



REPUBLIC OF KENYA



**KENYA LAW**  
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**Cospin SRL Limited v County DCI Headquarters, Nairobi; Coralie Piron  
& another (Interested Parties) (Criminal Revision 385 & 367 of 2021  
(Consolidated)) [2022] KEHC 495 (KLR) (Crim) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 495 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL REVISION 385 & 367 OF 2021 (CONSOLIDATED)**

**LN MUTENDE, J**

**MAY 19, 2022**

**IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT**

**CRIMINAL CASE NO. E2346, COUNTY DCI**

**HEADQUARTERS NAIROBI VS. NCBA BANK**

**KENYA LIMITED**

**IN THE MATTER OF: AN APPLICATION BY COSPIN SRL LIMITED**

**INVOKING THE SUPERVISORY JURISDICTION**

**OF THE HIGH COURT PURSUANT TO**

**ARTICLES 165 (6) AND (7) OF THE**

**CONSTITUTION OF KENYA, 2010 &**

**RE VISIONARY JURISDICTION UNDER SECTION**

**362 OF THE CRIMINAL PROCEDURE CODE**

**CAP 75 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLES 50 (1), 165 (6) AND 165 (7) OF THE**

**CONSTITUTION OF KENYA, 2010, SECTION**

**362, 364 AND 367 OF THE CRIMINAL**

**PROCEDURE CODE CAP 75 LAWS OF KENYA**

**BETWEEN**

**BETWEEN**



COSPIN SRL LIMITED ..... APPLICANT

AND

COUNTY DCI HEADQUARTERS, NAIROBI ..... RESPONDENT

AND

CORALIE PIRON ..... INTERESTED PARTY

THOMAS & PIRON GRAND LACS LIMITED ..... INTERESTED PARTY

*(On the 16th July 2021, the Chief Magistrate's Court, Milimani issued warrants to No. 99418 P.C. George Mwangi, an investigator to investigate books of accounts of Account Number 8639620016 (KES) and Account No. 8639620021 (Euros) in the names of Cospin SRL Limited domiciled at NCBA Bank, Galleria Branch. The officer was to investigate a case of conspiracy to defraud following a report made by a complainant, Coralie Piron. The applicant in this case moved to High Court to quash the warrants)*

### RULING

1. On the 16<sup>th</sup> July 2021, the Chief Magistrate's Court, Milimani issued warrants to No. 99418 P.C. George Mwangi, an investigator to investigate books of accounts of Account Number 8639620016 (KES) and Account No. 8639620021 (Euros) in the names of Cospin SRL Limited domiciled at NCBA Bank, Galleria Branch. The officer was to investigate a case of conspiracy to defraud following a report made by a complainant, Coralie Piron.
2. Through a Notice of Motion dated 30<sup>th</sup> September, 2021, Cospin SRL Limited, the Applicant, seeks orders thus:
  1. This Honourable Court be pleased to stay the order of the Chief Magistrate's Court in Miscellaneous Criminal Application No. E2346 of 2021 County DCI Headquarters, Nairobi vs. NCBA Bank Limited of 16/7/2021 pending the hearing and determination of this Notice of Motion application.
  2. This Honourable Court be pleased to examine and revise the record of the criminal proceedings in Miscellaneous Criminal Application No. E2346 of 2021 County DCI Headquarters, Nairobi vs. NCBA Bank Limited for the purpose of satisfying itself as to the correctness, legality or propriety of the findings in the Ruling and the order passed by Honourable Court on 16/7/2021, by which Hon. Magistrate improperly, procedurally and unlawfully issued a warrants to the police to investigate the complainants Bank Accounts without full disclosure of the dispute between the parties.
  3. This Honourable court be pleased to set aside the order of Honourable Chief Magistrate's Court on 16/7/2021 and dismiss the application dated 13<sup>th</sup> July, 2021 in Miscellaneous Criminal Application No. E2346 of 2021 County DCI Headquarters, Nairobi vs. NCBA Bank Limited.
  4. This Honourable Court be pleased to make such other orders as it considers appropriate for the proper, fair and effective access of justice to the Applicant.



3. The application is premised on grounds that: A complaint was lodged by a complainant and investigations were being undertaken by the National Police but the applicant has not been summoned by the Police to explain the nature of relationship that existed between it and the complainant. That the two are parties to a contract which provides means of dispute resolution through Arbitration Process. That in the claim, the complainant has demanded payment of Euros 1,643,427.54 for work allegedly done under the contract which he has disputed.
4. That the complaint made to police was tainted with non-disclosure of material facts and the lodgment of the complaint and application to obtain Bank Statements is an abuse of the court process intended to compel the applicant to settle a civil dispute.
5. The application is supported by an affidavit sworn by Christopher Fierens, the Country Director of the applicant who deposes that he received a notification from the Branch Manager of the NCBA Galleria Branch on 24/9/2021 who informed him of the existence of the order that the Bank was to comply with. That the complainants were subcontractors to the project where the applicant was the main contractor and the contract entered into provided for a mode of dispute resolution, which was through Mediation and Arbitration. That a dispute arose between the applicant and complainant on account of work done on the project and the complainant issued a demand for payment of the sum of Euro 1,643,427.54 for work allegedly done and through communication the applicant was amenable to amicable settlement therefore lodging of the complaint with the police is malicious and an abuse of the process of the court.
6. That the order of 16/7/2021 was delivered on unfounded allegations. That unless orders sought are granted there was danger of information and documents related to the Bank Account being released to the complainant which shall be in violation of the rights of the Applicant.
7. In reply thereto, the County DCI Headquarters, the 2<sup>nd</sup> Respondent, deponed an affidavit through No. 101083 P.C Edwin Pamba where he averred that the complainant lodged a complaint against the applicant for the matter to be investigated by the DCI County Headquarters Nairobi on allegations that he had been defrauded. That it is within the mandate of the DCI to investigate complaints lodged therefore he commenced investigations and to establish the allegations, an application to obtain warrants to investigate the accounts was made so as to obtain evidence.
8. That orders were made by the court and served upon the NCBA Bank which issued them with account opening documents and Bank Statements and upon analyzing the Bank Statements it was evident that the applicant had defrauded the complainant.
9. That investigations conducted required evidence from a different Bank at Galleria Branch but upon request, the Bank declined and deliberately failed to supply them with the information and instead informed the applicant of the investigations being conducted. The action of the Bank caused them to make another application dated 22<sup>nd</sup> September 2021 requiring NCBA Bank to provide them with proof of payments and/or supporting documents of the transactions, a request that was declined, an act that has deterred them from completing investigations.
10. The complainants, Coralie Piron and Thomas and Piron Grand Lacs Limited were enjoined as parties. In an affidavit deponed by Coralie Piron, it was averred that they were defrauded by the applicant following work done therefore they lodged a complaint against it to the DCI and requested investigations to be conducted which makes the application for revision to be pre-mature as investigations were on going.
11. That action by the applicant is not a civil dispute but criminal



## **conduct of fraud.**

12. The application was canvassed through oral submissions. It was urged by Mr. Wetangula, learned Counsel for the applicant that the lower court issued two (2) orders on 16/7/2021 and 27/9/2021 in Misc. Application No. E2346/2021 and Misc. Application No. E3186/2021, where the two (2) applications were similarly worded, the parties were the same save for the Investigating Officers. That the orders obtained in the first application were for alleged Investigations of fraudulent disposition of mortgaged property and in the second application the claim was to investigate conspiracy to defraud. That there was lack of certainty of what they were investigating and the dispute between the parties was civil in nature.
13. Mr. Kiragu, learned Counsel for the State argued that the application in E3186/2021 was not made by the Investigating Officer suo moto but after a complaint was raised to the DCI by the complainants; And the order made by the lower court was not complied with therefore the applicant made another application.
14. That the Investigating Officer was informed by the NCBA Bank of an order stopping them which was a delaying tactic to ensure that the accounts were cleared. That where a complaint has been made the court should not push parties to go to a civil court because existence of a civil case cannot bar a criminal case from going on.
15. Mr. Rotich learned Counsel for the Interested Party argued that there was a basis for the complaint being lodged which resulted into criminal investigations and after the order was issued there was nothing stopping the applicant from co-operating with the police to clear themselves from inculpability. That it would have been upon the ODPP to recommend to the DCI whether or not charges should have been preferred.
16. That to stop an ongoing investigation, the applicant should have demonstrated that the ongoing investigations had been done in a manner that violates the rights of the applicant, that there has been an abuse of the Police power and failure to adhere to the criminal investigation process. In this regard he cited the case of *Maina and 4 others -DPP*, Constitutional Petition E106 and 140 of 2021 (consolidated)
17. That the application having been prematurely filed the court should allow the investigations to be completed so that the ODPP can look at the inquiry file and make recommendations.
18. I have considered rival arguments of all counsels herein, the affidavit evidence and the applications. I have been invited to invoke the court's revisionary jurisdiction that is conferred upon this court by statute. Section 362 of the *Criminal Procedure Code* (CPC) provides:

The High Court may 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.
19. The jurisdiction alluded to is basically and fundamentally invoked where there is incorrectness, illegality and impropriety of the court's record. In the instant case it is argued that warrants issued were done irregularly and orders obtained were contrary to the law.



20. Applications in issue were made pursuant to the provisions of Section 118 and 112 of the CPC and Section 180 (1) of the Evidence Act. Section 118 of the CPC provides that :

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.

Section 180 (1) of the Evidence Act enacts that:

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.

21. A reading of the law shows that a Magistrate/Court has the discretion to issue warrants authorizing a Police Officer to investigate or scrutinize the bankers books. Where there is suspicion of an offence having been committed, such warrants are applied for and obtained. The warrants can only be issued where evidence on oath is availed to establish that an offence has been committed or where it is reasonably suspected.
22. In the instant case it is admitted that a complaint was made to the police who commenced investigations. There were allegations of fraudulent disposition of mortgage property and conspiracy to defraud. These are offences punishable in law.
23. The contention of the applicant is that they were not notified of the application prior to the notice being in issued. In the case cited of Hassan Mohammed vs. 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.”

24. The case gives directions in regard to ACECA to be taken by the courts in granting warrants of search. The trial court herein had jurisdiction to issue the impugned order, *ex parte* as provided in Section 118 of the CPC. The court upon issuance of the order, gave a return date. In the case of *Okiya Omtatah & 2 Others vs. 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”

25. At the outset, it was not necessary to notify the applicant herein. Disclosing the fact of the intended investigation would defeat justice.

26. An argument is advanced that the relationship between the parties was contractual such that any dispute arising was to be subjected to a dispute resolution mechanism clearly captured in the Arbitration Clause. Affidavit Evidence availed is of an agreement entered into by the parties which has terms and conditions binding them. An indepth look of the documents shows that a contractual relationship existed between the parties that was civil in nature which would require the party aggrieved to seek redress in a civil court.

27. However, looking at the complaint raised in the affidavit in support of the application, it was an allegation of conspiracy to defraud following the complainant’s belief of existence of fraudulent transactions which would have been to the detriment of the complainant.

28. Once a complaint is lodged the DCI has the mandate to investigate. In the case of *Commissioner of Police and Another Ex Parte Michael Monari & Another* (2012) eKLR Warsame J. (as he then was) held that:

“The police have a duty to investigate any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime if they do not investigate).”

29. To enable the DCI form the opinion of indicting the suspect they needed evidence from the Bank which could only be obtained following issuance of a warrant to inspect books of accounts. The applicant approached the court and presented evidence on oath which made the trial court conclude that there was necessity of investigations being conducted. As provided in Section 118 of the CPC, a reasonable suspicion, if established would move the court to grant the order *ex-parte*. In the circumstances, the order made in Misc. Criminal Application No. E2346/2021 was not irregular.

30. With regard to the 2<sup>nd</sup> application that was made in Misc. Criminal Application No. E3186/21 it is argued that the application was necessary as the Bank failed to comply with the earlier order granted and subsequently, there were orders stopping the Bank from compliance with the order granted by releasing details of the applicant’s accounts.

31. The alleged orders were not availed to this court. That notwithstanding, when the order was granted in E2346/2021 the court gave a mention date. Parties were to return to court on 18/8/2021. Failure to enforce court orders by a party would be contemptuous. The appropriate step that should have been taken would be to cite the Bank for contempt but not to file another application. Filing a second



application without disclosing existence of the first application and the order made was therefore an abuse of the court process.

32. It is urged that the application herein was premature. I have aforefound that Section 118 of the CPC gives the court powers to issue warrants for search and seizure. Based on that provision of the law the court would issue warrants to inspect books of accounts. But where there is an irregularity this court is mandated to act pursuant to Section 362 of the CPC to interrogate the legality of the proceedings. As pointed out, the second application in E3186/2021 was irregular therefore the application herein cannot be dismissed as having been premature.
33. The upshot of the matter is that this application succeeds partially in that I do call to this court orders issued in E3186/21 by way of revision which I quash and set aside. But, orders issued in E2346/21 shall subsist.
34. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY**

**AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY, 2022.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Mr. Kiragu for – ODPP

Mr. Rotich for the Interested Party.

Court Assistant - Mutai

