



Case Number:	Miscellaneous Application E025 of 2021
Date Delivered:	07 Apr 2022
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Esther Nyambura Maina
Citation:	David Kinyae Isika & another v Ethics & another [2022] eKLR
Advocates:	Mrs. Okwara for EACC/Respondent Mr. Eric Mutua for the Respondent/ Applicant
Case Summary:	-
Court Division:	Anti-Corruption and Economic Crimes Division
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ACEC MISC. APPLICATION NO. E025 OF 2021**

DAVID KINYAE ISIKA .....1<sup>ST</sup> RESPONDENT/APPLICANT

WANGA TECH GENERAL ENTERPRISES LIMITED .....2<sup>ND</sup> RESPONDENT

VERSUS

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

**RULING**

**Introduction**

1. By the Notice of Motion dated 13<sup>th</sup> September 2021 which is expressed to be brought under **Section 56(4) of The Anti-corruption and Economic Crimes Act and Articles 23, 24, 31, 40, 47 and 50 of the Constitution** David Kinyae Isika, the 1<sup>ST</sup> Respondent/Applicant, seeks to have the freezing orders granted to the EACC/Respondent on 26<sup>th</sup> August, 2021 vacated in the following terms:

*“i) That the order issued on 26<sup>th</sup> August 2021 be discharged, lifted, reviewed and or set aside.*

*i) That the application dated 25<sup>th</sup> August 2021 be dismissed.*

*ii) Costs of the application be granted.”*

2. The application is premised on grounds that:-

*“i) That the order of 26<sup>th</sup> August, 2021 was issued following a misrepresentation and non-disclosure of relevant facts by the applicant.*

*ii) That there is no evidence that the funds held in bank account No. xxxxxxxxxx and xxxxxxxx at Co-operative Bank of Kenya in the name of the 2<sup>nd</sup> Respondent amount to unexplained assets.*

*iii) That there is no evidence that the funds held in bank account No. xxxxxxxxxx and xxxxxxxx at Co-operative Bank of Kenya held in the name of the 2<sup>nd</sup> Respondent are proceeds of crime or corrupt conduct or are public funds.*

*iv) That private property is sacrosanct and cannot be taken away and or the state cannot curtail its use and or utilization without the due process of the law.*

*v) That Eunice Wangari Wambugu a Director of the 2<sup>nd</sup> Respondent and a mandatory signatory of the bank account is deceased.*

*vi) That the suit herein and the order are an abuse of the court process.*

*vii) That the Respondent’s right to a fair hearing have been violated.*

*viii) That Respondent’s right to a fair administrative action have been violated by the applicant in guise of undertaking*

*investigations.*

*ix) That the applicant commenced investigations way back on April 2021, where after it raided the 1<sup>st</sup> Respondent's offices and residence and has interrogated the 1<sup>st</sup> Respondent. Despite all that the applicant has been unable to produce evidence of corrupt practices or conduct on the part of the 1<sup>st</sup> Respondent.*

*x) That no further investigations are pending hence the order herein is unmerited.*

*xi) That following the applicant's recommendation, the applicant has been suspended from employment. In view of the above action the proceedings herein are malicious and prejudicial to the 1<sup>st</sup> Respondent."*

3. The application is supported by the affidavit of David Kinyae Isika, sworn 13<sup>th</sup> September 2021 and his further affidavit sworn on 29<sup>th</sup> October 2021. He deposes that he is a public servant, employed by the State Department for Housing and Urban Development: That the freezing orders against the subject accounts were obtained in the mistaken belief that the funds and assets in his possession which he has acquired over time amount to unexplained assets; That he has an interest in the assets of the 2<sup>nd</sup> respondent by virtue of being the husband of Eunice Wangari Wambugu (Deceased) who is a director of the 2<sup>nd</sup> respondent and a mandatory signatory to the subject bank accounts. That he has applied for a grant of letters of administration to the estate of the late Eunice Wangari Wambugu; That the EACC/Respondent commenced investigations into his finances in April 2021 and all relevant information on his personnel file, payslips, P9 forms, wealth declaration forms and various procurement documents were handed over to the Commission in May 2021. He contends that the Respondent also "raided" his business premises and residences on 3<sup>rd</sup> June 2021 and among the items that were carted away were delivery notes, payslips and a sum of Kshs. 1,500,000 in cash which the Commission had in its possession for two months prior to filing the Originating Motion. He explains that he had undertaken private businesses with his late wives prior to his employment; That the first wife, Faith Nduku Kinyae who died on 9<sup>th</sup> March 2006 engaged in various activities ranging from selling second hand clothes, wholesale and retail business, farming, pastoralism, supplies, real estate and loans and that as at the time of her demise they had three bank accounts at Cooperative Bank, one account at Equity Bank and one account at Giro Commercial Bank. The Applicant further deposed that after his first wife's demise he incorporated his children and his second wife, Eunice Wangari Wambugu into the running of his businesses including Nissy Wines and Spirits, a bar/restaurant at Nairobi West and Riara, an entertainment business, event hosting and an import and export of vehicles business.

4. In his further affidavit the Applicant annexed a detailed Statement of Income prepared by Messrs J.M. Matheka & Associates, Certified Public Accountants which lists his sources of income for the years 2014 to 2021 as being *inter alia*:- his salary and allowances, imprest, harambees, sale of second hand clothes, sale of cows and disposal of assets. He refers to sale of a property in Buruburu which he purchased at Kshs. 2,600,000 and from which he was receiving a rental income of Kshs. 60,000; the sale of an undeveloped parcel of land which he purchased at Njoro at Kshs. 4,500,000 and a Kajiado property which he purchased at Kshs. 8,500,000. He deposes further that he held fundraisers for a wedding with his second wife in 2016 and raised Kshs. 8,500,000/= another for his daughter's treatment in 2018 where he raised Kshs. 12,000,000 and for his wife's treatment in 2019 where he raised Kshs. 22,000,000. He states that over the period in issue his sources of income have earned him a total sum of Kshs. 120,532,442 compared to the Kshs. 77,460,082 projected in his bank statement annexed to the Commission's Replying Affidavit. He avers that as a result of the Commission's recommendations, he was suspended from employment on 30<sup>th</sup> August 2021 which is unfair and in contravention of his rights to fair administrative action, fair trial and due process.

5. Learned Counsel for the Applicant submitted that the applicant is aggrieved by the order prohibiting him from withdrawing funds in the subject bank accounts and has invoked the provisions of **Section 56(4)** of the **Anti-Corruption and Economic Crimes Act** to have the orders discharged or set aside. He contends that the orders issued on 26<sup>th</sup> August 2021 and extended on 29<sup>th</sup> September 2021 were irregular as there is nothing on the court record to show that the court considered the facts and evidence before issuing the orders; That under **Section 56(1)** of the **Act**, in order for a court to issue a freezing order it ought to be convinced that the facts and evidence presented before it establish a reasonable suspicion that the property or asset the subject matter of the application is connected to corrupt conduct yet in the applicant's case all there is are sweeping statements.

6. Counsel submitted that a payment per se cannot amount to suspicion. That there is no evidence that the procurement process in respect of any of the goods or services from which the funds were obtained was flawed; That there is no evidence that the applicant sat in any meetings that awarded tenders to the 2<sup>nd</sup> respondent; that there is no evidence that goods were not supplied or that the 2<sup>nd</sup> Respondent inflated the prices and further that there is no evidence the 1<sup>st</sup> respondent did not make a disclosure of conflict of interest nor was there any entry in the bank statement showing that funds were irregularly paid to the 1<sup>st</sup> respondent.

7. Counsel cited the following cases to support his submissions:

- *Ethics & Anticorruption Commission vs Sachdeva Nabhan & Another (2019) eKLR*
- *Ethics & Anticorruption Commission vs Daayo Construction and General Supplies Ltd & 2 Others (2019) eKLR*
- *Manfred Walter Schmitt & Another vs Republic and Another (2013) eKLR*
- *Emmanuel Suipanu Siyanga vs Republic (2013) eKLR*
- *Ethics and Anticorruption Commission vs Moses Kasaine Lenolkulaal & Another (2019) eKLR.*

**The EACC/Respondent's case.**

8. The Respondent vehemently opposed the application through its replying and supplementary affidavits sworn by Margaret Wambeti on 7<sup>th</sup> October and 11<sup>th</sup> November 2021 respectively. Learned Counsel for the Respondent submitted that there is an active investigation against the applicant on allegations of corruption and economic crimes, specifically embezzlement or misappropriation of public funds, conflict of interest and abuse of office perpetrated in his capacity as a Senior Supply Chain Management Officer in the Ministry of Lands, Housing & Urban Development (Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works) and that due to his corrupt conduct, the applicant has acquired and accumulated illicit unexplained assets.

9. It is the Commission's case that the 2<sup>nd</sup> respondent being a company associated with the 1<sup>st</sup> respondent was awarded multiple tenders and was paid through the Integrated Financial Management System by various institutions including the State Department of Housing, and Urban Development where the applicant is currently the Senior Deputy Director, Supply Chain Management. It is the Commission's case that the applicant's spouse and relative are directors of the 2<sup>nd</sup> respondent which demonstrates conflict of interest. Further, that an analysis of the bank statements of the of the Respondents reveal that since the opening of the accounts sometimes in 2014, the 2<sup>nd</sup> respondent's main source of income has been the Ministry. Counsel submitted that a summary of recorded transactions shows that the accounts of the Applicant were purposely opened to receive monies from the Ministry.

10. Citing **Section 56(4) and (5) of Anti-Corruption and Economic Crimes Act** Counsel submitted that a person seeking to have preservation orders varied must satisfy the court, on a balance of probability, that the property in respect of which the order sought to be discharged or varied was not acquired as a result of corrupt conduct. Counsel pointed out that the burden of proof lies with the party seeking to discharge the preservation orders as was held in the case of *Ethics & Anti-Corruption Commission vs Njage Makanga & 2 Others (2017)eKLR*, Counsel submitted that the Respondent satisfied this court that there was reasonable suspicion that the preserved monies were acquired as a result of corrupt conduct. Counsel stated that at the exparte stage, evidential facts need not answer the description of specific offences of corrupt conduct provided they point to that probability. To buttress this point counsel cited **Section 56(1) of Anti-Corruption and Economic Crimes Act** and the case of **Ethics & Anti-Corruption Commission vs National Bank of Kenya & Another (2017) eKLR**. Counsel further submitted that **Section 24 of the Bribery Act** amended **Section 56 of Anti-Corruption and Economic Crimes Act** by deleting the words **"on evidence" and substituted it with "if satisfied that there are reasonable grounds to suspect"** which position was adopted in the case cited above as the threshold upon which the court grants preservation orders.

11. Counsel stated that the Commission outlined its reasons for reasonable suspicion of the applicant's finances after preliminary investigations as follows:

- a) The applicant as a public officer working as a Senior Deputy Director Supply Chain Management in blatant abuse of office and conflict of interest engaged in corrupt conduct to influence or award tenders to companies or firms associated with him, his relatives or proxies.
- b) The 2<sup>nd</sup> Respondent is a company associated with the applicant and his spouse and relative as directors demonstrating conflict of interest
- c) The applicant was an IFMIS user during the period of investigation and his responsibilities included procurement planning, sourcing and purchase order approver and supervisor in which position he could make payments to the 2<sup>nd</sup> respondent.

d) That the first deposit into the account of the 2<sup>nd</sup> Respondent which was made by one Wangari was for Ksh. 2000/= but that on the 22<sup>nd</sup> of the same month, a sum of Kshs. 750,000 was deposited by the Ministry of Lands.

e) That from 2014 to 2021 the applicant earned a net salary of Kshs. 149,348.25 with his cumulative net salary over the years being Kshs. 5,289,675.10 yet the applicant and his proxies have transacted or received over Kshs. 350,000,000 from the Ministry of Lands.

12. According to the Commission the applicant could not explain the source of his funds. The Commission cited the case of *Ethics & Anti-corruption Commission vs Andrew Biketi Musuya t/a Mukuyu Petroleum Dealers (2019) eKLR* where it was held:

*“The explanation given by the applicant is just a general statement which is not convincing or tied to a specific source. He has not sufficiently discharged that onerous burden of proving his case on a balance of probability as required of him under section 56(5) of ACECA”*

13. Counsel for Commission submitted that the applicant’s explanations on the sources of his income do not hold water; That in regard to the rental income from the Buruburu property, there is no evidence to show that the Kshs. 60,000 monthly rent is usually paid into the subject accounts. In regard to the sale of the Njoro and Kajiado property, the commission asserts that the agreement of sale is not sufficient evidence of its disposition and there is no evidence that the proceeds of sale was paid into the subject accounts and that moreover, the former property is still registered in the applicant’s name. Counsel submitted that similarly, there is no documentary evidence of the alleged fundraising for the wedding and medical expenses and that moreover, the wedding did not take place and that further there is no evidence that the monies were channelled into the subject accounts. Counsel for the commission questioned the validity of the applicant’s audited statement of income for the years 2014 to 2021 stating that the Commission will carry out its own investigations to verify the same.

14. Counsel also submitted that the Applicant has not demonstrated that the preservation orders will cause him undue hardship that far outweighs the risk of the subject money being concealed or transferred; That the Applicant is still earning rental income and the preservation orders have not curtailed his legitimate sources of income.

#### *Analysis and determination.*

15. I have considered the pleadings, the rival submissions the cases cited thereat and the law. The issue for determination is whether the applicant is entitled to the discharge or setting aside of the preservation orders issued in regard to his accounts.

16. The law pertaining to preservation orders is found in **Section 56 of the Anti-Corruption and Economic Crimes Act** which states:-

#### *56. Order preserving suspect property, etc.*

*(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 if it is satisfied that there are reasonable grounds to suspect 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.” (Underlining mine).*

17. The Commission/Respondent was granted orders preserving the subject funds after satisfying this court that it was necessary to preserve the funds pending investigations. The application was made *ex parte* as provided in Section 56 (1) of ACECA. The court being satisfied that there were reasonable grounds to suspect the property was acquired from corrupt conduct granted the order pending investigations. The order granted was to last for six months as provided in section 56 (3) of ACECA. In the case of *Mape Building & General Engineering vs Attorney General & 3 others (2016)eKLR* the court held as follows:

*“In the circumstances of this case, the warrants and freezing orders were evidently necessary for the purposes of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations the 2nd Respondent was, in my view, justified in making the application for both the warrants and freezing order ex parte.”*

18. To succeed in setting aside/discharging a preservation order the applicant ought to demonstrate that the orders have exposed him to undue suffering/hardship that far outweighs having the funds concealed or transferred. This was as was held in the case of *Ethics & Anti-Corruption Commission vs Catherine Nkrote Maingi & 2 Others (supra)* where the court stated:

*“It has thus not been demonstrated to the satisfaction of the court that the enforcement of the preservation orders has caused undue hardship to the applicants that far outweighs the risk of the subject money being concealed or transferred. I find it in the interest of justice to retain the preservation orders”*

19. It is my finding that the applicant has not satisfied the above requirement. Apart from stating that the money was acquired legitimately which as the Commission has stated is still under investigation he has not explained the other issues such as conflict of interest. Moreover, this court can only vacate the preservation orders if it is satisfied on a balance of probabilities that the money was not acquired as a result of corrupt conduct. That in my view can only become evident upon conclusion of the investigations being conducted by the Commission and after this court has heard evidence from both sides.

20. In the upshot it is my finding that the application is not merited. The same is dismissed but I shall make no order for costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF APRIL, 2022.**

**E.N MAINA**

**JUDGE**

**IN THE PRESENCE OF:-**

**MRS. OKWARA FOR EACC/RESPONDENT**

**MR. ERIC MUTUA FOR THE RESPONDENT/ APPLICANT**

**HOPE JOE – COURT ASSISTANT.**



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