

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION SUIT NO. E022 OF 2023

ETHICS AND ANTI-CORRUPTION COMMISSION.....APPLICANT

VERSUS

NASHON WILSON KANANI1ST RESPONDENT
WILLY WALLA INTERNATIONAL LIMITED.....2ND RESPONDENT
WILCOREG LIMITED.....3RD RESPONDENT
BRIDGE SIDE FARM.....4TH RESPONDENT
REGINA MUNYIVA MUTINDA.....5TH RESPONDENT
REGINEEZ ENTERPRISES LIMITED.....6TH RESPONDENT

RULING

1. The Applicant herein ETHICS AND ANTI-CORRUPTION COMMISSION (EACC) is a government entity having the responsibility of combating corruption and recovering for the government, funds and properties acquired through corrupt conduct. From the pleadings on record, the 1st Respondent a male adult, is a salaried employee of the COUNTY GOVERNMENT OF NAIROBI; with a net salary stated by the Applicant to be Ksh 55,866/=. The 5th Respondent is the 1st Respondent's wife, while the 2nd, 3rd, 4th, and 6th Respondent are companies associated with the 1st and 5th Respondent.
2. This ruling is on the 1st Respondent's Application, a Notice of Motion dated 25th September 2023. The Application seeks to set aside the interim conservatory injunctive orders issued by this Court on 13th September 2023 against certain of the Respondents' bank accounts, motor vehicles, and parcels of land.

3. Those orders were issued on the Applicant's Notice of Motion dated 12th September 2023 that had been filed principally brought under the provisions of Order 40 (1) of the Civil Procedure Rules 2010 and Section 56 (4) & (5) of the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003, popularly referred to by the acronym ACECA).
4. The said conservatory injunctive orders were issued to preserve the earlier frozen status of the impugned funds and properties, following the lapse of the ACECA-based preservation orders earlier issued by this Court under Section 56 (1) & (3) of the Act. It is the fresh conservatory orders that the Respondents are by their instant Application, contesting and seeking to set aside. The Application is supported by a Supporting Affidavit sworn by the 1st Respondent NASHON WILSON KANANI.
5. The said impugned orders, and which were issued *ex parte*, restrained the Respondents from dealing with the subject assets comprising several parcels of land, motor vehicles and money on Bank Accounts associated with the Respondents, largely attributed to the 1st Respondent, and suspected to have been acquired through corrupt conduct largely by the said Respondent. The Application specifically sought the following orders:
 - (a) *(Spent).*
 - (b) *That the said ex parte conservatory injunctive orders be set aside, particularly orders 3, 4 and 5.*
 - (c) *That in the alternative to prayer (b) above, this Court be pleased to discharge the following bank account numbers the subject of those orders:*

- (i) Account No. 0020100014675 domiciled at Equity Bank in the name of the said NASHON WILSON KANANI the 1st Respondent (salary account);
 - (j) Account No. 1290179388101 domiciled at Equity Bank in the name of Shanice Agatha (the 1st Respondent's daughter, a minor);
 - (k) Account No. 1290179320142 at Equity Bank Ltd, in the name of SHIRLEEN MBITHE the 1st Respondent's daughter a Minor; and
 - (l) Account No. 0020297745852, at Equity Bank, in the name of Bridge Side Farm a Company associated with the 1st Respondent and his wife.
 - (m) Account No. 1132877784, at Kenya Commercial Bank, in the name of REGINA MUNYIVA MUTINDA the 5th Respondent, and who is also the 1st Respondent's wife.
 - (n) Account No. 1250278968699, at Equity Bank, in the name of REGINEEZ LTD, a company associated with the 1st Respondent and his wife the said REGINA MUNYIVA MUTINDA the 5th Respondent; and
 - (o) Account No. 012000035239, at Family Bank, in the name of the said REGINEEZ LTD.
- (d) That in the alternative to prayer (b) above, this Honourable Court be pleased to lift the interim orders of injunction against the following properties:

- (i) Motor Vehicle KDB 999F Toyota Land Cruiser V8, registered in the name of PANIJ AUTOMOBILE (K) LTD.
 - (ii) Motor Vehicle KDH 999S Toyota Alphard, registered in the name of PANIJ AUTOMOBILE (K) LTD.
 - (iii) Land Parcel NAIVASHA/MARAIGUSHU BLOCK 42/78, located in Naivasha, and registered in the name of PETER NJAGI NJERU.
- (e) That again in the alternative to prayer (b) above, the said conservatory injunctive orders be varied, to allow the Respondents access to at least Ksh 3,000,000/= monthly from any of the 12 frozen bank accounts, for purposes of operations of the respondents' family and business operations.
- (f) The costs of this Application.

6. The grounds for this Application may be summarized as follows:

- (a) That said conservatory interim injunctive although issued to allow the Applicant to undertake investigations into the Respondent's income and impugned funds and properties, the same have been extended despite opposition from the Respondents.
- (b) That the Applicant issuing to the Respondents a Notice (under Section 26 of ACECA), requiring them to explain sources of their wealth, comprising land, bank credits, MPESA transactions and cash received within the period from 1st January 2016 to 31st October 2022.

- (c) That the Respondents have since forwarded to the Applicant, Forensic Audit Reports as well as bank statements, satisfactorily explaining and demonstrating their sources of wealth and proof of their businesses and income.
- (d) That the 1st Respondent has further explained to the Applicant that despite being a salaried employee of the COUNTY GOVERNMENT OF NAIROBI, with a monthly net salary of Ksh 55,866=, he is an established businessman with diverse sources of revenue that were backed by a Forensic Audit Report on his accounts and appendices of documents demonstrating his sources of income.
- (e) That BRIDGE SIDE FARM the 4th Respondent has been misjoined in these proceedings as the 5th Respondent's directorship therein, is merely nominal and dormant and that the company is in no way related to the 1st Respondent who is the 5th Respondent's husband.
- (f) The 5th Respondent has been dragged into these proceedings for reason only of being the Respondent's wife, without any basis being laid to demonstrate any other dealings with the 1st Respondent and the County government of Nairobi.
- (g) The Respondents have since the issuance of the said conservatory interim injunctive orders endured months of financial hardship; cash flow challenges, rental arrears for the various business premises with the threat of eviction, untold losses in business and financial hardship for the

family with this Court's freeze orders that have been in operation since 13th December, 2022 to date, obtained to enable the Applicant to conclude its investigations on the Respondents.

- (h) That all the 1st Respondent's accounts are frozen, including his salary account thereby preventing him from having a means of providing basic needs for his family.
- (i) That while the 1st Applicant's wife is a Director of the 6th Respondent, the 1st Respondent is not, hence there is no nexus between the 6th Applicant and either the 1st Respondent or the County Government of Nairobi.
- (j) Despite the 6th Respondent being the 1st and 5th Respondent's family Company, it conducts its business independent of them, and has no correlation with the COUNTY GOVERNMENT OF NAIROBI the 1st Respondent's employer.
- (k) That some of the land parcels and motor vehicles included in these proceedings, do not belong to the 1st Respondent.
- (l) That the said ex parte injunctive orders were issued without disclosure of these material facts.
- (m) That the Applicant (EACC) will not suffer any loss or harm if this application is allowed.

7. The Applicant has in response to this Application maintained that of the over a billion wealth owned by the 1st Respondent in concert with his wife the 5th Respondent, the source of over Ksh 600 Million thereof, remains unexplained as the explanations and the evidence the Respondents have provided, have failed to discount the cloud of

doubt and suspicion over the manner in which that multi-million worth in bank deposits and the subject motor vehicles as well as subject land parcels were acquired.

8. The Commission further maintains that the wealth in question is far beyond the legitimate known formal income of the 1st Respondent and his wife the 5th Respondent; hence that the same were acquired through corruption, as the 1st Respondent has even previously been charged with a bribery a corruption offence, and convicted.

Analysis and Determination

9. This Application was canvassed by way of written submissions as both parties filed their respective submissions. I have considered the Application, the Applicant's response thereto. Upon carefully distilling this, I find that there is only one issue for me to determine in this Application. That is, whether the Respondents have through this Application put forth grounds that warrant the setting aside of the conservatory interim injunctive orders hitherto in force.
10. This is a matter in which the EACC obtained preservative orders that were to last for nine months. Those orders were against these same funds and assets, and were intended to enable the EACC complete investigations as to how those funds and assets were acquired- principally, whether they were acquired through corrupt conduct.
11. Allegations and suspicion of corruption and theft of public funds are of a very serious character, that have to be attended with seriousness, carefulness and thoroughness. Such allegations need to spark alarm and alertness. World over, the preferred approach to combating corruption, is zero-tolerance to corrupt conduct. In

Kenya, corruption has hit alarming heights. To the extent of graduating from just a vice, into a lifestyle. This is unacceptable!

12. From traffic policemen openly collecting folded money notes from motorists, to public officials stealing funds whose custody and safety they have been entrusted with. The prevailing level of corruption is akin to stage 4 of a cancer. The fight against this vice that has attained astronomical levels, requires firmness, zeal, vigour, resilience, patriotism, accountability, utmost good faith, and even God's grace.
13. As courts through their rulings and judgments sound alarm bells, they need to through the orders they issue, disincentivize corruption by employing effective and deterrent precautionary measures to arrest this vice before it can escalate into a mammoth monster that it is threatening to become. This is not to say that we should in being zealously disinclined, lower the evidentiary threshold required in cases, or abandon due process and resort to lynching, cursing, crucifixion, or persecution.
14. As regards interim precautionary measures, once any funds or assets have to the required threshold of suspicion, been reasonably suspected to have been acquired by corrupt activity or conduct, or to be proceeds of corruption, they need to be quarantined until the subject has satisfactorily explained their source; or been vindicated by the findings of credible investigations or court process.
15. This is the application of the legal principle I will call precautionary principle; where assets or funds suspected to have been acquired by corrupt conduct and whose source has not been sufficiently and

convincingly explained, are in the interim period quarantined on the basis of credible preliminary investigation, *prima facie* preliminary evidence. Being issued on an interim basis pending comprehensive investigations, the evidential threshold for such at this preservatory stage need to be merely prima face evidence rather than final and conclusive evidence.

16. Such precautionary measures are in the best interest of the common good of the entire Kenyan public rather than the narrow and often conflicted interest of the subject or the investigator. In this scenario, the court is usually the objective, impartial, and unconflicted umpire.
17. Quarantining such assets and funds should inevitably and essentially comprise limiting and even prohibiting the subject's access to them until such a time when he or she shall have, through credible and ethical investigations, been vindicated and cleared of the allegations/suspicion, or been vindicated by a court of law such as this Court.
18. It will be ironical and cynical for this Court to with one hand quarantine a subject's assets and funds, and with the other hand with eyes closed, allow the subject to access and appropriate them, or even part thereof, in the name of either allowing the subject to maintain his or her preferred lifestyle, or even as a form of subsistence allowance.
19. In my considered view, any such property or fund having been tainted with reasonable suspicion of illegality and illegitimacy should

- in the intervening period and pending conclusive investigation and findings, be wholly and unitarily kept out of reach of the subject.
20. I would call this the indivisibility doctrine where the money or asset is treated as one unit. An attempt at fragmenting the money or asset into units for the purpose of allowing the subject access, is in my view a circumvention of the legal consequence of the wrongful act or illegality when it is eventually proved.
21. It is better to adopt a hands-off stance and expedite the investigations or court proceedings, rather than allow access in exchange of a slacken court process or investigations. On reasonable suspicion being established, it should not be business as usual, and the *status quo ante* should as of necessity be upset.
22. The subject cannot insist on any form of access to any portion of the impugned funds or assets being in the sustenance of his preferred lifestyle. This like many medicaments may for now be a bitter to swallow, but once the treatment is completed, a patient is released from further medication.
23. Any subject whose funds or assets are by due process frozen, has a choice of rationalizing his or her lifestyle or adopting other austerity measures to navigate through the transition period between the time the preservatory orders are issued to the time the court or investigations will have vindicated him or her and the quarantined funds or assets released for resumption of access. This Court similarly held in **NAIROBI HIGH COURT ANTI-CORRUPTION MISC APPLICATION NO. E024 OF 2023 EACC v. DANIEL MUNYWOKI WAMBUA.**

24. During that preservative period, those funds or assets are no longer the subject's free property and he or she is holding them in trust for the Kenya Public collectively. In the case of funds, the subject can no longer access or spend or transfer them; not even when he or she desires to do so. In the case of an asset, the subject can no longer lease it, charge it, or transfer it or even bequeath it by a will or other testamentary instrument. This is the stark reality that the subject has to, in the interim, endure. This to my mind is the correct position of the law.
25. The same shall continue to abide until the logical conclusion of this matter. After all, they are interim orders intended to merely preserve the assets and funds the subject of these proceedings during the pendency and before the hearing and final determination of this suit.
26. I have not found on the record any material to warrant me to upset the injunctive orders hitherto existing and impugned in this Application. Many of the grounds raised by the Respondents in this Application are proper ones for the Applicant's interlocutory Application and defences to the suit itself. This court shall consider them when determining that Application and when determining the suit.
27. For the above reasons, I find that this Application is for dismissal, and hereby dismiss it with costs. As to whether to confirm the said interim order granted on the EACC's Notice of Motion dated 12th September 2023, as well as whether Order 40 of the Civil Procedure Rules is applicable in recovery and forfeiture proceedings under the

ACECA, I will render my decision while determining the said Application, as it has since been heard *inter partes*.

DATED and DELIVERED at NAIROBI this 7th day of February 2024.



PROF (DR) NIXON SIFUNA

JUDGE

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