



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CIVIL SUIT NO. 6 OF 2018

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

CATHERINE NKIROTE MAINGI (Sued in her personal capacity

and also T/A VENYTE SUPPLIERS &

JOSKATE SALES & SUPPLIES.....1ST DEFENDANT

JOHN KAGO MURIMA.....2ND DEFENDANT

JANE MAKENA MAINGI T/A

QSETTERS INVESTMENTS.....3RD DEFENDANT

RULING

1. The plaintiff/applicant filed the Notice of Motion dated 28th March, 2018 and filed on 29th March, 2018. The application is brought under Section 1A, 1B, 3A and Orders 40 (1) 1 and 51 (1) of the Civil Procedure Act and Rules. The application seeks the following orders:

(3) Pending inter parties hearing and determination of this suit, the defendants/respondents by themselves, their agents, servants and/or employees or any other person whatsoever be restrained from withdrawing funds, transferring, disposing or in any other way dealing with funds held in the following bank accounts;

i. Account No. 0020192678243 held at Equity Bank in the name of the 2nd defendant;

ii. Account No. 0940197601341 held at Equity Bank in the name of the Venyte Suppliers;

iii. Account No. 1180263423271 held at Equity Bank in the name of Qsetters Investments;

iv. Account No. 0260192617892 held at Equity Bank in the name of Joscate Sales and Suppliers; and

v. Account NO. 01109416161300 held at Co-operative Bank, Kimathi Branch in the name of the 1st defendant

(4) Pending the hearing and determination of this application, the 1st and 2nd defendants/respondents by themselves, their agents, servants and/or employees or any other person whatsoever be restrained from transferring, disposing of, wasting, or in any other way dealing with parcel of land reference number LR.14968/210 I.R No. 97853.

(5) Pending the hearing and determination of this suit, the 1st and 2nd defendants/respondents by themselves, their agents, servants and/or employees or any other person whatsoever be restrained from transferring, disposing of, wasting, or in any other way dealing with parcel of land reference No. LR.14968/210 I.R No. 97853.

2. The application is supported by the grounds on its face plus the supporting affidavit of Catherine Ngari an investigator with Ethics and Anti-Corruption (EACC). She also filed a further affidavit.

The defendants/respondents filed a replying affidavit by John Kago Muriwa in opposing the application.

APPLICANT'S CASE

3. M/s Catherine Ngari has in her supporting affidavit explained how investigations were carried out in respect of procurement of materials for the National Youth Service (NYS). There are allegations of manipulation of this process. I will not go into the details since this is an application and not the hearing of the claim. All this is found at paragraphs 4 - 11 of the said affidavit.

4. The applicant accuses the respondents of using entities related to them to manipulate the procurement process and even inflate prices of the items that were being sourced. A market survey was done and confirmed the inflation of the prices (paragraphs 12 – 18).

5. Calculations of the actual prices and the inflated prices was done and they revealed that a total of Ksh.33,700,000/= had been lost by virtue of overcharging (paragraph 19).

6. That the applicant had obtained warrants to search the respondents' bank accounts (CWN13) and scrutiny of the accounts disclosed a series of cash transfers from one bank account to another.

At paragraph 19, the deponent outline the payments into the 3rd respondent's account by NYS. A flow chart (CWN14) shows the movement of the funds.

7. She averred that part of these funds were utilized to purchase property LR 14968/2101R No. 97853 (Transfer document marked CWN 15). She stated that presevatory orders in respect of various accounts mentioned at paragraph 21 were obtained from the court (CWN 16).

8. In her further affidavit, the deponents averred that the bidders were bound by the provisions of the PPDA 2005 which forbade collusive practices among bidders. That such practices lead to disqualification from bidding, she said. She averred that the defendants had engaged in such malpractices. The deponent otherwise reiterated the contents of the supporting affidavit, saying that the present application was for an injunction under Order 40 Civil Procedure Rules and not a preservation order under the Anti-Corruption and Ethics Crimes Act (ACECA).

9. *M/s Kibogi* for the applicant submitted that the suit filed herein is in respect of two tenders mentioned and related to NYS, which were awarded to the 3rd respondent. In her submission, she sought to distinguish presevatory orders and an injunction. She therefore contended that the current application for injunction was not a tactic to extend the presevatory orders as intimidated by the respondents.

10. She referred to the *Giella –vs- Cassman Brown & Co. Ltd. case [1973] EA 358* for the principles of grant of an injunction. Counsel submitted that it was their case that the procurement process was manipulated by the 1st respondent who was in control of the entities involved.

11. The applicant claimed that there was collusion among the bidders yet this is prohibited under Section 42 of the Public Procurement and Disposal Act 2005 (PPDA). There was high overpricing of the items supplied contrary to Section 30 (3) of the

PPADA. She said this had been revealed though the survey conducted which showed a difference of shs.33,700,000/=.

12. She submitted that the applicant had shown a prima facie case with chances of success. Further, she argued that the general public stands to suffer irreparable loss if the orders sought are not granted. It was her submission that there may be nothing to recover if they are successful, unless the orders sought are granted.

13. She referred to the cases of

(i) *Ethics & Anti-Corruption Commission –vs- Jimmy Mutuku Kiambaa, Civil Case No. 33 of 2016* – paragraphs 6 and 17 (Sergon J.)

(ii) *Ethics & Anti-Corruption Commission –vs- Jitech Contractors Ltd. & 4 Others ACEC Civil Case No. 10 of 2017* – paragraph 27

THE RESPONDENTS' CASE

14. The respondents opposed the application and filed a replying affidavit through the 2nd respondent. In it, he averred that he legally participated in the tendering process with the NYS. Secondly, that he had no control of the dealings of the NYS who had the liberty of choosing any one of the companies.

15. He denied all the accusations levelled against the respondents which to him were mere allegations and needed to be proved. He averred that the preservative orders herein had been extended more than the required period. That their constitutional rights should be considered and the court should not grant the applicant's prayer. Further, that the issuance of the orders sought would deprive him of his right to fair trial.

It was also his contention that his business had deteriorated due to the allegations levelled against him.

16. He averred that for an injunction to issue, it had to be shown that the applicant would suffer irreparable injury which could not be adequately compensated by an award of damages. That since the applicant had prayed for restitution, there would be no need for an injunction. He said he would not interfere with the properties listed. He averred that there was no good reason advanced as to why the orders should be granted.

17. **Mr. Omari** for the respondents in his submissions, stated that the application was opposed. He contended that the proper procedure was followed during the procurement process. He said that before bidding, there is a prequalification by the entity. In his view, the submission on collusion and non-disclosure is wrong as the respondents could not collude. Furthermore, there was only one bidder and so could not collude in respect to Section 42 of the PPDA. This is in respect to the 1st tender.

18. As far as the 2nd tender was concerned, he submitted that there were ten companies that did the bidding, which to him was competitive bidding. There was therefore no evidence of collusion. He argued that the injunctive orders sought were not based on any new evidence and was oppressive.

19. **Mr. Omari** submitted that there was an allegation that Kshs.26M was transferred from the 2nd respondent's account to acquire land but the actual costs of the land had not been provided. It was therefore not clear if any other money had been added for the purchase of the land.

20. It was his further submission that the accounts frozen were business accounts and held money besides the NYS money. He pointed out that the sum in dispute is Kshs.33M. He said, if the court would be inclined to grant the injunction, the same should be one property or be equivalent to Kshs.33M to allow the defendant to utilize the rest.

21. Counsel argued that the law provides for recovery through several means. It cannot therefore be limited to one transaction. He contended that there would be no serious loss or damage to be incurred by the public. What was ordered for was supplied and utilized. He said the element of cost and profit must be considered as the figure of Kshs.33M is not supported.

22. Finally, on the balance of convenience, he argued that it does not tilt in the applicant's favour.

23. In a rejoinder, *M/s Kibogi* said they would demonstrate the bidders collusion as led by the 1st respondent during the hearing she admitted that they did not have the current evaluation of the land. It was however clear that the land was bought at Kshs.26M in August, 2016. She said in the plaint they sought to recover Kshs.45,517,241/= in respect of the two tenders. She opposed the proposal to limit the injunction to Kshs.33M.

24. It was her further submission that it was only logical that what had been preserved should continue being preserved to avoid multiple suits when properties have changed hands. She prayed for the orders sought to be granted.

DETERMINATION

25. I have considered the application, affidavits and the submissions by the counsels. The issue for determination is whether the applicant has made out a case for grant of the order of injunction sought.

26. It is true that orders of preservation have been issued by this court in respect of the same parties and same assets. The said orders were issued under Section 56 of the Anti-Corruption & Economic Crimes Act (ACECA) for purposes of investigation of the assets complained of.

27. After completion of the investigations, the applicant decided to file a recovery suit which is the current civil suit. The orders sought cannot therefore be said to be an extension of the preservatory orders. The simple reason is that they are sought under totally different circumstances and for different reasons.

28. As was held in the famous case of *Giella –vs- Cassman Brown (supra)* an order of injunction may be issued upon the following principles being satisfied;

- (a) The applicant had established a prima facie case with probability of success.
- (b) The applicant stood to suffer irreparable loss which could not be compensated by an award of damages.
- (c) If the court was in doubt, the application would be determined on a balance of convenience.

29. In the suit filed before this court, the plaintiff/applicant is seeking restitution of Kshs.45,517,241.40 to the NYS being the sums paid and received by the 3rd respondent. There is an alternative prayer for Kshs.33,700,000.00 being the inflated costs by the respondents. Mr. Omari in his submission stated that the NYS had actually been supplied with the goods in dispute which were received and utilized. That was not disputed by the plaintiff/applicant. If that be the case, then the plaintiff/applicant's claim would be more on the alternative prayer at (c) in the plaint.

30. There is however another angle to the issue before this court. The applicant claims that the procurement process was tainted with fraudulent practices. That the 1st respondent manipulated the process as she was in control of the entities involved. According to it, there was collusion among the bidders, a practice outlined under Section 42 of the PPDA 2005 which provide as follows;

42. (1) No person shall collude or attempt to collude with any other person —

- (a) to make any proposed price higher than would otherwise have been the case;**
- (b) to have that other person refrain from submitting a tender, proposal or quotation or withdraw or change a tender, proposal or quotation; or**
- (c) to submit a tender, proposal or quotation with a specified price or with any specified inclusions or exclusions.**

(2) If a person contravenes subsection (1) the following shall apply —

(a) both persons referred to in subsection (1) shall be disqualified from entering into a contract for the procurement; or

(b) if a contract has already been entered into with either person referred to in subsection (1), the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2) (b) does not limit any other legal remedy the procuring entity may have.

(4) A person who contravenes subsection (1) shall be guilty of an offence.”

31. If the applicant succeeds in establishing that the whole process of tendering was manipulated to benefit the respondents, then prayer No. (a) and (b) of the plaint will come into play.

At this point, the court would not be in position to state with certainty without hearing the evidence, which of the claims would succeed.

32. What is however before the court, is that there are two tenders, namely;

(i) NYS/93/2014-2015

(ii) NYS/RT/35/2014-2015

which tenders have raised integrity issues. As a result of the said tenders, the NYS paid to the respondents a total of Kshs.45,517,241.40. This is all public funds and the public has a high stake in this matter.

33. The figure cited above is not little money which one can easily brush off and say it can easily be refunded. It is the duty of the applicant to protect the integrity of processes and more so, procurement processes in this country. It is for that reason that the applicant vide Nairobi ACEC Misc. Application No. 43 of 2017 applied for preservative orders in respect of the respondents assets as investigations into these allegations were on going. The main suit has now been filed and it is on that basis that the injunction orders are being sought.

34. The orders sought are to prohibit the respondents from withdrawing/transferring money from the said accounts and disposing, transferring or disposing of the two cited properties. Would the applicant suffer irreparable harm if the orders sought are not granted" I have already stated that the amount involved in the two tenders is not little money and it is public money.

Secondly, if the money and properties were disposed off before the determination of this suit and the applicant was finally successful, it would lead to a multiplicity of recovery suits against the beneficiaries.

Thirdly, payment of compensation plus the amounts involved herein would require loads and loads of money.

35. I find the balance of convenience to tilt in favour of the applicant. Mr. Omari submitted that if any injunction were to be granted, it should be limited to the amount being claimed. The material before this court (paragraph 19 of the supporting affidavit and annexure CWN 14 shows the movement of the money). It involves all the defendants' accounts. It is claimed that the cited properties were purchased using the cash from the questioned tender. This court cannot be sure of what was done or not done, before hearing the evidence. It cannot give any limitations without knowing what is in each account. The best way forward is to expedite the hearing of this suit.

36. I therefore find that there is merit in the application dated 28th March, 2018. It is allowed in terms of prayers 3, 4 and 5.

37. Parties are directed to expedite the completion of filing their pleadings. The defendants/respondents ought to have filed their defence by now.

38. Witness statements and all documents to be filed and exchanged within the next twenty (20) days. The plaintiff to have the first ten (10) days.

39. Parties to take a mention date to confirm compliance and fixing of a hearing date.

Costs in cause.

Orders accordingly.

Delivered, signed and dated this 3rd day of May, 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE



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