



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION NO. 10 OF 2015
CONSOLIDATED WITH
MISCELLANEOUS APPLICATIONS SERIES 11 – 17 OF 2015

ETHICS AND ANTI-CORRUPTION COMMISSION (K) APPLICANT

VERSUS

MAHMOUD HASSAN ALI

EQUITY BANK, LAMU RESPONDENTS

CONSOLIDATED RULING

The application dated 20th February, 2015 is seeking to freeze the accounts of the Respondents in various bank accounts for a period of six months. It is supported by the affidavit of Eva Nyawira sworn on the 20th February, 2015 and a further affidavit of the same person sworn on the 17th March, 2015. The Respondents filed their respective replying affidavits sworn on the 9th March, 2015. The contents of the Respondents' respective affidavits are quite similar.

Miss Olivia, Counsel for the Applicant relied on the application and submitted that there are complaints that the Respondents do not own land in Lamu and were therefore fraudulently paid. The allegations were made to the Commission which is empowered to commence investigations. The issue does not involve the Respondent's only but it is a scheme. There are other people involved. The Applicant has written to the National Land Commission but has not received a reply or document. Some accounts were not frozen and the manner in which the proprietors of those accounts are dealing with them is suspicious. Currently the Applicant is not in a position to determine the extent of the problem. The Respondents have recorded statements with the Applicant. The order freezing the Respondents' accounts will enable the Applicant to conduct investigations.

Mr. Aboubakar, Counsel for the Respondents, opposed the application. Counsel submitted that the application is based on speculation and alleged complaints. The National Land Commission conducted a ground survey and came up with a list of the affected persons. There are some disputes which are still pending before the National Land Commission. The Respondents were included in the list of beneficiaries prepared by the National Land Commission. The National Government conducted a verification exercise and came up with the list of the affected persons. The Respondents are included in the list by the National Government. A resettlement plan was prepared by the Ministry of Transport in October, 2012 and the Respondents are included in that list. A list of the beneficiaries was done by the

National Land Commission and all the Respondents are included.

Counsel contends that all the Respondents come from Lamu and they are not outsiders. There is no investigation report or name of the alleged complainant. The Respondents were vetted and their names included in the list. A list of disputed areas was prepared but the Respondents are not included in that list. The Respondents own land in the area and were affected by the LAPPSET project. Counsel maintains that one of the beneficiaries, KALATHUM MOHAMED transferred Kshs.15 million to one of the Respondents, MOHAMED ABDEREHAMAN, who was not a beneficiary. The explanation is that Mohamed Abderehaman is a relative and an estate agent. The beneficiary was purchasing a house that was a subject of succession before the Kadhi's Court in Mombasa and had been available for sale so that the proceeds could be shared amongst the beneficiaries of an estate. The funds were frozen and Kalathum is likely to miss out on the purchase of the house. It is contended that the freezing of the accounts is contrary to Article 31 and 40 of the Constitution. The Applicant is venturing into the accounts of the Respondent without basis. The Land Act was complied with. The application is merely grounded on suspicion and is unfounded.

The application is brought under Section 56 of the Anti-corruption and Economic Crimes Act. The Section states as follows:

- “(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.”***

Under the above section, the Applicant is empowered to make an application to the court and stop the transfer or disposal of a property. In the current case, what is involved is money paid by the National Land Commission to the Respondents as compensation for their land affected by the Lamu Port and the Lamu-South Sudan-Ethiopia Transport Corridor (LAPPSET). The documents annexed by the Respondent show that the evaluation exercise started way back in 2012. There are several lists of affected persons and the Respondents are included in those lists. It is clear that ground verification was done and the Respondents were considered to be amongst the beneficiaries. The unfortunate thing is that there are no title deeds to show that each of the beneficiaries was a registered land owner. All what is provided is an area map. It is therefore clear that even those people who were paid but have not been brought to court did not have title deeds. It is not established how the applicant pinpointed the Respondents out of a list of about 150 people.

There is a list of the beneficiaries prepared by the National Land Commission and it is that list that was used to disburse the funds. This court granted the Applicant interim orders on the 23rd February 2015. The application was fixed for hearing on 11th March, 2015 but the Applicants requested for more time. It was fixed for hearing on 23rd March, 2015. From the time the interim orders were granted to date the Respondents have not been able to utilize the funds in their respective accounts. Section 56 of the Anti-corruption and Economic Crimes Act presupposes that the orders being sought would be granted exparte. However, Section 56(5) allows the court to vary or discharge an order issued under Section 56(1) and

56(3). The court should consider the powers of the Applicant to investigate economic crimes against the rights of the Respondents to enjoy the compensation for their land.

It is in the interest of justice that the Applicant be accorded an opportunity to carry out its investigations. I have gone through the list of those entitled to benefit from the payment and do find that all the Respondents are included as beneficiaries. The main criteria for the payments has not been indicated to the court by any of the parties. The Applicant contends that they have written to the National Land Commission for more information but have not received any response yet. The Applicant seeks more time to carry out investigations. I have noted two accounts whose payments are in line with the general perceived compensation method of Kshs. One and a half million per acre. Although none of the parties informed the court what the rate was, it is common knowledge that the payment rate was Kshs. 1.5Million. The account for Mahmoud Hassan Ali was paid kshs. 6,149,083.50 for his 1.659Hectares. This particular Respondent's land translates to slightly above four acres. I do find that taking the issue of acreage into account against the payment, there should be no allegations of corruption against this particular beneficiary or suspicions on the payments. As indicated herein, there are no title deeds for each beneficiary. Similarly, the account for Samia Mohamed Abdul was paid Kshs. 5,748,420.15 for her 1.5459 Hectares. This is quite in line with the compensation mode and there is no good reason to freeze her account. The allegations by the Applicant that the Respondents do not own land would be difficult to prove as there are no letters of allotment or title deeds. The concerned government officers recognised the Respondents as beneficiaries. Even the other payments more or less corresponds with the acreage of each beneficiary. May be it is the amounts involved that could have raised the applicant's concern.

Other than size, I believe the officials who made the evaluation and ultimate payment had other factors that were considered. Acreage may not have been the only factor for consideration. It is the duty of the court to allow the Applicant carry out its functions as mandated by statute. Counsel for the Respondent contends that the Applicant's action is tantamount to violation of the Respondents' rights under Articles 31 and 40 of the Constitution. Article 31 provides for the right to privacy. Article 31 provides for the right not to have one's home or property searched and the right not to have one's possessions seized among other rights. Article 40 protects the right to property. The source of the funds paid to the Respondents is from the Government of Kenya. These funds have been accumulated through taxes paid by Kenyans. Since the Applicant has the duty to carry out investigation to find out whether the payments were lawful, it would not be violation of the Respondents' rights under Articles 31 and 40 of the Constitution if the court allows the Applicant to investigate the payments. I believe the Respondents would also not wish to be associated with corruption. The Applicant is legally empowered to investigate personal bank accounts if it is suspected that the money involved has been obtained through corrupt means.

In order to allow the Applicant carry out its mandate, I do find that it would be prudent to freeze the accounts for sometime. This does not mean that the funds in the respective accounts will be taken away. I will not grant the six (6) month period requested as the evaluation exercise took over two years and the Respondents have waited anxiously to utilize their respective payments. Apart from the above two accounts of Mahmoud Hassan Ali and Samia Mohamed Abdul, all the accounts of the Respondents shall be frozen for a period of thirty (30 days) hereof. This period together with the interim period granted on 23rd February, 2015 to date is sufficient for the Applicant to conclude its investigations.

In the end, the application dated 20th February, 2015 partly succeeds. The accounts for Mohamed Abderehaman (Gulf African Bank), Mariam Athman Hassan (Kenya Commercial Bank), Kalathum Mohamed Ahmed (Gulf African Bank), Fauzia Mohamed Famau (ABC Bank) and Mohamed Bwanamkuu Ali (ABC Bank) are hereby frozen as prayed but for a period of thirty (30) days only. The accounts for Mahmoud Hassan Ali (Equity Bank) and Samia Mohamed Abdul (Diamond Trust Bank) are hereby unfrozen and the two Respondents shall be at liberty to utilize their funds. This matter shall be mentioned thirty (30) days from the date hereof. Each party is at liberty to apply before then. The Applicant is at liberty to file its investigation report before thirty (30) days hereof.

Delivered and dated at Malindi this **8th** day of **April, 2015**.

Said J. Chitembwe

JUDGE