



**WNK & 3 others v Ethics & Anti-Corruption Commission & another; Equity Bank Kenya & 4 others (Interested Parties) (Anti-Corruption and Economic Crimes Revision 1 of 2022) [2023] KEHC 20950 (KLR) (Anti-Corruption and Economic Crimes) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20950 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES REVISION 1 OF 2022**

**EN MAINA, J**

**JULY 27, 2023**

**BETWEEN**

**WNK ..... 1<sup>ST</sup> APPLICANT**

**WILLY WALLA INTERNATIONAL LIMITED ..... 2<sup>ND</sup> APPLICANT**

**SMW (A MINOR SUIING THROUGH NEXT FRIEND WNK) .. 3<sup>RD</sup> APPLICANT**

**SA (A MINOR SUIING THROUGH NEXT FRIEND WNK ) ..... 4<sup>TH</sup> APPLICANT**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF MAGISTRATES COURT, MILIMANI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**EQUITY BANK KENYA ..... INTERESTED PARTY**

**SERAH JOY MALABA ..... INTERESTED PARTY**

**REGINA MUNYIVA MUTIDA ..... INTERESTED PARTY**

**BRIDGE SIDE FARM LIMITED ..... INTERESTED PARTY**

**REGINEEZ ENTERPRISES ..... INTERESTED PARTY**

*(Being an Application for revision of orders issued in Milimani CMCR Misc. Application No. E3753 of 2022; Ethics and Anti-Corruption Commission versus Equity Bank of Kenya)*



## JUDGMENT

1. By the Notice of Motion dated November 29, 2022, which was first filed in the Criminal Division on November 30, 2022, the Applicant sought revision of the order issued on November 23, 2022 in Milimani CMCR Misc Application No E3753 of 2022; Ethics and Anti-Corruption Commission versus Equity Bank Kenya.
2. The gist of the Application is that the warrants arising from the impugned order are illegal for being issued in disregard of or in breach of the directions of the High Court in the case of *Hassan Mohammed v Ethics and Anti-Corruption Commission & Another* [2018] eKLR. More specifically that the order did not have a time frame; that the Learned Magistrate froze the Applicant's account for 21 days instead of 14 days as directed by the High Court in the case of *Hassan Mohammed v Ethics & Anti-Corruption Commission & Another* (supra); that no return to court date was stated in the order and further that the order was not served upon the applicant and he only learnt of the order from his bank.
3. The Applicant also avers that the order is incorrect and improper because neither the application nor the supporting affidavit from which it derives, stated specifically and articulately any reasonable suspicion as to why the order ought to issue; that the application did not state the public officer who was being investigated and the position he held; that no evidence was proffered to show there were ongoing investigations or that the accounts in issue were linked to the said investigations; that the order issued by the court included investigations into the offence of conflict of interest yet the offences that were being investigated were embezzlement of public funds, corruption and economic crimes, bribery, abuse of office and illegal acquisition of wealth and it is in the interest of justice and fairness therefore, that the proceedings before the lower court be set aside.
4. The application is vehemently opposed by the 1<sup>st</sup> Respondent through the Grounds of Opposition filed herein on December 19, 2022. The Respondent states that:-
  - “ 1. The Applicant has not met the threshold for grant of orders of review and setting aside.
  2. The application has been overtaken by events as orders sought to be stayed, to wit, to investigate and freeze the Applicants' bank accounts for 21 days, have since lapsed and warrants executed.
  3. The application for review is prematurely before this Honourable Court as the Applicant has not approached the court that issued the warrants.
  4. The warrants, subject of the application, were obtained pursuant to the provisions of Section 118 and 121 of the *Criminal Procedure Code* (CPC), section 180 of the *Evidence Act* and section 23 of the *Anti-Corruption and Economic Crimes Act* (ACECA).
  5. EACC satisfied the requirement under Section 118A of the *CPC* in applying ex-parte to the magistrate for a search warrant under Section 118 CPC.
  6. EACC satisfied the requirement under section 180 (1) of the *Evidence Act* in proving on oath to the magistrate that there was reasonable suspicion of corruption or economic crime, necessitating the inspection of the Applicant's banker's books for the purpose of an investigation.



7. The magistrate in issuing the warrants and granting freezing orders acted within his powers to authorize access by police officers and investigators to bank accounts suspected to have been used for the commission of an offence. An investigator under section 23 of the [ACECA](#) for the purposes of an investigation, has the powers, privileges and immunities of a police officer.
  8. The warrants to search and investigate accounts were issued upon the court being satisfied that there was reasonable suspicion of the offence of corruption and/or economic crime.
  9. *EACC* is mandated by Section 27 of the [ACECA](#) to extend investigations onto an "associate of a suspected person" which is defined to be a person, whether or not suspected of corruption or economic crime, who the investigator reasonably believes may have had dealings with a person suspected of corruption or economic crime.
  10. Setting aside of the warrants to investigate the Applicant's bank accounts to test the veracity of the allegation of corruption and/or economic crime is not in the public's interest.
  11. The Applicant has not demonstrated any prejudice suffered in the circumstances of this case.
  12. The Court has discretion to give the duration of the freezing orders. The Fourteen days period issued in the case of [Hassan Mohammed v EACC & Anor](#) was not a direction of general application, but applicable only in that case."
5. The application was canvassed by way of written submissions which this court has considered carefully alongside all the other material placed before it.

### **Analysis and Determination**

6. In an application for revision the court is concerned with correctness, legality propriety and regularity of the finding, sentence or order and the propriety of the proceedings of the trial court but not the merits.
7. The gravamen of this application is that firstly the order/warrant issued by the trial court was for a period greater than that set by this court (14 days) in the case of [Hassan Mohammed v Ethics and Anti-Corruption Commission & Another](#) (supra), that the order lacked a return date and further that the order was not served upon the respondent. It is also contended that there were no reasonable grounds demonstrated to warrant granting of the order and further that the order issue was in respect to investigations into the commission of an offence for which the 1<sup>st</sup> Respondent was not investigating.
8. The application that gave rise to the impugned order was expressed to be made under Sections 180 and 106B of the [Evidence Act](#), Section 118 and 121 (1) of the [Criminal Procedure Code](#) and Section 23 of the [Anti-Corruption and Economic Crimes Act](#). The application sought in the first instance a warrant to investigate, inspect and lift copies of account opening documents, statements, cheques, deposit slips, bankers books, payment vouchers or any other relevant information in respect of Account Numbers; 0020xxxxxxxx, 0020xxxxxxxx, 0020xxxxxxxx, 1290xxxxxxxx, 1290xxxxxxxx, 1290xxxxxxxx, 1290xxxxxxxx, 1290xxxxxxxx, 0020xxxxxxxx, 0020xxxxxxxx, 1250xxxxxxxx domiciled at Equity Bank Of Kenya for the period between January 1, 2016 to October 31, 2022. The application also sought an order to freeze funds in the said account pending conclusion of the investigations that were



being undertaken by the Ethics and Anti-Corruption Commission in regard to suspicious activities of the owner of those accounts.

9. There is now a long line of cases to the effect that subordinate courts are seized with jurisdiction to grant orders for the inspection of bank records and to freeze the accounts. In the case of *Samuel Watatua & Anor v Republic Court of Appeal*, Criminal Appeal No 2 of 2013 (unreported) the Court of Appeal stated:

“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”.

10. Section 180 of the *Evidence Act* and Sections 118 and 121 (1) of the Criminal Procedure Code make reference to a court or magistrate. Section 180 of the *Evidence Act* and Sections 118 and 121 (1) of the *Criminal Procedure Code* state:

“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.”

“118. 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.

121(1) 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.”

11. The above sections do not make specific reference to Special Magistrates appointed under the *Anti-Corruption and Economic Crimes Act*. Indeed, Section 118A of the *Criminal Procedure Code* provides that an application for a search warrant shall be made *ex parte* to a magistrate. The magistrate who granted the order was competent and had the authority to do so under the law. The fact therefore, that the warrant/order herein was obtained from a court other than one presided over by a special magistrate does not render it invalid.



12. As to the order being illegal or being granted for a period greater than that recommended by this court in the case of *Hassan Mohammed v Ethics & Anti-Corruption Commission* (supra). My finding is that whereas the High Court did direct that such orders should be granted only for 14 days and that the same should have a return date that directive was intended to bring fair play in the proceedings, but was not in my view intended as a hard and fast rule that tie the hands of the magistrate who grant those orders. Indeed, in the case of Samuel Watatua & Another v Republic (supra) the words used by the Court of Appeal were that ex parte orders may be granted but only for “a short period”. It is my finding that in any event an order that goes beyond 14 days is not illegal; that the omission to give a time frame for the order would only render the order irregular but not illegal. In my view the irregularity would, as in the case of an appeal, be curable under Section 382 of the Criminal Procedure Code and a party would then have to demonstrate that it suffered prejudice for such a warrant order to be set aside. In this case no prejudice was demonstrated as would warrant this court to set the warrants aside. That is not to say however that the directions given in the case of Hassan Mohammed v Ethics and Anti-Corruption Commission & Anor (supra) ought to be ignored. The courts and the police must endeavor to strictly comply with the same as the same facilitate the right to fair hearing of the persons affected by their orders.
13. My finding above finds support in the case of *Omwanza Ombati T/a Nchogu Omwanza & Nyasimi Advocates v Director of Criminal Investigations* [2017] eKLR where the court stated:-
- “27. In the absence of evidence of abuse power or a gross violation of the rights of a person to be searched, a court would be slow to find that a search warrant is unlawful on purely technical grounds.
28. The right to privacy is expressly guaranteed by Article 31 of *the Constitution*, while the statutory procedure for conducting search and seizure by police has three inbuilt requirements to be met. Such requirements are that: -
- a. prior to the search and seizure, the police should obtain a search warrant;
  - b. such warrant should be issued by a judicial officer; and
  - c. Lastly there should be proof on oath that there is reasonable suspicion of commission of an offence. To me, the above inbuilt requirements are present in this case”.

14. The finding is also supported by the decision of Mumbi Ngugi J, as she then was, in the case of *Innocent Momanyi Obiri v Ethics & Anti-Corruption Commission & Another* [2019] eKLR where she observed:-

“51. ....it seems to me that though the warrants did not bear the matters set out in the directions issued in the Hassan Mohammed v Ethics & Anti-Corruption Commission & Another case, there is no prejudice that was suffered by the applicant in the circumstances of this case.”

15. I would therefore also decline to nullify and set aside the warrant/order merely for reason that it did not follow the directives issued in the Hassan Mohamed case.

16. As for the allegation that the warrant was not served upon the Applicant it is my finding that that too cannot of itself be a ground to nullify the same. The Applicant did after all get to learn of the order



from his bank and no prejudice was occasioned to him. That however is not to say that the position of this court is that orders once obtained should never be served. To make it clear my position is that no prejudice was demonstrated for the omission to serve the order and the omission was not in itself therefore, a good reason to vitiate the order.

17. The Applicant also alleged that the order was issued in respect of a matter which the Ethics and Anti-Corruption Commission was not investigating. This probably because the Magistrate who issued the order made mention of the offence of conflict of interest whereas that offence was not among those referred to in ground 1 of the grounds for the application. Be that as it may, my reading of the order reveals that the same was clear on the bank accounts that were in issue and the bank records that were to be inspected which is what was relevant and material. I am not therefore persuaded that the order was used other than for the purpose it was issued.
18. In the upshot it is my finding that this application has no merit and it is dismissed. But, this being a criminal matter there shall be no order for costs.

Orders accordingly.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27<sup>TH</sup> DAY OF JULY 2023.**

**E.N. MAINA**

**JUDGE**

