



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI LAW COURTS

ANTI-CORRUPTION MISCELLANEOUS CASE NO. 18 OF 2016

(Formerly HC Misc. Application No. 156 of 2006)

GLADYS GATHONI CHEGE

t/a DIGIAGE AGENCY.....RESPONDENT/APPLICANT

-VERSUS-

ETHICS AND ANTI-CORRUPTION

COMMISSIONAPPLICANT/RESPONDENT

RULING

1. The respondent, the ***Ethics and Anti-Corruption Commission*** approached this Court on the 15th June, 2016 and obtained ex parte orders freezing A/c No. [particulars withheld], Equity Bank, Knut Branch which account belongs to the Respondent/Applicant. It is this order that the applicant ***Gladys Gathoni Chege*** has come to court to challenge by way of Notice of Motion dated 18th July, 2016 seeking the following orders:-

- 1. That the application be certified as urgent and service upon the respondent be dispensed with in the 1st instance.***
- 2. That the applicant be granted leave to file this application out of time.***
- 3. That the Honourable Court be pleased to set aside and discharge the preservation orders obtained by the respondent herein on 15th June, 2016 freezing the applicant A/c No. [particulars withheld], Equity Bank Knut Branch.***
- 4. That the applicant be allowed unimpeded access to A/c No [particulars withheld] and be at liberty to withdraw funds deposited therein.***
- 5. That the order be served upon the branch manager Equity Bank Ltd. Knut Branch.***
- 6. That costs of the application be granted.***

2. The application is premised on the grounds on its face and the supporting affidavit of **Gladys Gathoni Chege** sworn on the 18th July, 2016 together with the annexures thereto.

3. She stated that she was the proprietor trading in the name and style of Digiage Agency, dealing in

general supplies, registered on 17th July, 2014. That she opened an account with Family Bank River Road branch, whose number is [particulars withheld] and has been operating the same since then.

4. She further stated that she registered the business under the youth access to government procurement opportunities on the 24th September, 2014 with a view to applying for tenders in various government ministries and institutions under the category normally reserved for youths, **(GGC-1 and GGC-2)**.

5. It is her case that she submitted her documents for prequalification in various government departments including the department of Defence, Ministry of Devolution and planning.

6. According to her, she was elated at the prospect of getting business following numerous unsuccessful attempts; she immediately embarked on establishing the cost of the Antivirus and submitted her quotation after factoring a reasonable mark-up. Further, that she submitted the quotation through her integrated financial management information system (IFMIS) account which generated a document with all her quotation details.

7. She contended that IFMIS required her to fill elaborated details on the quantity and price of each unit to be supplied which she correctly did and thereafter received several correspondence to her email updating her on the progress of her quotation on each stage of approval, **(GGC - 3- 7)**.

8. On the 20th January, 2016 she received a notification on the system for the standard purchase order number 5074 and decided to do a physical follow up at the Ministry, where she was issued with a purchase order number 5074 duly signed by the Ministry officials.

9. She contends that after that, she went back to her supplier with whom she had an arrangement to supply and install the product and subsequently the antivirus was supplied on the 29th of January, 2016 and installed in several computers leaving the installation kit and licence to be installed on the ones they did not have access to. It was her case that the Ministry officials acknowledged receipt of the goods through a delivery note dated 29th January, 2016 and she simultaneously invoiced the said Ministry.

10. She further asserted that she was issued with a certificate of compliance signed by several persons whom she has never met to date. It is her case that upon her request, she was issued with a Ministerial inspection and acceptance committee certificate dated 4th February, 2016 and the same has been signed by several people on the face of it, **(GGC – 8 and GGC – 9)**.

11. According to her, on the 19th April, 2016 she went to withdraw Kshs.20,000/= from the business account at Family Bank and noted that the Ministry had sent money to the account in payment of the goods delivered.

12. It is further her case that the following day, she went to withdraw a lump sum amount with the intention of paying the supplier but the bank denied her access and asked her to supply supporting documents, to show that the money was genuinely paid to her.

13. She contends that she produced the documents but the bank informed her that they had a new policy which was not accepting money from the Ministry of Devolution and Planning and proceeded to reverse the payment while she was still in the banking hall.

14. It is further her case that she went back to the Ministry and explained the situation where she was advised to write a letter giving details of an alternative account. Further that since she had no other account, she opened an account with Equity Bank, Knut House Branch, being account number [particulars withheld] and submitted the details to the Ministry through her letter dated 21st of April, 2016, **(GGC – 11)**.

15. It is her case that the Ministry effected payment on the 6th May, 2016 and when she later went to withdraw some money, she was informed by the bank that she could not do so until it was ascertained that

the money was genuinely paid to her.

16. She proceeded to supply the Manager with all the documentation pertaining to the transaction and kept on going to access the money but she could not do so, with the Manager informing her that the account had been flagged and was under investigation by the banks security and fraud unit.

17. She contends that she requested to present herself to the security unit at Equity Bank Headquarters, Upper Hill and supplied them with all the documents and the information they requested. She further contends that she kept on going to the security unit to follow but they kept on deferring to different dates and she became frustrated with the slowness of the verification and lack of concrete information by the bank.

18. According to her, on the 17th June, 2016 she received a call from a person who identified himself as Mr. Kamau from the Ethics and Anti-corruption Commission who informed her that he had Court documents for her. She picked the documents which included the Court Order on 20th June, 2016. She then filed the present application.

19. She averred that the Commission was not seized of all the documentation when it made the decision to apply for the freezing order and neither did it request her to avail the documents despite the fact that the bank had already barred her from accessing the funds.

20. In closing, she averred that she had suffered immense mental and emotional anguish yet she had done an honest job and had not induced anyone to get the job and therefore urged the court to scrutinize all the documents she had availed, as there was nothing fishy about the transaction.

21. The Respondent opposed the application through grounds of opposition filed in Court on the 26th July, 2016 and the replying affidavit of **James Kariuki** sworn on the 2nd August, 2016 in his capacity as the investigator.

22. He deposed that he is a member of the team involved in the inquiry relating to the subject matter of the application in pursuit of the mandate of the respondent and reiterated the contents of the affidavit of his colleague Pius Maithya. In support of the application of the orders issued and the steps taken by the Applicant/Respondent.

23. Based on the information from his advocate, he contended that the investigations were still at a preliminary stage and the whole process would be rendered nugatory if the preservation orders were discharged; that the Respondent had not proved that there was reasonable basis for issuance of the Preliminary Orders complained of.

24. He asserted that the Respondent/Applicant had not adduced any evidence to demonstrate that they had acted contrary to their mandate, further that they had remained independent and objective in the investigations which are still on-going. In closing, he stated that they were still in the process of investigations and were yet to make any conclusions and recommendations.

25. The following are the grounds of opposition dated 26th July, 2016 raised by the Applicant/Respondent:

1. Section 13 (2) (c) of the Ethics and Anti-Corruption Commission Act 2011 and Section 23 of the Anti-Corruption and Economic Crimes Act, 2003 mandates the Commission to investigate corruption and economic crimes.

2. The grant of Order(s) sought in the application before this Honourable Court as against the Respondent would be unnecessary as it is statutorily obligated to investigate corruption and economics crimes.

3. The applicant has not adduced reasonable evidence to prove that the investigation being conducted against her is discriminative and malicious.

4. In the premises, the application should be struck out in *limine for incompetence.

5. In the alternative, the application should be heard on prayer 2 moving on to prayer 3.

6. Section 56 of the Anti-Corruption and Economic Crimes Act, 2003 sets out clear provisions on the issue of preservation of suspect property. It provides that an order granted under this section shall subsist for six months and the person served with it may apply to vary it within 15 days of service which time has since lapsed. There is no provision for the extension of the said period.

7. Moreover, Order 50 of the Civil Procedure Rules, 2010 has not been invoked/cited for the application for the extension of time and even if it were cited, the Civil Procedure Rules are subsidiary legislation as opposed to the Anti-Corruption and Economic Crimes Act, 2003 which overrides it as an Act of Parliament.

8. Under Order 50, the court has powers to extend time in three scenarios; if it was proceeding under the Rules, by summary notice or by Order of the court. Therefore, the court has no jurisdiction to extend time limited by statute, in this case, the Anti-Corruption and Economic Crimes Act, 2003 as the same would amount to the judiciary usurping the role of Parliament and an infringement to the constitutional separation of powers.

26. Counsel for the Respondent had argued that the application is impotent for failing to comply with Order 50 of the Civil Procedure Rules. The applicant's counsel on the other hand argued that there was no procedure in the Act upon which to approach the Court and hence their coming under the cited Sections of the Act together with the constitutional provisions.

27. The Supreme Court affirmed in the case of SAMUEL KAMAU MACHARIA & 2 OTHERS v. KENYA COMMERCIAL BANK & 2 OTHERS [2012] eKLR, that;

“A court’s jurisdiction flows from either the Constitution or Legislation, or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law.”

28. Jurisdiction either flows from the Constitution or statute. This is the basis upon which a court can exercise jurisdiction. I have interrogated the substantive Act in question and nowhere does it state that it shall be governed by the Civil Procedure Rules.

29. *M/s Kemboi* in her submission on the Civil Procedure Rules blows both hot and cold on the application of Order 50 Civil Procedure Rules. She submits that the Respondent/Applicant should have cited it as governing her application. At the same time, she submits that even if she came under it, she could not have succeeded for the reasons she cites in the grounds of opposition. I find no merit in the Respondent's argument that there was no compliance with Order 50 of the Civil Procedure Rules for the reason stated in paragraph 28 above.

30. The Court of Appeal of East African in the case of SAINT BENOIST PLANTATIONS LTD. vs. JEAN EMILE ADRIEN FELIX CA NO. 25 OF 1954 stated thus;

“Where a local statute law does not provide a forum or procedure for a particular proceeding, it would be by an Originating Motion which means a motion which is not interlocutory but originates the proceedings in question.

Later Nyamu J. (as he then was) in KENYA ANTI-CORRUPTION COMMISSION vs. LANDS LTD. & 7 OTHERS [2008] E KLR said this of Section 56 of ACECA;

“In addition since ACECA had provided a new remedy without stating the manner of approaching the court an Originating Notice of Motion or a Notice of Motion would have been the appropriate approach to the court instead of filing a Chamber Summon.”

31. It is therefore clear that a party may either approach the Court by Originating Motion or Notice of Motion.

Finally it is to be appreciated that proceedings under Section 56 **ACECA** are essentially Civil in nature. There could therefore be a borrowing here and there of acceptable Processes, Rules and Procedures of the Civil Procedure Rules to make the section work. The whole idea is to bring to the fore what the claim by the Applicant is and what the defence by the Respondent is.

32. Inasmuch as the prayer for leave and the prayer seeking to challenge the *ex parte* Orders were made in the same application, I do not find it untidy handling the issues raised. It's for that reason that I will first deal with the prayer seeking leave to file the application out of time, on its merit.

33. Counsel for the Applicant/Respondent has argued that **ACECA** does not make any provision for extension of the 15 days in section 56 (4) and so the Court should not even entertain that prayer.

It is clear that Section 56 (1) of **ACECA** provides that the Applicant makes an *ex parte* application in the first instance. Section 56 (3) provides that the said *ex parte* Orders shall be effective for six months and maybe extended by the Court on the application of the applicant.

34. On the other hand, under Section 56 (4) the person affected by this Order obtained *ex parte* may challenge the said Order within fifteen days of service.

It is the Applicant's/Respondent's submission that since there is no express provision for extension of the period of fifteen days in the **ACECA** the Respondent/Applicant request for leave should not be allowed because this would offend the principle of separation of powers.

35. Section 56 (4) **ACECA** provides this;

“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.”

The word used here is **“may”** and not **“shall”**. It means the person served with the Order may or may not make the application contemplated.

The most important thing is for the court to ensure that justice is done and seen to be done. The wording in Section 56 (4) **ACECA** is not an end in itself but simply directory in guiding the offended party on what should be done.

36. In the case of **NICHOLAS KIPTOO ARAP KORIR SALAT vs. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR**, the Supreme Court set grounds which the court would use in exercising the discretionary power of extending time. They are as follows:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay, and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

37. From the grounds set out above, it is clear that the issue of extension of time is a discretionary power vested on the courts and the said power should be exercised judiciously. Exercising this power where there is no express provision in statute cannot be said to be interfering with the principle of separation of powers.

What would happen where a person falling under Section 56 (4) *ACECA* fell sick; or was out of the country or was incapacitated during the 15 days period? Would the court shut its eyes and say, since there is no express provision for extension, my hands are tied? I think each case should be considered on its own peculiar circumstances, so that justice is not only done but seen to be done.

38. I now proceed to consider the application on its merits.

39. The Respondent/Applicant has in her affidavit contended that she was not able to move the Court within the prescribed period because soon after service of the Order on her on 20th June, 2016 she was called to attend to her father who had been admitted in hospital in Nyeri. She was also under serious financial constraints.

The application seeking leave was filed some nine (9) days after the lapse of the set out statutory period. I find it to have been filed within reasonable time and there was no inordinate delay.

40. Has the Respondent/Applicant then made a case for grant of the leave?

The Applicant explained her reasons for delay in filing her application. She is not the one who was sick but her father. She states that he was admitted in a hospital in Nyeri. She did not produce any single document or even receipt to confirm that indeed her father had been sick and/or even admitted. The Court could have expected the said father even without the receipts to swear an affidavit stating those facts. This has not been done.

I am therefore not satisfied that this is one of the special circumstances for extension of time as the said circumstances have not been proved. I decline to grant the prayer for leave.

41. Had prayer No. 2 succeeded, I would have proceeded to determine prayer No. 3 on whether or not to discharge or vary the Orders of 15th June, 2016.

In the circumstances, I disallow the application dated 17th August, 2016 and dismiss it.

42. The Applicant/Respondent is however directed to expedite its investigations. The matter to be mentioned on 27th October, 2016 for the Applicant/ Respondent to explain to the Court how far it has gone with its investigations.

Delivered and Dated* this 14th day of **September, 2016** at **Nairobi*

H. I. ONG'UDI

HIGH COURT JUDGE