Ng'ang'a v Republic (DCI Western Region Office); Ng'ang'a (Interested Party) (Criminal Revision E338 of 2024) [2024] KEHC 16436 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16436 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL REVISION E338 OF 2024

S MBUNGI, J

DECEMBER 18, 2024

IN THE MATTER OF REVISION OF THE DECISION IN CHIEF'S MAGISTRATE'S COURT AT KAKAMEGA IN MISC. MCCR NO. E217 OF2024 DELIVERED ON 13/11/2024

BETWEEN

JAMES NDIRANGU NG'ANG'A ..... APPLICANT

AND

REPUBLIC (DCI WESTERN REGION OFFICE) ..... RESPONDENT

AND

MARGARET WANGOI NG'ANG'A ..... INTERESTED PARTY

Jurisdiction and procedural safeguards in freezing bank accounts

The High Court reviewed ex parte freezing orders issued in Kakamega Misc. Cr. No. E217 of 2024 against Bennandira Company's bank accounts and seizure of mobile phones. The applicant alleged rights violations and forum shopping, while the State and interested party argued the orders were lawful under the Criminal Procedure Code, Evidence Act, and POCAMLA to preserve evidence. The court held that section 180 of the Evidence Act must be read with sections 118 and 121 CPC to authorize freezing bank accounts, with a mandatory return to court for inter partes hearing. The trial court erred by failing to order service, set a hearing date, and imposing a six-month ex parte freeze.

Reported by John Ribia

Statutes *- interpretation of statutes - section 180 of the Evidence Act - section 118 and 121 of the Criminal Procedure Code - whether section 180 of the Evidence Act authorizing seizure of an item in premises that was a place, building, ship, aircraft, vehicle, box or receptacle extended to freezing bank accounts - what were the enabling provisions that granted courts the authority to freeze bank accounts - Evidence Act (cap 80) section 180; Criminal Procedure Code (cap 75) section 118 and 121.*

Constitutional Law *- fundamental rights and freedoms - right to a fair hearing - right to property - right to privacy - order freezing bank account that was issued ex parte - challenge that such an order was a breach*

of the aforementioned rights - notice requirement under the right to fair hearing - whether the issuance of ex parte freezing orders without prior notice to the account holder was justified in order to prevent interference with investigations or was a breach of the right to a fair hearing - Constitution of Kenya articles 24(1)(d), 40(6), 50, 165, and 165(6).

***Law of Evidence** - seizure - freezing of assets pending investigations - freezing of bank accounts - period of a freezing order issued ex parte - duty of the trial court to refer such a matter back for interpartes hearing - whether a 6 month duration of a prohibition order granted ex parte that froze one's bank accounts was excessive given the absence of an inter partes hearing - whether courts were under a mandate to ensure that once property was seized pursuant to a warrant, the matter must be returned to court for further directions, thereby affording affected parties an opportunity to be heard and to challenge the seizure or continued freezing of their property - Evidence Act (cap 80) section 180(1)(2); Criminal Procedure Code (cap 75) sections 118, 118A, 121 , 362, and 364,*

Brief facts

The applicant moved the High Court under certificate of urgency seeking, among others, a stay of orders issued on 13 November 2024 in Kakamega Misc. Cr. No. E217 of 2024, the setting aside of orders freezing Bennandira Company accounts and compelling him to provide his phone PINs, and the release of the seized phones. He alleged that similar orders had been obtained in Busia matters relating to the same facts, that he was ambushed without notice, and that the prosecution was biased and acting for the interested party. The respondent maintained the orders were lawfully obtained ex parte under the Criminal Procedure Code, Evidence Act, and POCAMLA to preserve evidence and prevent dissipation of funds, and that the phones were under forensic analysis.

The interested party asserted that the orders targeted financial institutions, not the applicant, and arose from her appointment as administrator of her late husband's estate, which the applicant had interfered with. She claimed the frozen funds belonged to the estate, the application was defective as it was not brought by the company itself, and the applicant's actions were linked to ongoing fraud and forgery investigations.

Both the respondent and interested party urged dismissal of the application with costs.

Issues

i. Whether section 180 of the Evidence Act authorizing seizure of an item in premises that was a place, building, ship, aircraft, vehicle, box or receptacle, extended to freezing bank accounts.
ii. What were the enabling provisions that granted courts the authority to freeze bank accounts?
iii. Whether the issuance of *ex parte* freezing orders without prior notice to the account holder was justified in order to prevent interference with investigations, or was a breach of the right to a fair hearing.
iv. Whether a 6 month duration of a prohibition order granted ex parte freezing one's bank accounts was excessive given the absence of an *inter partes* hearing.
v. Whether courts were under a mandate to ensure that once property was seized pursuant to a warrant, the matter must be returned to court for further directions, thereby affording affected parties an opportunity to be heard and to challenge the seizure or continued freezing of their property.

Held

1. Section 362 and 364 of the *Criminal Procedure Code* granted the High Court supervisory powers over the lower Court. Under Section 362 *CPC* the court had power to 'call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. Section 364 provided for the powers of the High Court on revision, which flowed from article 165 of the Constitution.
2. The prohibition order granted by the magistrate was in nature of freezing of bank accounts in order to enable the respondent to carry out investigations following a complaint by the interested party. The nature of the orders sought and issued as highlighted in this ruling were to warrant investigation by the respondent. Had the applicant been notified of the application, warrants of investigation and orders

sought prior to the issuance of the ex-parte orders, there was likelihood that the applicant could have interfered with or subverted the investigation. Such a possibility warrants issuing of such orders in a manner that the money in the bank account was safeguarded. While the applicant's right to be heard was a fundamental right, the timing of the notification must balance the need for a fair trial with the protection of the ongoing investigation. The balance justified the issuance of the *ex-parte* orders, given the circumstances at the time. Disclosing the fact of the intended investigation would defeat justice.

3. The enabling provisions of the law that gave power to the court to issue freezing orders are therefore to be found in the Evidence Act read together with the Criminal Procedure Code. Section 180 of the Evidence Act authorized the court to issue orders of investigation. It did not give powers to order the freezing of a bank account.
4. The limitation of section 180 of the Evidence Act therefore warranted the need to invoke the provisions of section 118 and 121 of the Criminal Procedure Code. Section 180 of the Evidence Act should be read together with section 121(1) of the Criminal Procedure Code which provided that when anything was so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.
5. There was a lacuna in section 180 of the Evidence Act. The section failed to make a further provision for safeguarding evidence in the form of money held in a bank account. It provided for seizure of an item in premises that was, a place, building, ship, aircraft, vehicle, box or receptacle. The purpose of the provision was to allow the search of anything capable of holding an item that can be seized. A bank account did qualify to the extent that it held money. Money in a bank could not be practically seized as an object to be physically presented in court, the act of seizing money was by way of freezing the relevant account. The understanding of the provision ought to be viewed in the context of its object to preserve evidence to facilitate the investigation of a crime.
6. The trial court had jurisdiction to issue the orders of inspection and freezing of the subject bank account. The orders were lawfully issued and not irregularly issued.
7. Section 118 of the Criminal Procedure Code on the other hand required that once anything is seized in execution of a warrant, it should be taken before a court having jurisdiction to be dealt with according to law. Section 121(1) indicated that further detention of seized items was to be done with the direction of the court. The freezing order was to run for 6 months. Section 118 of the Evidence Act emphasized the fact that once anything was seized, there must be a return to the court for the thing so seized be dealt with in accordance with the law. The purpose of the requirement was to inform the court of the outcome of the search and inspection, and to get direction whether or not the seizure of the subject matter would be maintained.
8. Since warrants were often granted *ex parte* due to the nature of the orders, Sections 118 and 121 imposed a condition of returning to court, and as section 121 implied, further detention of seized items was subject to the court's direction. That allowed affected persons an opportunity at that stage to challenge the seizure. The conditions were intended to ensure that the court maintained a supervisory role over the police. A bank account, being a special kind of item not capable of physical seizure, would, in practical terms, be frozen to preserve its contents until further court direction. The requirement was important as it aligned with the constitutional guarantee under article 50 that all persons be granted an opportunity to be heard on matters affecting them.
9. From previous matters, parties affected by adverse orders often invoked the revisionary jurisdiction of the High Court immediately upon becoming aware of such orders. It was unsurprising, as banks under an obligation to freeze a client's account would often inform their clients of the order. That did not remove the duty of the Director of Public Prosecutions (DPP) to serve the affected parties so that they could be represented during the return to court with the outcome of the execution of the warrants, as required by law. The DPP was obliged, upon executing warrants freezing an account, to serve the affected parties and notify them of the date for their appearance in court.

10. The return to court, which would serve as an *inter partes* hearing, often did not take place. The failure could also occur where the police neglected their duty to return to court with the results of their findings. Consequently, parties approached the High Court to challenge the lower court's orders granting the warrants in the first place. The effect was that the High Court, at that stage, was effectively sitting in what ought to have been the *inter partes* hearing in the lower court. The court observed that, following such an *inter partes* hearing in the lower court, any aggrieved party could approach the High Court to challenge the orders. The current practice, however, created the unusual situation where interested parties sought to be heard on the same issue directly before the High Court, instead of having first been heard in the lower court and presenting further evidence to the trial court.
11. In the instant case, the orders were issued on November 13, 2024. There was no order for service of the application to the respondent. The applicant only learnt about the orders, when he was served the same by the respondent. When issuing such orders, it should require the applicant to serve both the application and the orders on all affected parties, including the relevant financial institution, and give directions on when the parties would appear for a hearing before final orders on continued seizure or freezing were made. Such directions ought to be expressly stated in the order granting the warrants, rather than in generalized terms that give police officers unrestricted discretion. Upon service of such an order, any aggrieved party could then approach the court.
12. The applicant's claim of a violation of the right to be heard was misplaced, as the right had not been infringed, only that the trial court had failed to give a date for an *inter partes* hearing. His rights to privacy and property were not violated as they could be limited under article 24(1)(d) of the Constitution. The right to property did not extend protection to property illegally acquired. The limitation was necessary to facilitate investigations to establish whether there was any crime committed in opening of the bank accounts and whether the mobile phones were used in any way like moving the money in or out of the bank accounts in issue.
13. The applicant's claim that Kakamega Criminal Case No. E217 of 2024 involved prayers similar to those in several Busia matters based on the same facts, but found that no supporting applications or orders had been annexed to assess whether the matter was *res judicata*. The allegation of forum shopping was unfounded, as both Kakamega Criminal Case No. E217 of 2024 and E1943 of 2024 were before the same Magistrate.
14. The trial court erred in:
    a. Not giving a specific order of service of the application *interpartes* hearing.
    b. Not giving a date for *interpartes* hearing.
    c. For ordering that the prohibition order last for 6 months. A lengthy period, given that the orders were given *ex-parte.*

Application partially allowed.

Orders

i. *The ex-parte prohibition orders to last up to 8 January, 2025 (the trial court had given a mention date for 11 January 2025 but that was on a Saturday).*
ii. *The parties were to argue the application interpartes on 8 January 2025 where the trial court would decide whether to maintain or not to maintain the ex-parte orders.*
iii. *The Investigating Officer was to make a progressive report on the investigations to the court during the interpartes hearing on 8 January 2025.*

Citations

Cases

Kenya

1. *Erastus Kibiti Stephen v Euro Bank Limited & another* Miscellaneous Criminal Application 9 of 2003; [2003] KEHC 976 (KLR) - (Explained)

2. *Mohammed, Hassan v Ethics and Anti Corruption Commission & another* Anti-Corruption and Economic Crimes miscellaneous 51 of 2018; [2018] eKLR - (Explained)
3. *Okiya Omtatah & 2 others v Attorney General & 4 others* Petition 109 of 2016; [2018] KEHC 9175 (KLR) - (Explained)
4. *Watatua, Samuel & another v Republic* Criminal Appeal No 2 of 2013 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 24(1)(d); 40(6); 50; 165(6) - (Interpreted)
2. Criminal Procedure Code (cap 75) sections 118, 118A, 121 , 362, 364 - (Interpreted)
3. Evidence Act (cap 80) section 180(1)(2) - (Interpreted)
4. Proceeds of Crime And Anti-Money Laundering Act (cap 59A) - (Interpreted)

Advocates

None mentioned

RULING

1. The applicant filed a motion under certificate of urgency seeking the following orders:

    a. That pending the hearing and determination of this application inter-partes the orders of November 13, 2024 arising *vide* Kakamega Misc Cr No E217 of 2024 be stayed.

    b. That the honourable court be pleased to revise and set aside and/or vacate the unlawful, irregular orders and or ruling interfering with the accounts of Bennandira Company and orders requiring the applicant to provide his pins to his phones and all arising orders *vide* Kakamega Misc Cr No E217 of 2024.

    c. That the honourable court do issue an order directing that the impugned mobile phones be released unconditionally.

    d. That Incharge DCI Western Region and OCS Kakamega central police station enforce the orders.

2. Despite this being a revision, which ordinarily is decided without the court hearing the parties, given the contents of the application the court with concurrence of the counsels directed that parties were at liberty to file any affidavits, written submissions or material that would enable the court to make an informed decision.

3. The interested party filed a replying affidavit. The respondent also filed a replying affidavit and submissions.

Applicant's Case.

4. The application was premised on the grounds on the face of it and an affidavit sworn by the applicant where he stated that the applicant was served with substantive orders issued in CR E217 of 2024 and the respondents have forcefully gained access and purported to take over the company with hostility. He stated that similar orders were obtained in Busia Criminal Misc No E135 of 2024 and the same orders are subject to Busia High Court Criminal No E029 of 2024 which is pending determination.

5. The applicant stated that he was ambushed with court orders compelling him to deliver personal accounts, opening details and documents relating to change of signatories of the company accounts,

and orders stopping the withdrawal, transfer or dealings with the purported accounts for six months without being heard or given notice of the application.

6. He averred that the application was an abuse of the court process because there also exists a suit in Busia ELC No E001 of 2024 over the same facts as in the Kakamega Criminal Case No 1943 of 2024, Busia High Court Misc No E065 of 2024 and Kakamega CM's Miscellaneous Criminal Case No E217 of 2024.

7. The applicant further averred that the prosecution was not impartial and the discretion of the ODPP was being abused and used for the interests of the interested party and others. He averred that the offence at hand being forgery, there was no proof how bank statements were linked to the said offence.

Respondent's Case.

8. The respondent filed submissions dated December 12, 2024 and a replying affidavit by one Nicholas Waringa, officer No 235270, attached to the DCI Kakamega.

9. The respondent stated that the orders sought in Kakamega Misc Cr Appl No E217 of 2024 were obtained under section 118, 118A & 121 of the *Criminal Procedure Code*, section 180(1) & (2) of the *Evidence Act* and section 53A of the *Proceeds of Crime and Anti Money Laundering Act* [POCAMLA] for purposes of investigations, thus these orders cannot be termed as unlawful and/or irregular. Further, that section 118A of the *Criminal Procedure Code* requires that an application seeking orders to investigate should be obtained *ex-parte*. The *Proceeds of Crime and Anti Money Laundering Act* [POCAMLA], also allows for the freezing of bank accounts if there is suspicion that the funds are from unlawful activity or will be used illegally.

10. The respondent averred that the *ex-parte* orders issued in Kakamega Misc Cr Appl No 217 of 2024 were served on the applicant on the same date that they were issued, a fact acknowledged by the applicant who filed the present application on the same day. Further, he stated that the orders issued by the court were not final, since the court directed that they will remain in force for a period of six (6) months as provided by section 118 and 121 of the *Criminal Procedure Code*.

11. It was the respondent's submission that the burden of proving constitutional violations rests with the applicant and the applicant has not demonstrated how his constitutional rights were violated.

12. He further submitted that had the orders not been obtained ex-parte, there was a high risk that the funds in the accounts could be withdrawn, dissipated or transferred thus interfering with investigations and that the applicant's phones were confiscated for purposes of carrying out investigations and are currently undergoing analysis at DCI headquarters Nairobi and when the same is done the same will be returned to the applicant if they will not form part of the case exhibits.

13. Lastly, the respondent submitted that no similar orders were obtained in Busia Criminal Misc Cr Appl No E135 of 2024 as the orders in Busia Criminal Misc Cr Appl No E135 of 2024 directed the Investigating Officer to be allowed to access documents pertaining to the bank accounts while the orders the subject of this review were for freezing of the accounts and hence the trial magistrate cannot be faulted for issuing the said orders.

Interested Party's Case.

14. The interested party filed two replying affidavits and stated that orders (2), (3) and (4) issued by the court on November 13, 2024 were not directed to the applicant but to the financial institutions listed therein.

15. Secondly, the interested party stated that she took over the management of the three suit properties being Busia/municipality/532, Busia/municipality/533 And Busia/municipality/535 whereupon there are developed two rental properties popularly known as Benna Plaza and Equity Building pursuant to a post burial meeting that was held on February 6, 2024, which was attended by the applicant herein and indeed he was the first signatory to the minutes thereof. She further stated that in meeting, the family appointed the interested party to be the proposed administrator of her late husband's estate and she was to be in charge of the aforementioned estate assets and it was also resolved that the tenants of the said rental properties were to pay directly to the bank account to be operated by the interested party.

16. She stated that the applicant herein started to interfere with her duties to manage the said properties for and on behalf of the estate hence the interested party sued the applicant in the Environment and Land Court (ELC) at Busia in Busia Elcepcc/E001/2024 wherein she obtained an injunction order restraining the applicant herein from interfering with her duties as the administrator, collecting rent from the said estate's two rental buildings, he was also restrained from trespassing on the said rental properties.

17. The interested party further stated that she deliberately withdrew the application for injunction in the succession cause after Hon Justice Musyoka advised that all issues in the succession case that have nothing to do with distribution of estate assets eg land and company disputes should be directed to the proper courts hence the same was filed in the ELC, Busia and injunction orders granted in favor of the interested party. She submitted that any reference by the applicant to the same is misleading as it has been overtaken by events.

18. Further, she stated that the monies in the frozen bank accounts belong to the estate of her late husband and any unfreezing of the said bank accounts will be intermeddling with the estate and in furtherance of the applicant's criminal and fraudulent spree which he started through the multiple forgeries which are under investigation by the DCI who confiscated the applicant’s phones for fraud investigations against him.

19. The interested party averred that the application is defective and an abuse of the process of court on the grounds that the main revision prayer number (2) of the revision application and the entire application ought to have been made by and on behalf of the limited liability company Bennandira Limited which is a separate entity and not by the revision applicant himself. She submitted that applicant herein had also not sworn the supporting affidavit for and on behalf of the said limited liability company nor did he have authority to swear that affidavit for and on its behalf and bring this action for and on behalf of the company. No authority to bring this action for and on behalf of the company has been exhibited nor have minutes of the company directors' meeting authorizing such an action including swearing the said affidavit on behalf of the company have been exhibited.

20. The interested party argued that the applicant claimed that his bank accounts and those of his fraudulent company are not related to the criminal proceedings yet the money in those accounts are proceeds of the estate land properties whose transfer by the applicant herein to his company's name is not only fraudulent and criminal but it is the very subject matter of 22 criminal charges against him and prayed that the revision application be dismissed with costs.

Analysis and Determination.

21. I have looked at the application, the submissions by the parties, the supporting affidavits, replying affidavits and the annexures.

22. The application which led to the impugned orders is dated November 13, 2024 which sought the following orders:

That this application be deemed fit for admission for hearing on priority basis.

i. That a prohibition order issue prohibiting the respondent, by himself or through his agents or servants from withdrawing, transferring, wasting, disposing of or any other dealings (howsoever described) with Bank Account Numbers Stated Above and held within the Republic of Kenya for a period of six (6) months.

ii. That the applicant be furnished with certified copies of the respondents personal banks accounts operating under his personal Identity Card number xxxxx for a period running from December 1, 2023 to date.

iii. That the applicant be furnished with certified copies of the above mentioned banks accounts for a period running from November 1, 2023 to date.

iv. That the applicant be furnished with account opening details and any documents relating to change of signatories for the above accounts since opening.

v. That the applicant be granted an order to extract data from the following mobile phones earlier confiscated and are believed to be linked to commission of crime:-

    i. Samsung Galaxy of IMEI number (1) 35xxxxxxxxx (2) 35xxxxxxxx attached with safaricom simcard of mobile number 0794xxxx

    ii. Techno Camon of IMEI number (1) 35xxxxxxxxx (2) 35xxxxxxxxxx attached with safaricom simcard of mobile number 070xxxx

    iii. That the respondent is ordered to provide pin for Techno mobile phone of IMEl number (1) 35xxxxxxxx (2) 35xxxxxxxx attached with safaricom simcard of mobile number 070xxxx

23. The trial court after considering the application gave out the following orders:

a. That a prohibition order issue prohibiting the respondent, by himself or through his agents or servants from withdrawing, transferring, wasting, disposing of or any other dealings (howsoever described) with Bank Account Numbers stated above and held within the Republic of Kenya for a period of six 6) months.

b. That the applicant be furnished with certified copies of the respondents personal banks accounts operating under his personal Identity Card number xxxxx for a period running from December 1, 2023 to date.

c. That the applicant be furnished with certified copies of the above mentioned banks accounts for a period running from November 1, 2023 to date.

d. That the applicant be furnished with account opening details and any documents relating to change of signatories for the above accounts since opening.

e. That the applicant be granted an order to extract data from the following mobile phones earlier confiscated and are believed to be linked to commission of crime :-

    i. Samsung Galaxy of IMEI number (1) 35xxxxxxxxx (2) 35xxxxxxxxx attached with safaricom simcard of mobile number 079xxxx

ii. Techno Camon of IMEI number (1) 35xxxxxxxx (2) 35xxxxxxx attached with safaricom simcard of mobile number 070xxxxx

iii. That the respondent is ordered to provide pin for Techno mobile phone of IMEI number (1) 35xxxxxxxx (2) 35xxxxxxx attached with safaricom simcard of mobile number 070xxxx

That the Officer Commanding Station(OCS) Busia Police Station and DCI Busia be directed to assist the applicants in the enforcement of the orders herein above.

24. Section 362 and 364 of the *Criminal Procedure Code* under which this application has been brought together with article 165(6) of the *Constitution*, grant the High Court supervisory powers over the lower court. Under section 362 *CPC* the court has power to 'call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court'. Section 364 provides for the powers of the High Court on revision.

25. This power stems from article 165 of the *Constitution* as follows:

6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

7. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of administration"

26. Pursuant to the provision of section 362 of the *Criminal Procedure Code*, I called for file No Kakamega Criminal Case E217 of 2024 and Kakamega Criminal Case No E1943 of 2024.

27. I have examined the record.

28. The applicant wants this court to revise and set aside the orders issued in E217 of 2024 on grounds that they are unlawful and they are irregular orders for they were obtained *ex-parte*. In response, the respondent in his replying affidavit averred that the orders are not unlawful, neither obtained irregularly for they were issued by a competent court which had requisite jurisdiction.

29. Prohibition order (1) granted by the magistrate was in nature of freezing of bank accounts in order to enable the respondent to carry out investigations following a complaint by the interested party.

30. I have looked at the law. Section 180 of the *Evidence Act* provides for the procedure to facilitate investigation into a bank account and reads as follows:

" 180. Warrant to investigate

1. Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the

officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book."

31. The respondent (applicant in E217/2024) duly filed an affidavit detailing reasons why he wanted the prohibition orders as required by section 180 of the *Evidence Act* and the magistrate having satisfied himself on the reasons canvassed by the applicant allowed the request for prohibition order.

32. The applicant says the *ex-parte* orders obtained by the respondent in the trial court were issued in violation of his right to be heard. The nature of the orders sought and issued as highlighted in this ruling were to warrant investigation by the respondent. It is my opinion that had the applicant been notified of the application, warrants of investigation and orders sought prior to the issuance of the *ex-parte* orders, there was likelihood that the applicant could have interfered with or subverted the investigation. Such a possibility warrants issuing of such orders in a manner that the money in the bank account is safeguarded. While the applicant's right to be heard is a fundamental right, the timing of the notification must balance the need for a fair trial with the protection of the ongoing investigation. This balance justified the issuance of the *ex-parte* orders, given the circumstances at the time. Disclosing the fact of the intended investigation would defeat justice.

33. In the case of *Okiya Omtatah & 2 others v Attorney General & 4 others* (2018) eKLR it was stated that:

> "To give notice to the person to be investigated can easily jeopardize the incriminating evidence"

34. The provisions of the law that were relied on in seeking the warrants were sections 118 and 121 of the *Criminal Procedure Code* and 180 of the *Evidence Act*.

35. The enabling provisions of the law that gave power to the court to issue freezing orders are therefore to be found in the *Evidence Act* read together with the *Criminal Procedure Code*.

36. Section 180 of the *Evidence Act* authorizes the court to issue orders of investigation. It does not give powers to order the freezing of a bank account.

37. A similar observation was made by Waki, J (as he then was) in the case of *Erastus Kibiti Stephen v Euro Bank Ltd and the Commissioner of Police* Criminal Application No 9 of 2003, which is of persuasive value. The judge noted that:

> "Section 180(1) does not encompass the freezing of a bank account. On the plain reading of the section, this is indeed so. But one may loudly wonder why the law should permit the inspection of Banker's books...when it does not safeguard the funds existing in those accounts...How else would the investigator ensure that the horse has not bolted from the stable as it were before he finalizes his inspection? The answer, I think, lies in enacting a law whether substantive or procedural to resolve that difficulty."

38. The limitation of section 180 therefore warrants the need to invoke the provisions of section 118 and 121 of the *Criminal Procedure Code*. Section 118 provides:

> "Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named

or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law."

39. The foregoing section should be read together with section 121(1) which goes further to provide that:

> When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

40. On whether section 118 does not apply to bank accounts as it provides for seizure of an item in premises that is, a 'place, building, ship, aircraft, vehicle, box or receptacle' I do associate myself with the sentiments expressed by the Hon Judge in the case of *Erastus Kibiti Stephen* (*Supra*), concerning the lacuna in the provisions of section 180 of the *Evidence Act*. The section fails to make a further provision for safeguarding evidence in the form of money held in a bank account.

41. To me, the purpose of this provision is to allow the search of anything capable of holding an item that can be seized. A bank account does qualify to the extent that it holds money.

42. Money in a bank is a special kind of item. Since it cannot be practically seized as an object to be physically presented in court, the act of 'seizing' money is by way of freezing the relevant account. The understanding of this provision ought to be viewed in the context of its object and that is, to preserve evidence to facilitate the investigation of a crime.

43. The Court of Appeal in the case of *Samuel Watatua & another v Republic*, Court of Appeal, Nairobi, Criminal Appeal No 2 of 2013 (unreported), said:

> "A reading of section 180 of the *Evidence Act* together with sections 118 and 121 of the Criminal Procedure Code leaves no doubt in anybody's mind that the court, upon application, has power not only to authorize access by police to bank accounts of suspected criminals but also to freeze those accounts for the purposes of preserving evidence and the subject matter of the alleged crime."

And further,

> "In this case, we find that the limitations in section 180 of the *Evidence Act* together with sections 118 and 121 of the Criminal Procedure Code are in consonance with article 24 of the *Constitution*."

44. On this basis, I find that the lower court had jurisdiction to issue the orders of inspection and freezing of the subject bank account. The orders were lawfully issued and not irregularly issued. Similarly, the same holding applies to order (2), (3), (4) and (5).

45. Section 118 of the Criminal Procedure Code on the other hand requires that once anything is seized in execution of a warrant, it should be taken "before a court having jurisdiction to be dealt with according to law." A further reading of section 121(1) of *Criminal Procedure Code* indicates that further detention of seized items is to be done with the direction of the court. Section 121(3) further directs that:

> 3. If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise.

46. The applicant's says the freezing order is to run for 6 months which is a long period of time. Section 118 of the *Evidence Act* emphasizes the fact that once anything is seized, there must be a return to the

court for the thing so seized be dealt with in accordance with the law. The purpose of this requirement is to inform the court of the outcome of the search and inspection, and to get direction whether or not the seizure of the subject matter will be maintained.

47. Since the warrants are often granted ex parte due to the nature of the orders, sections 118 and 121 have a condition of a return to court, and as section 121 implies, further detention of the subject items is upon the direction of the court. It is therefore implied that, the persons so affected would have an opportunity at this stage to challenge the seizure of items. The purpose for laying down the conditions is to ensure that the court continues to maintain a supervisory role over the police.

48. A bank account being a special kind of item, not capable of seizure in the sense of the word, would, in practical terms be 'frozen' so as to preserve the contents of the account until further direction of the court. This requirement is important as it is in accord with the constitutional requirement under article 50, that all persons should be granted an opportunity to be heard on matters affecting them.

49. As an observation and from previous matters before me, a situation often arises where parties affected invoke the revisionary jurisdiction of the High Court as soon as they become aware of the orders adverse to their interests. Such knowledge may not be surprising since a bank account under obligation to freeze a client's account will often bring such order to the attention of its clients.

50. This however, does not take away the duty of the DPP, to serve the parties involved so that they may be represented during the return to court, with the outcome of execution of the warrants as required by the law. The duty is upon the DPP upon executing the warrants freezing the account, to serve the parties affected and notify them of the date for appearing in court.

51. The return to court which would serve as the inter partes hearing does not often happen. This failure may also happen where the police do not as a matter of duty, return to court with the result of their findings. As a result, parties come before the High Court to challenge the lower court's orders that granted the warrants, in the first place.

52. The effect of this procedure is that the High Court is at this stage, sitting in what ought to be the inter partes hearing that should have first taken place in the lower court.

53. Subsequent to the orders of the lower court after such inter partes hearing, any aggrieved party may approach the High Court to challenge the orders. The current practice creates the rare occasion where interested parties will seek to be heard on the same issue at the High Court, while ordinarily they would have had an opportunity to be heard in the lower court and present further evidence, to the trial court during the date parties return to court.

54. In this case, the impugned orders were issued on November 13, 2024 according to the extracted order, there was no order for service of the application to the respondent. The applicant only learnt about the orders, when he was served the same by the respondent.

55. It is therefore, advisable on the part of the court issuing the orders to require the applicant seeking its orders, to serve the application and the orders on the affected parties including the financial institution. The court should also give direction as to when parties will appear before the court for hearing before final orders can be made as to whether or not, to allow continued seizure of the property or freezing of the bank account.

56. Such directions ought to be indicated in the order granting the warrants, as opposed to the usual practice of warrants being granted in generalized orders, that appear to give an open cheque to the police officers. It is upon such an order being served that any aggrieved party would approach the court.

57. From the above discussion, the applicant's assertion that his constitutional right not to be condemned unheard, was misplaced. It was not violated, only that the trial court did not give a return date on when the parties would be heard interpartes.

58. On the allegation that his right to privacy and property were infringed/violated, these rights can be limited under the *Constitution* as provided for in article 24(1)(d).

59. Further, protection of property under article 40(6) of the *Constitution* of Kenya 2010 does not extend to any property that is unlawfully acquired. So the limitation is necessary to facilitate investigations to establish whether there was any crime committed in opening of the bank accounts and whether the mobile phones were used in any way like moving the money in or out of the bank accounts in issue.

60. I note that the *ex-parte* prohibition orders are to last for 6 months. Courts have held such *ex-parte* orders should be for a short period in order to enable the affected parties a chance to challenge them if need be and also for the police to give the court the progress on the investigations. In the case of *Hassan Mohammed v EACC & another* 2019 it was stated that:

> "Owing to many complaints arising from the *ex parte* issuance of search warrants by the Magistrate courts under section 118 and section 121(1) CPC and for proper management of the process, as a division, we have decided to issue the following guidelines,
>
> i. Upon issuance of the orders under section 118 and 118A of the Criminal Procedure Code the Magistrate must state the duration within which the order shall remain in force.
>
> ii. The duration shall not exceed 14 days.
>
> iii. The court shall give a return to court date soon after the 14 days for the following purpose
>
> a. For the investigation to appraise the court on what he and she has done.
>
> b. For the affected party to raise any issues it may it may have
>
> c. The court could extend the search warrant by a maximum of 7 days if satisfied of the need to do so.
>
> d. The affected party must be served within 48 hours of the issuance of search warrants."

61. The Court of Appeal in *Samuel Watatua & another v Republic* (*Supra*) said:

> "In certain cases as stated in the *Kibiti* case (*supra*) where properties or monies in bank accounts may be dissipated before the matter is heard inter partes, *ex parte* orders may be granted but only for a short period. Thereafter the application should be served upon all persons likely to be affected by any ensuing orders and no final order should be made until the matter is heard inter partes with all parties, pursuant to article 50 of the *Constitution* accorded an opportunity to be heard."

62. Before I give final orders, I note that the applicant alleged that the same prayers sought and granted in Kakamega Criminal Case No E217 of 2024 were sought and granted in Busia Criminal Misc No E135 of 2024 where the same orders are subject to Busia High Court Criminal No E029 of 2024 which is

pending determination and Busia High Court Succession No E003 of 2024, Busia ELC No E001 of 2024, Busia High Court Misc No E065 of 2024 revolve around the same facts.

63. The applicant never bothered to annex any copies of the applications and any orders which may have been given in those matters listed in paragraph 61, for this court's consideration to see whether the application E217 of 2024 is *res judicata* or not.

64. The applicant also raised the issue of forum shopping saying that the orders sought in E217 of 2024 should have been sought in E1943 of 2024. But upon perusing the records of the two files, I note that the two files are being handled by the same magistrate Hon ZJ Nyakundi. So, I do not understand where the issue of forum shopping comes from.

65. On the issue of whether the orders sought by the respondent are meant to interfere with the running of the company, I find that there is no evidence of such interference. The investigations herein are meant to establish whether there is a commission of a crime by the applicant but not meant to manage the affairs of the company. If the applicant has evidence pointing to such alleged interference, he can move the relevant court appropriately for a redress.

66. The upshot of the above is that I find the application has no merit save for that I fault the magistrate for:

    i. Not giving a specific order of service of the application interpartes hearing.

    ii. Not giving a date for *interpartes* hearing.

    iii. For ordering that the prohibition order last for 6 months. A lengthy period, given that the orders were given *ex-parte*.

67. As a result of the above, I give the following orders:

    i. The *ex-parte* prohibition orders to last up to January 8, 2025. (I note the magistrate had given a mention date for January 11, 2025 but that is on a Saturday)

    ii. The parties to argue the application interpartes on January 8, 2025 where the learned magistrate will decide whether to maintain or not to maintain the *ex-parte* orders.

    iii. The Investigating Officer to make a progressive report on the investigations to the court during the *interpartes* hearing on Janaury 8, 2025.

68. No orders as to costs.

69. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

Applicant – absent

Interested party - absent

Court prosecutor – Mbonzo

Court Assistant – Elizabeth Angong'a