



**Fructo Commodities Limited v Republic (through the Banking Fraud Investigation Unit (BFIU) & 2 others (Criminal Revision 174 of 2022) [2022] KEHC 12915 (KLR) (3 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12915 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**CRIMINAL REVISION 174 OF 2022**  
**A. ONG'INJO, J**  
**AUGUST 3, 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**

**FRUCTO COMMODITIES LIMITED ..... APPLICANT**

**AND**

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

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

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

**RULING**

1. By a Notice of Motion dated 14<sup>th</sup> of July 2022, brought pursuant to Article 50 of *the Constitution* of Kenya 2010, section 362 and 364 of the Criminal Procedure code the Applicant sought the following orders;
  - a. That this Application be certified urgent and service thereof dispensed with in the first instance.



- b. That this Honourable Court do exercise its discretion in revision of the Decision and Orders by the Hon. Chief Magistrate Adet made on 6<sup>th</sup> July 2022 in Mombasa CM Criminal Court Miscellaneous Application Number E310 of 2022 – Republic (through Banking Fraud Investigation Unit) Vs ECO Bank Limited wherein the said Magistrate allowed the Miscellaneous Criminal Application dated 6<sup>th</sup> July 2022 ex-parte and issued Warrants for the access and investigation, and the suspension of the Bank Account Number 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. That pending the inter-partes hearing and determination of this Application, the Applicant be allowed to transact its Bank Account Number 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 favour of the Applicant herein.
  - d. That alternatively, pending the hearing and determination of this Application inter-partes, this Honourable Court issue an Order staying and/or lifting Orders made by the Hon. Chief Magistrate Adet on 6<sup>th</sup> July 2022 in Chief Magistrate’s Court at Mombasa in Mombasa CM Criminal Court Miscellaneous Application Number E310 of 2022 – Republic (through Banking Fraud Investigation Unit) Vs ECO Bank Limited.
  - e. That this Honourable Court do quash/set aside the Decision together with the Orders made by the Hon. Chief Magistrate Adet on 6<sup>th</sup> July 2022 in Chief Magistrate’s Court at Mombasa in Mombasa CM Criminal Court Miscellaneous Application Number E310 of 2022 – Republic (through Banking Fraud Investigation Unit) Vs ECO Bank Limited.
  - f. That 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 supporting Affidavit of ABBAS ALIBHAI sworn on 4<sup>th</sup> July 2022. The Application was opposed by the replying affidavit sworn on 22<sup>nd</sup> of July 2022 by PC Nickson Kiunga the investigating officer in Mombasa Chief Magistrates Court Miscellaneous criminal application Number E310 of 2022.
  3. By an Application dated 21<sup>st</sup> July 2022, Bwanyange Limited sought to be joined in the suit as an interested party. The Application was allowed by consent and the interested party filed a preliminary objection dated 26<sup>th</sup> of July 2022 seeking to dismiss the application herein on the grounds that it offends section 13 A of the Government’s Proceedings Act and section 362 and 364 of the Criminal Procedure Code.
  4. This Application was canvassed by way of written submissions filed by the interested party in respect to the preliminary objection on 28<sup>th</sup> of July and by the Applicant on the 27<sup>th</sup> of July and further submissions in respect to the preliminary objection on the 28<sup>th</sup> of July.
  5. This Court has considered the preliminary objection together with submissions filed in respect thereof and find 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 under section 362. of the *Criminal Procedure Code* that provides thus; -



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.

6. 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.
7. 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.
8. Turning to the application dated 14<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 Court be pleased to issue warrants to investigate bank accounts to the Applicant so as to enable No 89822 PC Nickon 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 cheques /sips or RTGS cleared between 1<sup>st</sup> May 2020 and 6<sup>th</sup> July 2022 in respect of account number xxxx and xxxx domiciled at ECO-Bank. That the Court be pleased to issue an order compelling managers of the above bank nominate authorized person to make and give to Number 89822 PC Nickson 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 devices that shall be given in compliance with order of this Court.
9. Orders issued by the Trial Magistrate on 6<sup>th</sup> July 2022 were as follows
  - a. A warrant to hereby issued authorizing 89822 PC Nickson 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 Limited for him to have access to, investigate / inspect obtain information and require to be supplied with and carry as exhibit certified copies of accounts opening documents, account statements .cheques and slips or RTGS cleared for the period between 1<sup>st</sup> May 2020 and 6<sup>th</sup> July 2022.
  - b. Above accounts 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 Nickson Kiunga a certificate of production of electronic evidence under section106 B (4) of *Evidence Act* in respects 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.
10. A perusal of the handwritten records of the Court shows that the Magistrate gave the following orders; -  
“Ct upon perusal of application dated 6<sup>th</sup> of July 2022, the same is allowed as prayed.”
11. 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 Trial magistrate allowed the application as prayed and the order that the Accounts be suspended from operations for 90 days is therefore an illegality that requires this Courts intervention in terms of revision. The application dated 14<sup>th</sup> Of July 2022 is allowed to the extent that the order suspending the operations of account number xxxx and xxxx is lifted. There are no order as to costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 3<sup>RD</sup> AUGUST 2022.**

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

**JUDGE**

**IN THE PRESENCE OF: -**

Ogwel Court Assistant

Mr Omondi Advocate for Applicant

Mr Makau Advocate for Interested Party – Mr. Makuto hold brief.

Mr Makuto for 1<sup>st</sup> Respondent.

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

**JUDGE**

**3/08/2022**

**MR. MAKUTO**

I seek suspension for 3 days. I seek for certified copies of the ruling. I also seek for leave to appeal.

**MR. OMONDI ADVOCATE**

We pray for certified copies of ruling. We oppose stay of ruling. The orders are negative in nature and not capable of being stayed.

**ORDER**

Leave to appeal granted to 1<sup>st</sup> Respondent. Certified Copies to be supplied to 1<sup>st</sup> Respondent (for free) whereas applicant to pay copying charges.

Application to stay this court orders are disallowed.

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

**JUDGE**

**3/08/2022**

