounts of the 2nd to 9th Respondents. It was thus necessary to obtain the freezing orders against the amounts transferred by the 1st Respondent to the 2nd to 9th respondents, to prevent further loss of the said funds, pending completion of the investigation.

15. It is also submitted that the freezing of the Kshs. 1,000,000 paid into the 9th Respondent's account by the 1st Respondent was proper as the said funds are traceable to the money the 1st Respondent was paid by the State Department of Public Service and Youth pursuant to a procurement which is the subject of on-going investigations by the Commission to ascertain the 9th Respondent's role in the financial transactions.

16. It is submitted on the third issue for determination that **Section 56(2)** empowers a court to issue preservation orders against a person who subsequently acquired the property. The Commission relied on the case of **Ethic & Anti-Corruption Commission -v- Njage Makanga & 2 others (2017) eKLR**, where the court stated that the burden of proof as articulated under the provisions of **Section 56(5)** of the **Anti-Corruption and Economic Crimes Act** is on a balance of probabilities and lies with the Applicants/Respondents.

17. The Commission urged that both the 1st and 9th Respondents have not discharged this burden as none of them demonstrated that the frozen property was not acquired as a result of corrupt conduct. That while the 9th Respondent maintains that no allegation of corrupt conduct was brought against it, the Commission has shown the Court that the 9th Respondent was a recipient of the money corruptly acquired by the 1st Respondent.

18. The Commission further argues that Mr. Kahenya to whom fuel was supplied and the 1st Respondent are not one and the same person, following the principle espoused by the House of Lords in **Salomon -v- Salomon & Co. Ltd (1897)**, that a company is a distinct and separate legal entity from its directors and shareholders.

19. The Commission also submits that it is an independent constitutional office established under **Section 79** of the Constitution. It is empowered to conduct investigations on its own initiative, or on a complaint made by a member of the public, and is not subject to the directions, nor is it bound by previous investigations carried out by DCIO or other agencies.

20. The Commission asserts that inability to meet financial and other contractual obligations as pleaded by the 1st Respondent is not one of the grounds upon which a court can discharge, or vary a preservation order as stated in the case of **EACC -v- Njage Makanga & 2 others (supra)**. Further that the order sought by the 9th Respondent to review or set aside part of the freezing orders is not provided for under the **Anti-Corruption and Economic Crimes Act, 2003, Section 56(4)** which, empowers the court to only vary or discharge such preservation orders.

21. On the fourth issue on the Constitutionality of **Section 56** of the **Anti-Corruption and Economic Crimes Act**, both the 1st and 9th Respondent submit that the issuance of the freezing orders ex-parte without giving them an opportunity to explain how the said funds were acquired is unconstitutional as it infringes on their right to fair hearing as provided under **Article 50** of the **Constitution**.

22. The Commission on the other hand has pointed to various legal authorities that recognize the importance of ex-parte applications when seeking freezing orders. They cite the book titled '**Freezing and Search Orders**' by **Mark S.W. Hoyle, Fourth Edition at page 31**, on the reason for seeking freezing orders, the publication titled "**Stolen Asset Recovery, A Good Practices Guide for Non-Conviction Based Asset Forfeiture**" where the need for obtaining freezing orders ex-parte was recognised. Miss Okeno also relied on the findings of the Court in the South African case of **National Director of Public Prosecutions -v- Mohamed N.O and others (2003) ZACC 4**.

23. The Commission therefore urges that the provision for issuance of ex-parte freezing orders under **Section 56** of the **Anti-Corruption and Economic Crimes Act** is not unconstitutional, neither does it infringe on the Respondents' right to fair hearing as provided for under **Article 50** of the Constitution. That it is necessary to reduce the risk of dissipation of funds suspected to have been acquired as a result of corrupt conduct a position which was upheld in the case of **Kenya Anti-Corruption Commission -v- Lands Limited & 7 others (2008)** where the court stated that Section 56 of the ACECA had an inbuilt right of hearing on merit at the earliest opportunity in the High Court which was the citadel of Constitutional enforcement of fundamental rights and the Constitution.

24. Both Applicants in their submissions contend that the Commission failed to meet the requirements of **Section 55(2)** of the **Anti-Corruption and Economic Crimes Act** that prescribes the conditions to be fulfilled by the Commission prior to the institution of proceedings. The Commission in response states that **Section 55 of the ACECA** deals with the forfeiture of unexplained assets which are the proceedings it will commence on completion of investigations.

25. The orders obtained and which are subject of the two discharge applications by the respondents were obtained under **Section 56** and not **Section 55** of the ACECA and therefore the procedure envisaged under **Section 55(2)** does not apply. The Commission has therefore urged the court to dismiss the applications with costs.

26. The 2nd Respondent filed a Replying affidavit sworn by the Chief Executive Officer Mr. Wilson Karanja on 14th March, 2017 and submissions which did not appear to either oppose or support the two applications before the court.

Issues for determination:

27. Having considered the pleadings, the submissions of the respective parties and the authorities relied on, I considered the matter along the issues I have framed by the Commission as follows:

- a. Whether there was reasonable suspicion of corrupt conduct by the respondents?
- b. The extent of the freezing orders
- c. Whether the respondents proved to the required standard that the property subject of the preservation order was not acquired as a result of corrupt conduct?
- d. Whether Section 56 of the Anti-Corruption and Economic Crimes Act is unconstitutional?

Analysis and findings:

28. *On the issue of reasonable suspicion* it has not been disputed that the 1st Respondent received payment of **Kshs. 209,315,427** on **20th December 2016**, deposited into its bank account No. [particulars

withheld] domiciled at National Bank of Kenya, Sameer Park Branch. The said payment was for alleged reimbursable of direct clearing and forwarding costs for National Youth Service Equipment Phase II-2ND delivery, services which were not shown to have been rendered.

29. The Ministry of Public Service, Youth and Gender Affairs does not appear to have tendered for the provision of the aforesaid services during the 2015-2016 financial year and no contract has been exhibited between the said ministry and the 1st Respondent pursuant to any such tender as a basis for the aforesaid payment. Prima facie there is no evidence that the 1st Respondent rendered any services to the said Public Department during the aforesaid financial year to warrant any such payment.

30. The documentation which formed the basis for payment raises reasonable suspicion. The payment was purportedly made pursuant to Payment Invoice No.[particulars withheld] dated **16th December 2014** which had been received by the said Department from the 1st respondent. On the 16th June 2015, the Principal Secretary, Ministry of Devolution and Planning vide letter Ref No. MDP/12/20 sent a Notification of Award to the Managing Director of the 1st respondent requiring him to accept the amount of Ksh.220, 732,633.42 as clearing agents for the National Youth Service Equipment Phase II-2nd delivery.

31. The purported Award was not made pursuant to any procurement process as provided for in the **Public Procurement and Disposal Act, 2005** and the **Public Procurement and Disposal Regulations 2006**. On the 18th of June 2015, the Managing Director of the 1st respondent wrote to the Principal Secretary, Ministry of Devolution and Planning accepting the aforesaid Award.

32. The documentation therefore creates reasonable suspicion that the payment of Kshs. 209,315,427/= by the Public Department to the 1st respondent was illegal as the said payment was made on the basis of the Payment Invoice which was issued by the 1st respondent 6 months before the 1st Respondent was awarded the relevant tender. The 1st Respondent appears to have sought payment even before the alleged contract was awarded. The payment for the amount of Kshs. 209,315,427/= by the state Department to the 1st Respondent was done two years after the invoice was raised by the 1st Respondent and more than one year after the Notification of the Award by the Principal Secretary.

33. **Section 56(2)** of the **Anti-Corruption and Economic Crimes Act** empowers a court to issue preservation orders against a person who subsequently acquired the property while under **Section 56(4)** of the **Anti-Corruption and Economic Crimes Act**, that preservation orders can only be discharged or varied if the court is satisfied on a balance of probabilities that the property was not acquired as a result of corrupt conduct.

34. Under sections **56(4)** and **(5)** of the Anti-Corruption and Economic Crimes Act:-

“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 burden of proof is provided under section 56 which states that the Court may discharge or vary an order under sub section (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.”

35. The Commission moved to court to obtain the preservation order to allow it to conclude investigation into the allegations of corruption between the Ministries and the 1st Applicant/Respondent and also preserve the property to avoid dissipation of public funds. What are before the court are allegations that require further investigations by the Commission.

36. In the book titled **Freezing and Search Orders’** by **Mark S.W. Hoyle, Fourth Edition** at page 31

to which the Commission referred the court, it is stated that:-

“A freezing order is sought because the claimant fears the consequences of not restraining the defendant. Thus, in whichever court the application is made, it is almost always without notice, based on affidavit or draft affidavit evidence...”

Although no specific allegation of corrupt conduct has been made against the 2nd to 9th Respondents in this case, it is not disputed that they received various sums of monies from the 1st Respondent which money flowed from the Ministry of Public Service Youth and Gender Affairs.

37. The contention of the 9th Applicant/Respondent that the Commission having not made an allegation of corrupt conduct on their part, and having failed to freeze the funds before the funds left the Respondent’s account the Commission had no basis of seeking the freezing of the Kshs. 1,000,000 transferred to its account from the 1st Respondent’s account is misconceived.

38. It is therefore the finding of this court that the freezing of the Kshs. 1,000,000/= paid into the 9th Respondent’s account by the 1st Respondent was proper as the said funds were traceable to the money the 1st Respondent was paid by the State Department of Public Service and Youth pursuant to a procurement which is the subject of Commission’s investigations.

39. On whether the Respondents have proved to the required standard that the subject of the preservation order was not acquired as a result of corrupt conduct the Commission brought the present application under **Section 56(1)** of the **Anti-Corruption and Economic Crimes Act** which 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.”

40. Investigations by the Commission revealed through the 1st Applicant/Respondent’s bank statement that subsequent to receiving the sum of Kshs. **209,315,427/=** from the State Department of Public Service and Youth, the 1st Respondent transferred various amounts totaling Kshs. **79,345,157/=** between the 3rd to 5th January 2017, from its bank account Number [particulars withheld] domiciled at the **National Bank of Kenya**, Sameer Park branch, to the bank accounts of the 2nd to 9th Respondents.

41. The law merely requires the High Court to satisfy itself that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct for it to make an order prohibiting the transfer or disposal of or other dealing with the property. That is the basis upon which the court herein was moved based on the evidence that was placed before it.

42. The 1st Respondent did not furnish evidence to show that the preserved property was not acquired as a result of corrupt conduct instead they relied on the findings of the Directorate of Criminal Investigations which is not sufficient to show that the said funds were genuinely acquired. The Commission as an independent Constitutional office established under **Section 79** of the **Constitution** is empowered to conduct investigations on its own initiative or on a complaint made by a member of the public. It is not subject to the directions and or is it bound by previous investigations carried out by other agencies it is therefore not sufficient for the 1st Respondent to rely on the findings of the Directorate of Criminal Investigations to prove that the preserved property was not acquired as a result of corrupt conduct.

43. On the constitutionality of **Section 56** of the **ACECA** the **South African** case of **National Director of Public Prosecutions -v- Mohamed N.O and others (2003) ZACC 4**, to which the Commission referred this court is pertinent. The said case considered whether South Africa’s ex-parte statutory preservation provisions similar to Kenya’s Section 56 of the ACECA were unconstitutional because they denied a fair hearing in court.

44. The South African court in upholding the said provision stated that while the statute may be a temporary deprivation of the right to fair hearing under the South African Constitution, such a limitation was justified as it “...enables the Act to function for the legitimate and most important purpose for which the Act was designed,...and to reduce the risk of the dissipation of the proceeds and instrumentalities of organized crime.”

45. In the publication titled “**Stolen Asset Recovery, A Good Practices Guide for Non-Conviction Based Asset Forfeiture**” by the need for obtaining freezing orders ex-parte was justified at *page 55* as follows:-

“The ability to obtain an ex-parte order...for freezing an account should be clearly stated in the forfeiture legislation. The absence of such a provision risks providing a possible loophole and an opening for the dissipation of assets. In addition government officials should be able to obtain documentary evidence such as bank records without notice to the account holder because the account holder can quickly transfer secret assets upon learning that an investigation is underway.”

46. The Applicants/Respondents have not proved to the court, on a balance of probabilities that they deserve the orders they seek of discharging or varying the preservation orders issued to the Commission. Further the orders sought by the 9th Respondent to review or set aside part of the freezing orders are not available under the ACECA. Section 56(4) of the said empowers the court to vary or discharge such preservation orders.

47. From the foregoing it is my finding that the Applicant/Respondents have failed to discharge their burden of proof on a balance of probabilities and decline to discharge the orders of this court issued on 16th January, 2017. The application is hereby dismissed.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **13th day of June 2017.**

.....

L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondents