



REPUBLIC OF KENYA



**KENYA LAW**  
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**Yusuf (t/a Arroz Rice Supply) v Republic & 2 others; Bwanyange Limited (Interested Party)  
(Criminal Revision E173 of 2022) [2022] KEHC 13857 (KLR) (23 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 13857 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL REVISION E173 OF 2022**

**A. ONG'INJO, J**

**AUGUST 23, 2022**

**IN THE MATTER OF: ARTICLE 50 OF THE CONSTITUTION OF  
KENYA, 2010**

**IN THE MATTER OF: SECTION 362 AND 364 OF THE CRIMINAL  
PROCEDURE CODE (CAP 75) LAWS OF KENYA**

**IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT AT  
MOMBASA MISCELLANEOUS APPLICATION NO.**

**E310 OF 2022**

**BETWEEN**

**YUSUF ALI ALIBHAI ..... APPLICANT  
T/A ARROZ RICE SUPPLY**

**AND**

**REPUBLIC( THROUGH BANKING FRAUD INVESTIGATION UNIT) .... 1<sup>ST</sup>  
RESPONDENT**

**CHIEF MAGISTRATE'S COURT AT MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**ECO BANK ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**BWANYANGE LIMITED ..... INTERESTED PARTY**



## RULING

1. By a notice of motion dated July 18, 2022, the applicant pursuant to sections 362, 364 (1) (b) of the Criminal Procedure Code, article 23, 24, 31, 40, 50 (1) and article 165 (6) of the Constitution of Kenya, 2010 sought orders that:-
  - a. The application be certified urgent and service be dispensed with in the first instance.
  - b. The honourable court do exercise its discretion in revision of the decision and orders by the Hon Chief Magistrate Adet made on July 6, 2022 in Mombasa CM Criminal Court Miscellaneous Application No E310 of 2022-Republic (through Banking Fraud Investigation Unit) vs. ECO Bank Limited wherein the said Magistrate allowed the Miscellaneous Criminal Application dated July 6, 2022 ex-parte and issued warrants for the access and investigation, and the suspension of the Bank Account No. xxxx belonging to the applicant domiciled at ECO Bank Limited for a period of 90 days; all without any service upon and hearing of the applicant in contravention of the constitutional rights of the applicant.
  - c. Pending the inter-partes hearing and determination of this application, the applicant be allowed to transact its bank account No xxxx domiciled at the 3<sup>rd</sup> respondent ECO Bank Limited for purposes of paying the salaries of its employees, for purposes of paying its sundry creditors, for purposes of accepting payments from its sundry debtors, and for purposes of banking all the cheques drawn in favor of the applicant herein.
  - d. Alternatively, pending the hearing and determination of this application inter-partes, this honourable court issue an order staying and/or lifting the orders made by the Hon Chief Magistrate Adet on July 6, 2022 in Chief Magistrate's Court at Mombasa in Mombasa CM Criminal Court Miscellaneous Application No E 310 of 2022 Republic (through Banking Fraud Investigation Unit) vs. ECO Bank Limited.
  - e. This honourable court do quash/set aside the decision together with the orders made by the Hon Chief Magistrate Adet on July 6, 2022 in Chief Magistrate's Court at Mombasa in Mombasa CM Criminal Court Miscellaneous Application Number E 310 of 2022 Republic (through Banking Fraud Investigation Unit) vs. ECO Bank Limited.
  - f. The costs of this application be awarded to the applicant.
2. The application is premised on the grounds on the face of the application and by affidavit deposed by Yusuf Alibhai on July 18, 2022.
3. The application was opposed by an undated replying affidavit of No 89822 PC Nixon Kiunga.
4. An application dated July 26, 2022 seeking that Bwanyange limited be joined as an interested party was allowed by consent of parties on July 27, 2022. Upon the joinder the said interested party filed a preliminary objection dated July 26, 2022 seeking to have the applicant's application dated July 18, 2022 dismissed.
5. The application and preliminary objection were heard concurrently by way of written submissions. The interested party filed their submissions on July 28, 2022 whereas the 1<sup>st</sup> respondent entered appearance in the matter on 2<sup>nd</sup> of August 2022 and filed its written submissions on even date.



6. This court has considered the preliminary objection together with submissions filed in respect thereof and finds that the same cannot be sustained because provisions of section 13A of the Government Proceedings Act are not applicable to causes such as the one in question. The applicant is seeking to have an order made by the trial magistrate revised and is not making any claims against the government to require statutory notice to be issued. Powers of revision of the High Court are provided for under section 362 of the Criminal Procedure Code as follows; -

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.

7. Section 364 of the Criminal Procedure Code also provides thus; -

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

8. The provisions of section 362 and section 364 of the Criminal Procedure Code coupled with article 165(6) of the Constitution empowers the High Court to supervise subordinate courts and any person, body or authority exercising a judicial or *quasi*-judicial function and it is therefore not true that it does not have jurisdiction in this matter. The preliminary objection is therefore incompetent and is rejected.

9. The written submissions of the interested party and particularly the authority cited Ogola Mujera Advocates LLP vs Banking Fraud Investigations Unit & 2 Others (2016) eKLR supports the applicant's case that the persons affected by an order such as the one issued in Mombasa Chief Magistrate's Court Miscellaneous Criminal Application No E 310 of 2022 should have an opportunity to challenge the same. Further in Samuel Watatua & Another vs Republic, it was held that *ex-parte* orders may be granted but only for a short period but thereafter the application should be served upon all persons likely to be affected by the ensuing order and no final order should be made until the matter is heard inter-parties pursuant to article 50 of the Constitution.

10. In their written submissions dated August 2, 2022, the 1<sup>st</sup> respondent urges the court to demonstrate restraint in issuing the orders prayed for by the applicant in the application dated July 18, 2022 on grounds of insufficient proof of ownership of the Bank account numbers xxxx and xxxx domiciled at ECO Bank Limited.

11. According to the 1<sup>st</sup> respondent, the applicant has neither certified the bank account statements tendered in court as evidence nor accompanied the same with an affidavit by a bank employee attesting that the statements are true records of the accounts held by the applicant.

12. The 1<sup>st</sup> respondent further accuses the applicant of material non-disclosure of the sums held in the impugned bank accounts and that the interested party will suffer prejudice if the impugned bank accounts are unfrozen. This is coupled with their position that the decision rendered in Mombasa Magistrate's Court is appealable and this court is therefore precluded from hearing this revision.

13. Turning to the application dated 6<sup>th</sup> of July 2022, this court has perused the application in Mombasa Chief Magistrates Court Miscellaneous Criminal Application Number E 310 OF 2022 and the prayers sought were as follows;

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



- b. That this honourable court be pleased to issue warrants to investigate bank accounts to the applicant so as to enable number 89822 PC Nixon Kiunga an investigator attached to Banking Fraud Investigation Unit Mombasa to have access inspect/ investigate /obtain, information and demand to be supplied with and carry away as exhibits certified copies of accounts opening documents; account statements and cheque(s), slips or RTGS cleared between May 1, 2020 and July 6, 2022 in respect of account numbers; xxxx and xxxx domiciled at ECO Bank.
  - c. That this honourable court be pleased to issue an order compelling managers of the above bank to nominate authorized persons to make and give to number 89822 PC Nixon Kiunga, a police officer and an investigator attached to the Banking Fraud Investigation Unit Mombasa, a certificate of production of electronic evidence under section 106B(4) of the Evidence Act in respect of evidence (certified copies) generated electronically or from and by electronic device(s) that shall be given in compliance with order of this court.
  - d. That the order of this court be served upon the manager(s) of the above bank.
  - e. That there be no orders as to the costs of the application.
14. Orders issued by the trial magistrate on July 6, 2022 were as follows; -
- a. A warrant do hereby issued authorizing No 89822 PC Nixon Kiunga an investigator attached to the banking fraud to demand that you avail to him books of bank account numbers xxxx and xxxx domiciled at ECO Bank in the name of Arror Rice Supply and Fructo Commodities Ltd for him to have access to, investigate / inspect obtain information and require to be supplied with and carry as exhibit certified copies of account opening documents, account statements, cheque(s) and slips or RTGS cleared for the period between May 1, 2020 and July 6, 2022.
  - b. Above account to be suspended for operations for 90 days to enable completion of investigations.
  - c. An order do and is hereby issued compelling you to nominate authorized persons to make and give to No 89822 PC Nixon Kiunga a certificate of production of electronic evidence under section 106 B (4) of Evidence Act in respect of evidence (certified copies) generated electronically or from and by electronic device (s) that shall be given in compliance with order 1(above) of this court.
  - d. This matter be mentioned on ..... day of ..... 2022 to confirm compliance of orders 1, 2 and 3 above.
15. The hand written records of the trial magistrate in Miscellaneous Criminal Application No. E 310 of 2022, the orders made were as follows:-
- “Upon perusal of application dated 6/7/2022, the same is allowed as prayed.”
16. It is apparent from the record of the trial magistrates court that the prayers sought did not include suspension of the operation of the accounts in question and more so there was no prayer for the period within which the alleged suspension was to operate. The order that the accounts be suspended from operations for 90 days is therefore an illegality that requires this court’s intervention in terms of revision. The application dated July 18, 2022 is allowed to the extent that the order suspending the operations of account number xxxx domiciled at ECO Bank Limited is lifted.
17. There are no orders as to costs.



**DATED,SIGNED AND DELIVERED THROUGH MS TEAMS/EMAIL THIS 23RD DAY OF  
AUGUST 2022**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

Ogwel- Court Assistant

Mr. Makuto for the 1st Respondent

Mr. Makau Advocate for the Interested Party

Mr. Omondi Advocate for the Applicant

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

