



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPL. NO. 98 OF 2016

ETHICS & ANTI-CORRUPTION COMMISSION..... APPLICANT

V E R S U S –

JOSEPH CHEGE GIKONYO.....1ST RESPONDENT

GICHE LTD..... 2ND RESPONDENT

RULING

1. Joseph Chege Gikonyo and Giche Ltd, the 1st and 2nd Respondents herein have taken out the motion dated 31.03.2016 in which they sought for the following orders:

1. This application brought by the 1st & 2nd Respondent (hereinafter referred to as the 1st and 2nd Respondents) be certified urgent and it be set down for hearing on priority basis.

2. An order be issued setting aside, varying and or completely discharging the freezing orders granted by this Hon. Court on 11th March 2016 with respect to the 1st and 2nd Respondents' properties and bank accounts and further authorizing and granting to the 1st and 2nd Respondents' immediate and unrestricted access to the following immovable properties and funds held in the respective bank accounts for purpose of transfer, withdrawal and or any other dealings whatsoever:

a) Kshs.1,557,205 held in account no. 01243031551000 in National Bank Limited, Hill Plaza branch in the name of Joseph Chege Gikonyo.

b) Kshs.10,803,544 held in account no.0161379611 in Barclays Bank Limited, Nkrumah Road Branch in the name of Giche limited.

c) Ksh.1,403,633 held in account no. 0824716420 in Barclays Bank Limited, 082-Haile Selassie Avenue Branch in the name of Joseph Chege Gikonyo.

d) Kshs.390,608 held in account no.0164820416 in Barclays bank limited, 016-Nkrumah Road branch in the name of Joseph Chege Gikonyo.

e) Kshs.588,106 held in account no.0164695824 in Barclays Bank Limited, 016 – Nkrumah Road branch in the name of Joseph Chege Gikonyo

f) Kshs.393,012 held in account no.0164821188 in Barclays bank limited, -016- Nkrumah Road branch in the name of Joseph Chege Gikonyo.

g) Property known as CR No.39366 LR No.13698 located in Shanzu, Mombasa

h) Property known as CR NO.16452 Plot No. 3166MN located in Nyali, Mombasa

i) Property known as plot no. 1408/XV/II located in Mwembe Tayari, Mombasa

j) Property known as LR No. Kilifi/Mtwapa 1560 located in Kilifi, Mombasa

k) Property known as Plot 147 located in Umoja, Nairobi

3. James Kamau Kariuki be availed for cross-examination on his affidavit sworn on 11th March 2016 pursuant to the provisions of Section 55(4) (b) of the Anti-Corruption and Economic Crimes Act, 2003 (“ACECA”)

4. The costs of this application be provided for.

2. The motion is supported by the affidavit of Joseph Chege Gikonyo. When served, Ethics & Anti-corruption Commission (EACC), the Applicant, filed the replying affidavit of James Kamau Kariuki, to oppose the motion. In response, the Respondents filed a supplementary affidavit of Joseph Chege Gikonyo. When the motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submissions. Learned counsels were further permitted to make oral submissions in form of highlights.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival written and oral submissions presented before this court. Pursuant to an ex parte application dated 11th March 2016, the Applicant/Respondent herein successfully obtained orders to temporarily prohibit the Respondents/Applicants from accessing their bank accounts and suspending any dealings with their properties for a period of six months. Being aggrieved with the aforesaid orders, the Respondents/Applicants were prompted to take out the current motion, the subject matter of this ruling. It is the submission of the Respondents/Applicants that the making of an application under Section 56(1) of the Anti-corruption and Economic Crimes Act does not automatically entitle the Applicant/Respondent the orders sought. It is further argued that the Applicant must present evidence that the properties which are sought to be frozen were acquired as a result of corrupt conduct which is not the case here. It is argued that the evidence presented by E.A.C.C in support of its application was by annexing of the 1st Respondent's title deeds to four properties owned by him and both the 1st and 2nd Respondents' various bank statements of accounts held with different banks. The Applicant/Respondent averred that it was conducting investigations and that its preliminary investigations into the 1st Respondent's affairs had disclosed evidence of corruption. The Respondents have argued that E.A.C.C have given no particulars to any degree of tangible evidence to demonstrate the manner in which the 1st Respondent was engaged in corrupt conduct. It is further argued that there is no evidence whatsoever to demonstrate that any of the funds in the Respondents' bank accounts or that the immovable properties that were frozen were acquired as a result of corruption or corrupt conduct by the 1st Respondent. The Respondents are of the view that EACC engaged in mere speculation regarding deposits and funds in the Respondents bank accounts by measuring the deposits in the aforesaid accounts with the 1st Respondent's known sources of income without bothering to investigate the Respondent's actual sources of income.

4. The Applicant/Respondent (EACC) on the other hand is of the view that the limitation of hearing at the ex parte stage is necessary and justifiable as the purpose of the preservation order obtained pursuant to Section 56 to prevent a person from dissipating or hiding his assets once he knows that there is an investigation under way. E.A.C.C. further argued that the Respondents/Applicants have failed to present evidence showing that the properties, the subject matter of these proceedings were not acquired through corrupt conduct as envisaged under Section 56 (4) of the ACECA. It is also the submission of E.A.C.C that in the absence of legitimate income or capital to support the asset base, it is reasonable for the court to find on a balance of probabilities that the assets restrained are recoverable property since they represent

directly or indirectly the proceeds of corrupt conduct over a period when the lawful income of the 1st Respondent was insufficient to fund the purchase of the properties listed. The Applicant/Respondent further averred that the 1st Respondent knowingly made false declarations of his income from investments, emoluments and assets in his wealth declaration forms to mislead the Public Service Commission about the nature and extent of his assets.

5. The Applicant/Respondent also submitted that the 1st Respondent has no genuine separate existence from the 2nd Respondent company and may be using the company as a device for corrupt conduct in relation to some bank accounts. It is further argued that from the preliminary investigation that may be the 1st Respondent is undertaking farming activities with money obtained as a result or in connection with his corrupt conduct. It is also alleged that the 1st Respondent has acquired and developed landed properties with unexplained sources of income. The Applicant/Respondent has accused the 1st Respondent of failing to present a statement on the sources of his monies used to acquire and develop the preserved properties nor a statement of account to prove the farming incomes, rental incomes and business incomes. For the above reasons the Applicant/Respondent urged this court to maintain the order granted on 11.3.2016.

6. Having considered the material placed before me, this court takes the following view of this matter. Under Section 56(4) of the Anti-corruption and Economic Crimes Act, this court may discharge or vary an order issued under subsection 4 only if it is satisfied on a 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. In other words the Respondents must show on a balance of probabilities that the properties that have been frozen were not acquired as a result of corrupt conduct. In seeking to discharge the *ex parte* freezing orders, the 1st Respondent has by his averments and annexures demonstrated how he started his investments in real estate and establishment of a spares business which enabled him to gain profits which he used to develop real estate business. The 1st Respondent was able to also show that the profits from the aforesaid ventures were used to expand horticulture and animal farming as well as the sale and supply of building and construction materials. The 1st Respondent has further demonstrated that cash deposits made into the 2nd Respondent's bank account is income derived from the above mentioned sources i.e. farming proceeds and rental incomes. The 1st Respondent has given a detailed summary of the loans taken from various financial institutions and used to acquire and develop various plots. I have carefully perused the replying affidavit filed by the Applicant/Respondent and it is apparent that E.A.C.C did not attempt to rebut any of the documents and averments submitted by the Respondents. The Applicant/Respondent's answer to those averments and documents are basically speculative. No credible evidence was submitted of corrupt conduct against the 1st Respondent. A reading of the replying affidavit of James Kamau Kariuki shows that E.A.C.C relied on undisclosed sources and beliefs without stating the grounds on which the belief is held. What has come out clearly from the replying affidavit is that the 1st Respondent is being accused of making false declarations in his wealth declaration forms. It is pointed out that in his declaration forms for 2007-2009 and 2011-2013, it is alleged that the 1st Respondent did not disclose his rental income and some properties therefore this amounts to knowingly making false declarations. I have looked at the provisions of Section 28 of the Public Officer Ethics Act, 2003, and it is apparent that the Act contemplates that a public officer may inadvertently omit certain information in the wealth declaration and accordingly gives leeway to the commission to seek clarifications within 6 months from the date of the declaration by the public officer. There is no evidence that the 1st Respondent was ever required to make any clarifications relating to any of his wealth declarations. Through the current motion, the 1st Respondent has stated that the omissions E.A.C.C has pointed out relating to his wealth declarations were inadvertent and not intended to be false nor to mislead. In any case section 31 of the aforesaid Act envisages a judicial process where a public officer is subjected to criminal charges for knowingly making false and misleading declarations which is not the case here. In my humble appreciation of the Applicant/Respondent's response to the Respondents'/ Applicants' motion, E.A.C.C has not displaced the averments made by the Respondents nor has E.A.C.C. tendered credible evidence to demonstrate, specify and particularise the allegations of corruption against the 1st Respondent. In other words there is no serious attempt on the part of the Applicant/Respondent to carry

out investigations to link the Respondents with the act of corruption. It is clear from the pleadings and the submissions that the Applicant/ Respondent is heavily relying on inferences to form the opinion that the 1st Respondent acquired and developed the properties mentioned herein by corrupt conduct. In my view, though these proceedings are civil in nature, the allegation levelled against the 1st Respondent is the commission of corruption, which is a serious offence. The threshold is therefore high and the Applicant/Respondent cannot solely rely on inferences to establish such an offence.

7. In the end, I am convinced that the motion dated 31.03.2016 is well founded. The appropriate order which is given is to set aside the order given on 11.3.2016. Each party to meet its own costs.

Dated, Signed and Delivered in open court this 9th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent