



Music Copyright Society of Kenya v Office of Director of Public Prosecutions & another; ABC Bank Limited & 4 others (Interested Parties) (Criminal Revision E173 of 2022) [2022] KEHC 11530 (KLR) (Crim) (12 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E173 OF 2022
LN MUTENDE, J
AUGUST 12, 2022**

BETWEEN

MUSIC COPYRIGHT SOCIETY OF KENYA APPLICANT

AND

OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS KILIMANI 2ND RESPONDENT

AND

ABC BANK LIMITED INTERESTED PARTY

ABSA BANK LIMITED INTERESTED PARTY

EQUITY BANK LIMITED INTERESTED PARTY

KENYA COMMERCIAL BANK LIMITED INTERESTED PARTY

FAMILY BANK LIMITED INTERESTED PARTY

RULING

1. Music Copyright Society of Kenya, the Applicant, a registered organisation charged with the mandate, inter alia, of enforcing copyright musical works and collecting royalties under the Copyright Act on behalf of its members, whose membership comprises of performing artists.
2. Through an application dated 29th July, 2022, the applicant seeks stay of orders issued by the lower court in Milimani Criminal Misc. Application No. E2414 of 2022, Republic v ABC Bank & Others, freezing/restricting debit in accounts No.xxxx; xxxx; xxxx; xxxx; xxxx; xxxx; xxxx; xxxx held at ABSA Bank in the name of the Applicant and revision of orders restricting debit and freezing accounts No's xxxx



held at ABC Bank(k) Limited; xxxx held at ABSA Bank; xxxx held at Equity Bank Limited; xxxx held at Kenya Commercial Bank Limited; and,xxxx, held at Family Bank Limited, in the name of Music Copyright Society of Kenya, the applicant herein; and, setting aside and quashing the stated orders. The stated orders were issued pursuant to Section 118 of the Criminal Procedure Code.

3. The impugned Orders were issued to No. 91873 PC Stephen Kibei of DCI Kilimani Divisional Headquarters which enabled him to conduct investigations into an alleged offence of stealing by agent.
4. The orders were issued to various banks where the applicant is stated to hold various accounts further to its mandate and operative business.
5. The applicant was prompted to file the instant application after it failed to access its accounts. The applicant's contention is that the orders do not have a specific period and are prejudicial to the applicant as they have paralysed the applicant's operations and the applicant is and/or would be unable to meet its expenditures incurred in running its daily activities which includes paying its employees, and, it is incapable of administering, managing and enforcing exploitation of copyrighted musical works on behalf of its membership which covers over 15000 members as per its statutory and legal obligations.
6. The application is premised on the supporting affidavit of Dr Ezekiel Mutua, the CEO of the applicant, who deposes that the applicant has expenditures, debts and tax obligations to pay to KRA from the frozen accounts. That if the orders which do not specify the period of time should remain in force, the applicant would be incapable of collecting and distributing royalties on behalf of the members.
7. The application is opposed by the respondents. Through the replying affidavit sworn by Stephen Kibei the Investigating Officer in the matter who contends that investigations were lodged following a complaint from one of the members of MCSK, the late Daudi Kabaka's son, over unpaid royalties. And as a result of orders obtained, the investigator has obtained a list of banks through which international royalties for authors, composers and publishers of music content are channelled.
8. He urged that he has already received bank opening details from Family Bank and Equity Bank and is in the process of analysing the documents which are voluminous and shall be able to conclude the process on or before 24/8/2022. That once the process is concluded, necessary action would be taken on the restricted accounts.
9. And, that the applicant does not have a letter authorising it to operate since August, 2021, according to the letter dated 5th July, 2022 from the Kenya Copyrights Board annexed to the respondent's affidavit. In its submissions, the applicant takes issue with the orders restricting debits in respect of the frozen accounts. That the orders have far reaching implications which are beyond investigations since all operation have been frozen. That the applicant have statutory obligations for over Fifteen Million members and its employees who rely on the applicants for their livelihood. That the orders stop the applicant from fulfilling its obligations because of intended investigations over complaints by one member, investigations that could still be achieved without restricting the debits of all the applicant's accounts, and, that there was no reason or justification of the orders restricting debits.
10. On its part, the respondents submitted that the 2nd Respondent has a constitutional mandate to investigate complaints received and the applicant has not demonstrated any illegality by the trial court to warrant exercise of this court's revisionary powers. That the period for investigations is not unreasonable and the time for conclusion is not unreasonable since the investigating officer has indicated that the investigations would be concluded on 28th August, 2022.
11. I have considered the application, affidavits in support and opposition, and rival submissions by both counsels for the applicant and respondent. This court's statutory jurisdiction as provided by Section



362 of the *Criminal Procedure Code* is to call for the subordinate courts record and to interrogate the correctness, legality or propriety of the proceedings and orders issued by the court. Orders to be granted would be to either set aside or review orders issued by the subordinate court. In the case of *Republic vs. Milkab Jerobon Chumba* [2017] eKLR, a decision that is persuasive, the court held that it is only where there is an illegality, incorrectness, irregularity, mistake or impropriety in the decision, sentence or order that an order for revision can be granted.

12. The power to issue search warrant is provided for in Section 118 of the Criminal Procedure Code that provides thus:

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.

11. Section 118A. of the CPC that provides for making an Ex-parte application for search warrant states that:

An application for a search warrant under section 118 shall be made ex-parte to a magistrate.

11. A perusal of the proceedings of the lower court shows that when the 2nd applicant sought the order that was granted on the 13th July, 2022, it was to remain in force for five (5) days pending hearing inter-parte on 19th July, 2022. There is no indication if the application was served as directed and when the matter came up on 19th July, 2022, there was no appearance of either party. Consequently, the matter was deferred to 2nd August, 2022, and, there having been no appearance of either party, the court dismissed the application dated 13th July, 2022. The fact that the application was dismissed is sufficient to render these proceedings baseless given that the impugned orders were no longer in existence.
12. At the outset the lower court did not perpetrate any illegality or impropriety since the court issued orders pursuant to the law which were intended to operate for 5 days and parties would appear before it for inter-parte hearing. Had parties appeared before court, it would have determined whether or not it was necessary for the orders to remain in force while investigations were being conducted. Having failed to do so, the applicant's representations before this court, though merited are not applicable in the current scenario.
13. Consequently, the court declines to grant orders sought as there is nothing to review.
14. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 12TH DAY OF AUGUST, 2022.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Applicant – N/A

Ms. Ntabo for the Respondent



