



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 2 OF 2016

ETHICS & ANTI-CORRUPTION COMMISSION APPLICANT

VERSUS

EQUITY BANK LIMITED 1ST RESPONDENT

OGNAL INVESTMENTS2ND RESPONDENT

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. 5 OF 2016

ETHICS & ANTI-CORRUPTION COMMISSION APPLICANT

VERSUS

EQUITY BANK LIMITED 1ST RESPONDENT

GRAND TOP SOLUTIONS 2ND RESPONDENT

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. 12 OF 2016

ETHICS & ANTI-CORRUPTION COMMISSIONAPPLICANT

VERSUS

EQUITY BANK LIMITED 1ST RESPONDENT

MEDISCOPE AGENCIES LTD 2ND RESPONDENT

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. 13 OF 2016

ETHICS & ANTI-CORRUPTION COMMISSION APPLICANT

VERSUS

EQUITY BANK LIMITED 1ST RESPONDENT

CAPTEC TECHNOLOGIES 2ND RESPONDENT

RULING

This omnibus ruling is for four similar applications namely as named herein above.

In all the four files the applications seeks similar orders, mainly freezing of the accounts of the respective second respondents (hereinafter referred to as respondent) as well as access to those accounts. All applications were filed on the same date. All the respondents in each file were represented by the same counsels. In all the four files, the respondents filed applications to have the interim orders vacated.

The applications dated 19th February, 2016 by the applicant seeks the following orders:

1. **Spent**
2. **THAT the warrant orders granted by this Honourable court on 22nd February, 2016 allowing the Anti-corruption commission or any of its investigations duly appointed to investigate, inspect list original records, application forms, mandate cards, instruction notes, bankers books, statements of account and any other relevant documents to investigate account number belonging to the applicant held at Equity Bank Branch be stayed.**
3. **THAT the prohibitory order issued by this court on 22nd February 2015 to freeze account No. belonging to the applicant held at Equity Bank be stayed.**
4. **THAT the warrant and prohibitory orders issued by this Honourable Court on 22nd February 2016 be varied, discharged and/or set aside.**
5. **THAT the originating summons dated 19th February 2016 be struck out.**

The court granted interim orders. This enabled the applicant to access the accounts of the four respondents. The application by the respondents dated 10th March, 2016 seeks the following orders: -

For purposes of clarity, I will deal with each application separately. However, as indicated hereinabove, the issues are the same.

All the applications are supported by two affidavits sworn by Omar Kofa Komora on 19th February, 2016 and 13th April, 2016 respectively. The respondents filed three affidavits for each file. One affidavit is in support of the applications to have the interim orders discharged. There are two affidavits sworn by SARAH MUSYIMI on 10th March, 2016 are in respect of three files. Sanga Barawah swore three affidavits for file number 12 of 2016. In all the files, the contents of the affidavits are almost the same save for the annexures.

Miss Olivia, counsel for the applicant submitted that they received information on embezzlement of funds from the Kilifi County Government. An internal audit was done and revealed the embezzlement. Counsel relied on two affidavits of Omar Kofa Komora in each file. With regard to file number 2 – OGNAL INVESTMENTS, counsel submitted that the 2nd respondent received payments from schools meant for the construction and supply of materials. There is also a cash deposit of Kshs.55 million in the account. There is a voucher for Kshs.1,849,137.95 dated 9th November, 2015 for supply of three tents with a capacity of 100 people each. The voucher is not supported by bid form or tenders forms. There are no names of directors or quotations given by the 2nd respondent. Other essential document missing is the relevant business questionnaire which reveals the names of the directors. This document is necessary for any payment to be effected.

With regard to file number 5 of 2016, Grand Top Solutions, Miss Olivia submitted that there are minutes

dated 24th June, 2015. There is also a payment voucher for Kshs.8,724,137/= being payment for upgrading of a data centre. The letter of offer is dated 18th May, 2015; the acceptance letter is dated 19th May, 2015. The report on acceptance and investigations is dated 19th May, 2015. The supporting minutes are for June, 2015. The process seems to have started before the minutes were done. There is no form 13 which confirms that delivery was done. There are other susceptible payments to the same respondents. On 2nd September, 2015 there were three payments from the Kilifi County Government. On 6th October, 2015 four payments to the respondents' account were made and other three transactions on 3rd November, 2015. The County Government has nothing to explain why those payments were made.

Concerning file number 12 of 2013, counsel submitted that there is a voucher dated 17th August, 2015 for Kshs.8,820,000/=. This was payment for treated nets. The minutes for the voucher are dated 9th April, 2015. The particular voucher lacks the business questionnaire, request for quotations and tender form. The bank statements give three payments in July 2015, 20th August, 2015 and 21st September, 2015.

Lastly, with regard to file number 13 of 2016, Miss Olivia contends that the 2nd respondent has minimal business with the Kilifi County Government. There is a payment of Kshs.9,295,000/= done on 18th July, 2015. The Kilifi County Government cannot give an account as to how the payment was done.

Miss Olivia further submitted that the applicant is mandated by Article 252 of the Constitution to conduct its own investigations in relation to Economic Crimes. Similarly, Section 11 of the Anti-Corruption and Economic Crimes Act empowers the applicant to conduct any investigations. The current application was brought under Section 56 of Chapter 65 Laws of Kenya. There is no violation of the rights of the respondents. The payments to the respondents were made from public funds. The applicant was not supposed to inform the respondents before seeking the freezing orders.

Mr. Mutinda, and Mr. Mbura, counsels for the respondents opposed the applications. Mr. Mutinda submitted that the applicant relies on an internal audit report which has not been annexed. The payment voucher for file number 2 of 2016 for Kshs.1,849,137/= was examined and approved for payment by the internal audit. There is authorization for payment by the accounting officer. It's not clear to the respondent how could the internal audit raise issues with payment vouchers they examined and approved. There is no allegations that the signatures on the vouchers were forged.

Mr. Mutinda further maintains that all the relevant documents are kept by the Kilifi County Government. The payment procedures are also done by the County Government. There is no evidence that the respondents did not supply what was tendered for. It is further submitted that the applicant did not follow the correct investigation procedures provided under Section 27 and 28 of Cap 65. No notice was given to the respondents. The investigations are malicious as there is no evidence that the respondents' payments were made through corrupt conduct.

Counsel contends that there is no indication by the applicant that they are going for any specific amount of money. There is no complaint from the Kilifi County Government. No document was availed to the court when the ex-parte orders were granted. The initial investigations were related to dealings between the respondents and the Kilifi County Governments. The applicant now is referring to cash deposit of Kshs.55 million which was deposited as a result of business transactions with other entities. There is no evidence of money laundering and there is no restriction for one to make deposits in his account.

Counsel further contends that some of the respondents are business names and could not be sued directly in those names. The alleged discrepancy of dates for file number 5 of 2016 is not within the knowledge of the 2nd respondent. The chairman or secretary of the tender committee ought to have sworn an affidavit. Some of the payments were for services rendered and therefore no delivery notes were issued. The payment for upgrading of the data centre was done after an invoice was raised. Letters of offer were issued and accepted. Services or deliveries were made. Issues involving procurement processes do not involve the respondents. The matter is now in court and the applicant cannot rely on Section 33 of Cap 65 not to disclose some information.

On his part, Mr. Mbura relied on the applications to set aside the ex-parte orders. Counsel maintains that there is no evidence to show that there was any corrupt dealing by the respondents. Counsel submit that there are allegations that the respondent, Captech Technologies, file 13 of 2016, is dealing with other entities which are under investigations. No one has been charged with a criminal offence. Articles 47 and 50 of the Constitution were violated. The respondent has not been called to record a statement. Limitation of the respondents' right have to be reasonable and justiciable. The burden of proof is upon the applicant. The case has mutated from being one for non-delivery of goods to explanation on one's account. Applicant expects the respondent to provide documents.

The issues for the determination by the court are whether the respondents' accounts should continue to be frozen to a period of upto six (6) months or whether the applications by the respondents to have the interim orders vacated should be granted. The issues relating to file number 2 of 2016 is that there was a cash deposit of Kshs.55 million. There is also contention that there is a payment voucher for Kshs.1,849,137.95 dated 9th November, 2015 for delivery of tents. The voucher is not supported by a bid or tender form. The names of directors of Orgnal Investments are also not given and that payments were received from schools.

I have carefully read the further affidavit of Omar Kofa Komora together with the annexures. The bank account for the 2nd respondent show that on 22nd October, 2015 a cash deposit of Kshs.55 million was made by Serah. The initial affidavit of 19th February, 2016 by Omar Kofa Komora indicated that there were illegal payments to the respondent by the Kilifi County Government. The cash deposit cannot be attributed to the Kilifi County Government. The bank statement show that from 22nd October, 2015 to 19th February, 2016 the account balance was Kshs.6,312,720.47. There are several other substantial deposits and withdrawals in between. This court cannot question the source of the cash deposit unless there is evidence that it is proceeds from economic crimes or is connected to criminal activities. It is clear that once the interim orders were granted, the applicant was able to see that cash deposit. The deposit is not connected to the Kilifi County Government where the internal audit was done. I do find that the deposit of that huge amount cannot be the basis of freezing the respondent's account. Indeed the entire deposit was utilized.

The payment of Kshs.1,849,137.95 was done through a voucher that was examined by the internal audit on 5th November, 2015. It was authorized on 9th November, 2015. Money was credited into the respondent's account on 12th November, 2015. The payment is for the supply and delivery of three branded 100 seater tents for Mtwapa market. The affidavit by Omar Komora has annexed a delivery note by the respondent dated 18th June, 2015. There is a local purchase order which is not dated. There is a letter of notification of award dated 10th June, 2015 addressed to the respondent and signed by Mr. Owen Yaa Baya, the County Secretary. The respondent accepted the offer vide its letter dated 11th June, 2015. The minutes of the procurement committee are dated 8th June, 2015 and three separate bids had bene received. The other bidders were Mats Massive Markets (Kshs.2,055,000/=) and Mavuno Global Investments (Kshs.2,100,000/=). The procurement committee recommended the award of the tender to the respondent at a cost of Kshs.1,950,000/=. This amount was subjected to taxation leading to the payment of Kshs.1,849,137.95. On 11th November, 2015 Mr. Omar Kofa also annexed an internal memo dated 26th August, 2015 which is titled **"Inspection and acceptance certificate"**. Three people namely Alex Mwongela, Richard Mwasambu and Ebrahim Zia signed on 26th August, 2015 that the three branded 100 seater tents for Mtwapa Market had been delivered.

I have observed from the respondent's account that similar payments of Kshs.1,849,137.95 were made on 3rd November, 2015 and 6th October, 2015 to the respondent. It is not clear to me whether that was double payment or it was for supply and delivery of tents to other markets at the same cost. The respondent's account has several payments from the Kilifi County Government. Some of these payments are similar. For instance, Kshs.469,365.55 was paid twice to the respondent on 6th October, 2015. There are other payments on the same date.

The respondent was paid Kshs.300,000/= on 12th February, 2016 by Kibokoni Secondary School. On 19th February, 2016 Malindi Secondary School paid the respondent Kshs.700,000/=.

Given the payments to the 2nd respondent, it cannot be concluded that there were no supply and delivery of the goods tendered for. There is evidence that the goods were tendered for. There is no overlap of dates. The procurement process started way back in June 2015 while payment was done in November 2015. The document annexed to Mr. Omar's affidavit titled "**Documents Required For Payments Processing**" gives a list of nine items. There is no indication that form 13 was not included as the item was marked as having been seen. Counsel for the applicant did not annex any document from the two schools relating to the payments. One cannot simply conclude that the payments are illegal. None of the heads of those schools swore an affidavit. There is no connection between those payments and the Kilifi County government

With regard to file number 5 of 2016, Grand Top Solutions, it is contended that the minutes were done after the procuring process had started. There is no form number 13 which proves delivery of the goods. Further, there are several transactions on some dates. There is also the payment of Kshs.8,724,137/= that was paid twice on 1st July, 2015. Mr. Omar Kofa also avers in paragraph 10 of the second affidavit of 14th April, 2016 that the respondent's bank account also shows a number of questionable payments.

The annexures by Mr. Omar in his further affidavit include a letter dated 18th August, 2015 to "**Grand Top Solutions**" signed by Mr. Owen Yaa Baya, County Secretary. The letter refers to the upgrading of the data centre. The respondent was required to liaise with the ICT Chief Officer for the contract. The respondent replied on 19th May, 2015. This was a quotation that was accepted. The tender committee met on 24th June, 2015 and deliberated on the various tenders.

The minutes annexed to Mr. Omar's affidavit are incomplete. The annexed pages contain a signature on each page which I presume to be that of the chairman of the committee as it was submitted that he signs on each page. The first page of the minutes give minute numbers 1 to 3/37/2014/2015. Page 32 starts from minute number 45/37/2014/2015 while the last page 37 gives minute number 51/37/2014/2015. It is evident that some pages are missing.

Apart from the above, there is the inspection and acceptance certificate signed by Alex Mwongela, Richard Mwasambu and Andrew Kombe on 19th May, 2015. The document confirms that the services were rendered. There are two lines running across most of the annexures. I do not find that the lines denote that the documents were cancelled. It could be that it denotes that the documents had been utilized and should not be used again. The payment for the delivery was done on 1st July, 2015.

It is true that the minutes were done in June, 2015 while deliveries were done in May, 2015. The other part of the minutes is not annexed for the court to know the explanation. The several payments on the respondent's account from the County Government do not prove that there was corruption. It is upto the applicant to call for the relevant documents from the Kilifi County and if there are no supporting documents, charge those who effected the payments without the supporting documents. It cannot be concluded at this interlocutory stage that no services or deliveries were made. The Bank account summary show that as on 16th February, 2016, there was a total of Kshs.88,028,065.25 having been credited into the account while Kshs.81,021,081.45 was debited. The account balance is Kshs.8,052,976.85. The applicant is empowered to conduct further investigations and see if there were indeed double payments or payments for non-delivered goods. On a balance of probabilities, there was no payment for non-delivered goods. The goods were tendered for the respondent is not involved in the internal administrative or financial process of the Kilifi County Government.

Turning to file number 12 of 2016, Mediscope Agencies Limited, there are two replying affidavits sworn by Stephen Sanga Barawah. The issues being raised by the applicant involve payment of Kshs.8,820,000/= and a payment voucher for Kshs.15,013,260/=. The response is that the payment was duly examined and authorized. The payment for Kshs.8,820,000/= done on 26th June, 2015 was for the

delivery of long lasting insecticide treated nets to the health department. The local purchase order is dated 26th May, 2015. The Chief Officer of health for the Kilifi County Government wrote to the respondent on 10th April, 2015 indicating that contract documents were being prepared. The duration of the contract was to be 90 days.

There is an inspection and acceptance certificate signed by Justine Nguni, Ricahard Mwasambu and Hillary Murira on 11th June, 2015. The payment voucher was done on 29th June, 2015 but payment was made on 20th August, 2015. It appears to me that the same processes as in the other files was used before the payment was effected. The local purchase order dated 8th August, 2015 for Kshs.15,013,260/= for the supply and delivery of non-pharmaceuticals to the Kilifi County Hospital has not been paid. With respect to the supply of the long lasting nets, the minutes of the tender committee are dated 9th April, 2015. This was before the delivery was done. The goods were requested and delivered.

The last file is number 13 of 2016, Captech Technologies. It is submitted by the applicant that this respondent has minimal operations with the Kilifi County Government. However, its bank account has several transactions with persons and business entities under investigation. The respondent made money transfers to **Danki's Agencies** on 25th February, 2015. On 9th February, 2015, a transaction involving Barawah Limited which is associated with Stephen Sanga Barawah, the proprietor of Mediscope Agencies which is under investigation was made. The affidavit of Omar Kofa does not attach any payment voucher that is the subject of investigations. The respondent's bank account contains several payments from the Kilifi County Government. It is true that there are money transfers to Danki's Agencies but that does not prove corrupt practices. I believe there are no allegations of corruption against this respondent. The court cannot ask the respondent not to associate with those it wishes to as that is outside the court's mandate. It is clear that no documents against this respondent were availed to the applicant.

The respondents contend that the applicant ought to have followed the procedure provided under Sections 28 and 29 of Cap 65. It is true that Section 28 empowers the applicant to call for the production of records and property. The applicant was concerned that the respondents' accounts had been credited with money yet no services or deliveries were made. The applicant was right to make an application under Section 56 of Cap 65 and have the accounts frozen. The applicant could not have issued notices of intention to freeze the accounts to the respondents. By the time the notice period would have lapsed, no money would have been traced in the accounts. I do find that the procedure followed is proper. The definition of records under Section 28 (7) includes books, bank accounts, returns or reports among others. The applicant would not have just asked for bank records yet there was information that some money was deposited in those accounts without services having been rendered.

Similarly, the contention by the respondents that no supporting documents were attached to the initial application to warrant the issuance of the interim orders cannot hold. The applicant is a public body created by a statute with powers to carry out investigations. Investigations entails looking at the private affairs of those being investigated. In this case, there was need to look at the Bank accounts and payments made to the respondents. This cannot be held to be violation of the respondents' rights to privacy and property. One cannot claim a right to privacy if it can be shown that his activities are perpetuating economic crimes. The investigators will have to access the bank accounts and have them frozen if need be. The fight against corruption cannot be curtailed by the right to privacy or property. If the investigations reveal that a property has been obtained through corrupt means, it can be taken away. What is of concern is public money. The rights of the tax payers to have their taxes utilized properly supercedes an individual's right to have access to his bank account. The court can freeze a bank account so that the investigators can access it and find out whether the transactions involving the account are clean and lawful. The contention by the respondent that the interim orders are baseless is made out of anger due to the freezing of the accounts.

Under Section 56 (4) of Cap 65, anyone served with a freezing order can apply to the court to have the order lifted. The test under Section 56 (5) to be applied is that of a balance of probabilities. From the record herein, it is evident that the respondents have been dealing with the Kilifi County Government.

The selected vouchers and payments represent just but a minimal percentage of their dealings. It is also clear that whoever has been supplying the applicant with information and documents has been selective. Some pages of the minutes were deliberately not given out while other relevant documents like forms 13 were left out. If the record shows that deliveries were done or services were rendered, the other forms become purely administrative. The delivery of goods or service provider is entitled to be paid for the services. Payment cannot be withheld due to lack of a bid or tender form. The respondents could not have decided on their own to deliver items to the Kilifi County Government without having been called upon to do so. There is evidence that the County Secretary called for the deliveries and services.

The purpose of freezing one's account is to enable the applicant access the account and make further investigations. The freezing orders were issued on 22nd February, 2016. It is now over three months. Although Section 56 of Cap 65 provides for a six (6) months period, that term is not fixed. The same Section allows for the lifting or discharging of the orders.

The documentation herein shows that the payments to the respondents were made in good faith and for services rendered or goods supplied. There is no evidence of corrupt practices that has been established. Continued freezing of the bank accounts is not prudent in the circumstances. The applicant can continue with the investigations. The money in the accounts cannot be held to be proceeds from corruption. If there are indeed double payments, the applicant should start with those who made the payments to produce the supporting documents. If they can't then the applicant can deal with them as per the law.

In the end, the applications by the applicant dated 19th February, 2016 to continue freezing the respondents' bank accounts for a period of upto six (6) months is disallowed. The respective applications by the respondents dated 10th March, 2016 are granted in terms of prayer four (4). The orders issued by the court in all the four (4) files freezing the respondents' accounts are hereby vacated. There shall be no orders as to costs.

Dated and delivered in Malindi this 2nd day of June, 2016.

S.J. CHITEMBWE

JUDGE