REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISC APPLICATION NO. E022 OF 2021

ESTHER WAGIO NJUNGE.....1ST APPLICANT

LIGHT HOUSE TRADING COMPANY LTD.....2ND APPLICANT

GRACE NYAMBURA NDIRITU.....3RD APPLICANT

MERCY WAMBUI NYAMBURA.....4TH APPLICANT

CYNTHIA WANJIKU NYAMBURA.....5TH APPLICANT

VERSUS

ASSET RECOVERY AGENCY.....1ST RESPONDENT

MARGARET WANJA MUTHUI.....2ND RESPONDENT

JUDGMENT ON REVISION

1. By the Notice of Motion dated 12th July 2021 brought under Articles 23, 24, 31, 40, 47, 50 and 165(6) of the Constitution and sections 362 and 364 of the Criminal Procedure Act Cap 75 the Applicants seek orders as follow:

> **"1. Spent**
>
> **2. This Honourable Court be pleased to bring to this Honourable Court for purposes of quashing the subordinate court orders of 3rd May 2021 in Nairobi Chief Magistrate Court Miscellaneous Criminal Application No. E1423 of 2021.**
>
> **3. The Honourable Court be pleased to dismiss Nairobi Chief Magistrate Court Miscellaneous Criminal Application No. E1423 of 2021.**
>
> **4. This Honourable Court be pleased to bring to this Honourable Court for purposes of quashing the subordinate court orders of 24th May 2021 in Nairobi Chief Magistrate Court Miscellaneous Criminal Application No. E1700 of 2021.**
>
> **5. The Honourable Court be pleased to dismiss Nairobi Chief Magistrate Court Miscellaneous Criminal Application No. E1700 of 2021.**
>
> **6. Costs of this application be provided for."**

2. **The grounds for the application are:-**

> **"1. By dint of Article 25 of the Constitution, the right to fair hearing under Article 50 of the Constitution is sacrosanct and any order flowing from a violation of this right is void.**
>
> **2. It is trite law that orders obtained in violation of the right to hearing and right to natural justice ought to be set aside *ex***

debito justisiae.

3. The applications before the subordinate court breached fundamental constitutional principles of the right to fair hearing and the right to fair administrative action as the account holders being necessary parties were not joined to the applications or served with the orders issued pursuant to the applications although the orders adversely affected them.

4. The named respondent, Co-operative Bank of Kenya Limited, had no interest in the application because it was not the affected party. The applications on their face were therefore incurably defective for failing to join necessary parties.

5. The application was bare assertions and suspicions devoid of any material fact that would have evidenced reasonable grounds as required by section 118 of the Criminal Procedure Code and section 180 of the Evidence Act.

6. It is trite that a police officer is not legally empowered to apply for or to obtain a warrant to investigate a person's bank account just because (s)he imagines that that person may commit or has committed an offence but there must be substantial facts and circumstances already available to the police officer to enable him to create or to have reasonable suspicion in mind that, the account holder has committed an offence. The existence of these facts and/or circumstances were not disclosed and/or proved in the applications before the subordinate court.

7. The orders made by the subordinate court were irregular and in violation of sections 140 and 178 of the Evidence Act and Articles 31, 47 and 50 of the Constitution as they were issued to apply to Equity Bank, Kenya Commercial Bank, NCBA Bank and Bank of India who were not parties to the applications.

8. In addition, the orders issued by the subordinate court were disparate from the pleadings filed by the 1 st Respondent (hereinafter the Agency) and were contrary to the legal doctrine that parties are bound by their pleadings as the subordinate court issued orders that were not sought by the Agency.

9. The Applicants were never served with the orders of the subordinate court and this violated their rights under Article 47 of the Constitution to be informed of any adverse action taken or likely to be taken against them.

10. It is trite law that the orders issued under section 118 of the Criminal Procedure Code and section 180 of the Evidence Act are not to be made final orders until and unless affected parties are heard pursuant to Article 50 of the Constitution. Contrary to this principle of law, the subordinate court made final orders as the orders did not provide return date for inter-partes hearing. This was a violation of the Applicants' right to hearing and to natural justice.

11. On the basis of these irregular, improper and illegal proceedings the Agency obtained documents from the Applicants' bank.

12. It is on the basis of these illegal and improper proceedings that the Agency now seeks to limit the rights of the Applicants to property and which proceedings have to be set aside *ex debito justisiae* for violating the constitutional rights to fair hearing, fair administrative action, privacy and property.

13. The Agency cannot seek to benefit from an outright illegality and claim that it is acting in the public interest as one of the tenets of the public interest is respect for the rule of law for the benefit of the whole society.

14. The orders of the Chief Magistrate Court of 3 rd and 24th May 2021 ought to be set aside for being irregular and issued in violation of the Constitution and the law,

15. This Honourable Court has jurisdiction to entertain the application and issue the orders as justice demands as it can 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 an proceedings of any such subordinate court."

3. The application is supported by the affidavit of Esther Wagio Njue, the 1st applicant and director of the 2nd applicant sworn on the 12th July 2021 with the consent of the 3rd, 4th and 5th applicants in which she deposes that the applicants were not made parties to nor were they served with the orders issued by the Chief Magistrate's Court although they were the account holders of the subject accounts and likely to be affected by the orders of the honourable court. She deposes that the orders of the subordinate court were final orders owing to the fact that the subordinate court did not provide a return date for *inter-partes* hearing of the application; that the failure to join the applicants in the subordinate court breached the fundamental constitutional principle of the right to fair hearing under Article 50; that, the failure to serve them with the orders of the subordinate court breached their right to fair administration action guaranteed under Article 47 of the Constitution; to be informed of any adverse action taken or likely to be taken against them; that a police officer is not legally empowered to apply for or to obtain a warrant to investigate a person's bank account on bare assertions and suspicion devoid of any material fact which were not disclosed in the application before the subordinate court and further that the orders issued by the subordinate court were disparate from the pleadings filed by the 1st Respondent and were in contravention of the legal doctrines that parties are bound by their pleadings as the orders were issued to Equity Bank, Kenya Commercial Bank, NCBA Bank and Bank of India who were not party to the proceedings. The 1st applicant also deposes that it was on the basis of the irregular, improper and illegal proceedings in the subordinate court that the 1st Respondent obtained their bank records hence violating their right to privacy under Article 31 of the Constitution and further that, by freezing their bank accounts based on illegal and improper proceedings the 1st respondent infringed the applicants right to property in violation of Article 40 of the Constitution. The applicants also argue that the orders were issued in violation of **Section 140 and 178 of the Evidence Act and Articles 31, 47 and 50 of the Constitution** and hence the proceedings in Nairobi Chief Magistrate Court Miscellaneous

Criminal Applications **E1423 of 2021 and E1700 of 2021** and the resultant orders of 3rd and 24th May 2021 ought to be set aside *ex debito justisiae* for being irregular and for violating the constitutional rights of the applicants.

4. In a supplementary affidavit filed in response to the 1st respondent's replying affidavit the 1st applicant deposed that NRB HCMISC. APP. NO. E019 of 2021 arose from the impugned application and orders and therefore the same form a continuing chain. She deposes that the orders in the lower court should therefore be quashed to prevent further violation of the constitutional rights of the applicants in the High Court. It is the applicants' contention that Miscellaneous Criminal Application E1422 of 2021 was never served on the applicants and that it was an attempt by the 1st respondent to cure the illegal and irregular order in Miscellaneous Criminal Applications E1700 of 2021.

1st Respondent's case

5. The 1st respondent opposed the application by way of a replying affidavit sworn by No. [Particulars Withheld] CPL. Fredrick Muriuki, a police officer/investigator of the Asset Recovery Agency (the Agency) where he deposed that on 26th April 2021, the 1st respondent received information that the 1st and 2nd applicants and the 2nd respondent received money suspected to be proceeds of crime; that an inquiry file No. 27 of 2021 was opened to investigate and inquire into the activities of the 1st and 2nd applicants' and the 2nd respondent's accounts for the offence of money laundering; that the1st Respondent obtained *exparte* orders to investigate and restrict debits in the 1st and 2nd applicants and the 2nd respondent's accounts from the Chief Magistrate's Court vide Misc. Criminal Applications E1423 of 2021 and E1700 of 2021 under **Section to Sections 118, 118A and 121 of the Criminal Procedure Code** and **Section 180 (1) & (2) of the Evidence Act and Section 53A of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)** and the orders were served on the Co-Operative Bank of Kenya, the respondent in the applications and a key party in the application and also being the bank where the accounts were held; that, the bank issued the 1st respondent with account opening forms and bank statements in the name of the 1st and 2nd applicants and the 2nd respondent. It is further asserted that the orders obtained in Misc. Criminal Applications E1423 of 2021 and E1700 of 2021 were for purposes of investigation only and that the applications are spent and the files closed. The 1st respondent avers that an analysis of the 1st and 2nd applicant's and the 2nd respondent's bank statements established that their accounts had received suspicious funds through a money laundering scheme and the funds were believed to be proceeds of crime. That subsequently on 21st June 2021 the 1st Respondent obtained preservation orders in Nairobi High Court Misc. App No. E019 of 2021 ASSET RECOVERY AGENCY vs ESTHER WAGIO NJUNGE & 5 OTHERS for funds in three accounts belonging to the 1st and 2nd applicants and the 2nd Respondent at Co-Operative Bank of Kenya. The deponent avers that the applications in the Chief Magistrate Court were not irregular or in violation of the law and that they were based on reliable information that culminated in instituting the applications in the superior court. It is further averred that the orders were obtained pursuant to **Section 118 A of the Criminal Procedure Code** for purposes of conducting investigations and that in Chief Magistrate Misc. Application No. E1422 of 2021 the 1st Respondent obtained orders to investigate the 1st and 2nd applicant's and the 2nd respondent's and other accounts which orders were served on Co-Operative Bank of Kenya, Equity Bank, Kenya Commercial Bank, NCBA and Bank of India. It is asserted that the bank records of the 1st and 2nd applicants and the 2nd respondent were obtained pursuant to lawful court orders and their constitutional rights were not violated.

6. **The 2nd Respondent's position is that she supports the application by the 1st and 2nd applicants.**

7. On 16th July 2021 directions were given that the application would be heard by way of written submissions. The applicants filed their submissions on 20th August 2021, while the 1st respondent filed their submissions on 16th September 2021. The 2nd Respondent did not file any submissions.

Applicants' submissions

8. After summarising the 1st & 2nd Applicamt's case against Mr. Ligunya and Mr. Wakwaya Learned Counsel for the applicants reduced the issues for determination to four and submitted on each separately. The issues are:-

> **"1. Jurisdiction**
>
> **2. Whether the applicants' have proved the grounds for revision.**
>
> **3. Violation of the applicants' constitutional rights.**
>
> **4. Irregular, illegal and incorrect proceedings and orders issued in violation of the law."**

9. On the issue of jurisdiction Counsel submitted that this court has jurisdiction to entertain this applicaton by virtue of **Article 165 (6) and (7) of the Constitution as read with Section 362 of the Criminal Procedure Code**. Counsel relied on the cases of **Republic v Jared Wakhule Tubei & Another (2013) eKLR, Republic v Enock Wekesa and Another (2010) eKLR** and the case of **Republic v James Kiarie Mutungei [2017] eKLR** where he contended the courts interpreted the foregoing provisions and stated that the supervisory power of the High Court was to scrutinize the record of the subordinate court to determine whether it complied with legal standards. Further, that the supervisory power of the High court dealt with incorrect, illegal, improper or irregular proceedings, orders or findings of the trial court. Counsel also relied on the decision of the High Court of Malaysia in **Public Prosecutors vs Muhari Bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735** .

10. On whether the Applicants have proved the grounds for revision, counsel submitted that the proceedings before the subordinate court violated the constitutional rights of the applicants' guaranteed under Articles 31, 40, 47 and 50 of the Constitution and that those proceedings departed from the lawful procedure demanded by **Sections 140 and 178 of the Evidence Act**. He submitted that the failure to conform to the constitutional and statutory provisions and requirements rendered the proceedings incorrect, illegal, irregular, and improper and therefore

subject to revision by this court. In support of this submission Counsel cited the case of **Republic v James Kiarie Mutungei (*supra*).**

11. On whether the applicants' rights were violated, Counsel submitted that the courts have set down the bare minimum procedure that should be followed in *exparte* proceedings brought under **Section 118 and 121 of the Criminal Procedure Code** in order to align the proceedings with the right to a fair hearing and the right to fair administrative action. He cited the case of **Hassan Mohammed vs EACC & Another [2019] eKLR** and the case of **Republic vs Prime Bank & Another [2018] eKLR** where the courts' held that orders in an *exparte application* under the foregoing provisions must indicate the period the orders issued will remain in force but not exceeding 14 days and also give a return date to court and the application and orders must be served after the first *exparte* hearing so that parties are heard before extension of the orders. Counsel further relied on the case of **Samuel Watatua & Another v Republic Nai Criminal Appeal No. 2 of 2013 (unreported)** where the Court of Appeal held that after *exparte* orders are granted, the application for seizure/freezing should be served on all persons likely to be affected by the orders and no final orders should be issued until the matter is heard *inter partes*. Counsel also submitted that the applicants' right to a fair hearing and the right to fair administrative action were violated by failure by the 1st Respondent to enjoin the applicants as respondents in the proceedings before the subordinate court, by the 1st Respondent's failure to serve the court process and orders upon them, and because the orders issued did not have a return date meaning that the orders were final orders yet the applicants' were not given an opportunity to address the court. Counsel contended that to the extent that the proceedings and orders violated the applicants' right to a fair hearing and right to fair administrative action the same are in contravention of the Constitution and are therefore a nullity and void as provided in Article 2 (4) of the Constitution and it should be so declared. Counsel placed reliance on the case of **Coalition for Reform and Democracy (CORD) & Another vs the Republic of Kenya & Another [2015] eKLR** and the case of **Law Society of Kenya v Attorney General & 2 Others [2016] eKLR.**

12. On the fourth issue, Counsel submitted that the orders issued by the subordinate court and which were used to access and freeze the applicants' accounts were made in violation of the law, as they were based on improper and illegal proceedings. Counsel contended that the orders were issued on a wrong consideration of the law as the applications were lodged in the wrong court and under the wrong provisions of the law. Counsel submitted that **Sections 56 and 81** of the **Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)** provide that proceedings under Part VII and VIII of the Act by which the 1st respondent exercises jurisdiction under Section 53 of the Act, shall be civil proceedings and that the rules of evidence applicable in civil proceedings shall apply. Counsel argued that the 1st respondent can only institute civil proceedings in exercise of its powers under the **Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)** but, it instead instituted criminal proceedings and the subordinate court in its criminal jurisdiction purported to exercise jurisdiction and issued illegal and improper orders. To support this argument Counsel cited the case of **Ruth Wendy Wambui v Republic [2016] eKLR.** Counsel contended that power to institute criminal proceedings are vested on the Director of Public Prosecutions (DPP) pursuant to Article 157 of the Constitution and that unless leave to prosecute is granted to a private person such as the 1st respondent it is only the Director of Public Prosecutions who has the constitutional mandate to institute criminal proceedings. For this Counsel placed reliance on the case of **Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 Others [2013] eKLR.** Counsel stated that the 1st respondent was investigating the applicants for offences including organized crime contrary to **Section 3 (c) as read with Section 4 of the Prevention of Organized Crimes Act**. That in accordance with **Section 16 of the Prevention of Organized Crimes Act** an application for investigating and freezing the applicants' accounts ought therefore to have been be instituted in the High Court and not the subordinate courts as that court did not have jurisdiction to entertain the applications. Counsel submitted that even if the subordinate court had jurisdiction to entertain the proceedings and issue the impugned orders, the order from the court was irregular, illegal, improper and incorrect as it was at variance with the pleadings and prayers in the applications. Counsel stated that whereas the applications were sought against the Co-operative Bank of Kenya the court proceeded to state that the orders were to apply to non-parties namely Equity Bank, Kenya Commercial Bank, NCBA Bank and Bank of India. Counsel contended that parties are bound by their pleadings and cited the cases of **Abdul Shakoor Sheikh v Abdul Majid Sheikh, Mansor Ltd and City Development Co. Ltd Civil Appeal No. 161 of 1991 (unreported); Anthony Francis Wareham t/a AF Wareham & 2 Others v Kenya Post Office Savings Bank [2004] eKLR** and; **Joseph Ocheri Obegi & 5 Others v Gesare Okioma [2012] eKLR.**

13. Counsel further submitted that the orders issued by the subordinate court were based on baseless and mere allegations as no evidence was laid before the court and the same should not have been granted. Counsel cited the case of **Vitu limited vs The Chief Magistrate Nairobi & 2 Others Misc. Criminak Application No. 475 of 2004** and the case of **Sanjay Shah Arunjain v Republic [2002] eKLR** to support this submission.

14. Counsel also argued that the subordinate court went beyond its jurisdiction and tainted the proceedings with illegality when it issued *ex parte* freezing orders contrary to the law. Counsel cited the case of **Erastus Kibiti Stephen v Euro Bank Limited & Another [2003] eKLR** where the court stated that:

> "Although I accept the view that the Affidavit presented to the court should be accompanied by an application, I do not subscribe to the view that the order may not be obtained ex-parte at the first instance where the circumstances so dictate, for example where prior notice to the customer would lead to the closure of the Account, thus defeating the very purpose of the exercise. But the application ought to be served soon after on the customer and the Bank for their response. Where it is desired that the
>
> ***Accounts be frozen, a separate application ought to be filed and contested inter partes for the investigator to satisfy the Court that there is sufficient basis for the order."***

15. Counsel submitted that the subordinate court went beyond its jurisdiction in issuing orders that went beyond the timelines prescribed by the Superior Court and which are binding on the subordinate court. Counsel argued that the orders were for 30 days whereas in several cases the High Court required such *exparte* orders to subsist for 14 days. Counsel contended that by relying on illegal, improper and incorrect proceedings to obtain the orders the 1st respondent violated the applicants' right to privacy and right to property under **Articles 31 and 40 of the Constitution** by accessing their accounts unlawfully and freezing them hence rendering them unaccessible to the applicants.

16. Counsel submitted that the applicants have demonstrated the violation of their rights and equally shown that the proceedings and the orders are tainted with illegality in the manner of their institution and prosecution for being in contravention to the provisions of the **Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)** and **the Prevention of Organized Crimes Act.** Counsel urged this court to quash the proceedings and orders of the subordinate court and all subsequent orders thereto. Counsel also cited the following cases:-

Macfoy vs United Africa Co Ltd [1961] 3 All E.R; Robert Akumu Asembo v Political Parties Tribunal & 2 Others [2013] eKLR and the decision of the South African Appellate Court in **Speaker of the National Assembly vs De Lille MP & Another 297/98 (1999) (ZASCA 50)**

1st respondent's submissions

17. On her part, Ms. Muchiri submitted that the orders sought by the 1st respondent in Misc. Application No. E1423 of 2021 and E1700 of 2021 were obtained under **Sections 118, 118A & 121 of the Criminal Procedure Code, Sections 180 (1) & (2) of the Evidence Act** and, **Section 53A of Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)** for purposes of investigation. She contended that **Section 118A of the Criminal Procedure Code** requires that an application seeking orders to investigate should be obtained *exparte.* She cited the case of **Mape Building & General Engineering vs AG & Others (2016) eKLR** where she stated the court emphasized the rationale for seeking orders *ex parte* and submitted that with the advent of e-banking money moves fast and for efficacy of the warrants and investigation, making the application for investigations and freezing order *ex parte was justified.* She put reliance on the case of **Samuel Watatua & Another vs Republic, Court of Appeal Nairobi Criminal Appeal No. 2 of 2013** and **Humphrey Oswago vs Ethics and Anti-Corruption Commission (2013) eKLR.** Ms. Muchiri argued that contrary to the contention by the applicants that the 1st respondent instituted criminal proceedings and was exercising the power vested on the DPP the 1st respondent was exercising its statutory mandate under **Section 53A (5) of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA).** Counsel submitted that the allegation by the Applicants that the applications were instituted in the wrong court under the wrong provisions of law was therefore misleading and baseless. Counsel contended that the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) provides for both criminal and civil forfeiture under Part VII and VIII respectively. It was her submission that the 1st respondent applied the civil forfeiture which has four stages which include: investigation, preservation (obtained under **Section 81 & 82);** gazettement of the preservation orders under **Section 83** and forfeiture proceedings pursuant to **Section 90 & 92 o**f **Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)**. She submitted that the orders obtained by the 1st respondent in Misc. Application No. E1423 of 2021 and E1700 of 2021 were for investigations only and were therefore instituted before the proper court in accordance with the law. She stated that the findings of the investigation informed the subsequent filing of the preservation application in NBI HCMISC. APP. NO. E019 of 2021. To buttress her submissions Counsel relied on the case of **Asset Recovery Agency vs Pamela Aboo [2018] eKLR.**

18. On the applicants allegation that the orders obtained by the 1st respondent in Misc. Application No. E1423 of 2021 and E1700 of 2021 applied to non-parties and that the court went beyond its jurisdiction Counsel submitted that the orders were only served upon Co-Operative Bank of Kenya. She submitted that the 1st respondent also obtained orders from the Chief Magistrate's Court in Misc. Application No. E1422 of 2021 to investigate the 1st and 2nd applicants, 2nd respondent and other persons accounts held in other banks and which orders were served on the respective banks namely; Co-Operative Bank of Kenya, Equity Bank, Kenya Commercial Bank, NCBA Bank and Bank of India.

19. Ms. Muchiri submitted that the allegation by the Applicants that the proceedings before the subordinate court departed from the lawful procedure provided under **Section 140 and 178 of the Evidence Act** is false and misleading. She argued that the aforementioned provisions are only applicable where the bank is not a party to the proceedings which was not the case in the subordinate court as the Bank was a party to the proceedings. Counsel submitted that the averments by the applicants that the applications by the 1st respondent ought to have been instituted in the High Court and not this court because the offences being investigated fell under the Prevention of Organized Crimes Act was misleading as the 1st respondent moved the court pursuant to the provisions of the law so as to conduct investigations. She also submitted that the orders were not obtained by mere allegations as the 1st respondent received reliable information on 26th April 2021 that the 1st and 2nd applicants and the 2nd respondent's accounts had received illicit funds suspected to be proceeds of crime. Counsel argued that in issuing the orders, the subordinate court was satisfied on the basis of the averments and grounds set out in the application and therefore the orders were merited. In support of her submissions, Counsel cited the case of **Ethics and Anti-Corruption Commission vs Nationak Bank of Kenya and Another (2017) eKLR** and **Mape Building & General Engineering vs AG & Others (*supra*).**

20. On whether the applicants' constitutional rights were violated, Ms. Muchiri submitted that the burden of proving constitutional violations rests with the applicants and that the applicants have not demonstrated how their constitutional rights were violated by the 1st respondent. It is counsel's contention that the *ex parte* applications and orders did not infringe the applicants right to a fair trial and fair administrative action as the orders were obtained pursuant to statutory provisions. Counsel submitted that had the orders not been obtained *ex parte* there was a high risk that the funds in the accounts would have been withdrawn, dissipated or transferred thus interfering with investigations. She relied on the case **Mape Building & General Engineering vs AG & Others (*supra*)** and the case of **Kenya Anti-Corruption Commission vs Republic & 4 Others (2013) eKLR** to support her submissions. On the claim by the applicants that their right to a fair hearing was violated, counsel contended that the applicants' had unlimited access to the court that granted the *ex parte* orders but they did not make an attempt to contest the said orders. On whether the applicants right to property under **Article 40 of the Constitution** was violated, it was her submission that the rights and fundamental freedoms cited by the applicants' are not absolute as they may be limited under Article 24 (1)(d) of the Constitution. She relied on the case of **Mohamed Garat alais Korio & Others vs Senior Principal Magistrate Garissa & Others [2012] eKLR**. Counsel urged that the applicants had acquired illicit funds and submitted that unlawfully acquired property was not protected under **Article 40 (6) of the Constitution.**

21. On whether this court should quash the orders obtained in the subordinate court, Ms. Muchiri submmitted that Article 160 (1) of the Constitution guarantees unconditional independence of the judiciary and judicial officers and that the subordinate courts must be independent from the superior courts. Further, that although the High Court has supervisory jurisdiction over subordinate courts that jurisdiction must not be used in a manner that renders the operations of the subordinate courts impossible or takes away their ordinary jurisdiction. She cited the case of **Pauline Cherono Kenes & Another vs The Chief Magistrate Court's and Another [2013].** Counsel submitted that the orders of the subordinate court were obtained and issued in accordance with the law and therefore the Chief Magistrate's court cannot be faulted for discharging its lawful mandate. Counsel asserted that the applicants have not demonstrated any illegality in the orders. She contended that moreover the orders were temporary and are now spent. Ms. Muchiri submitted that it is in the interest of justice that the court rejects the orders sought by the applicants as allowing the same would render the preservation orders in **NRB HCMISC APP. NO. E019 of 2021 Asset Recovery Agency vs Esther Wagio Njunge & 5 Others** nugatory. She stated that allowing the orders would in effect allow a few to benefit from the commission of crimes which does not angur well for the general public interest. She urged this court to dismiss the application with costs to 1st Respondent.

Analysis and determination

1. The orders issued by the chief magistrate which are sought to be quashed are:-

> **"1. THAT an order is hereby granted to the Applicant to investigate and restrict the following bank accounts for a period of 30 days:**
>
> **(a) Account NO. 011xxxxxxxxxx in the name of Esther Wagio Njuge held at Co-operative bank.**
>
> **(b) Account No. 011xxxxxxxxxx held at Co-Operative bank in the name of [Particulars Withheld] Trading Company and any other account held at the said bank in the name of light Trading Company.**
>
> **2. THAT an order is hereby granted compelling the managers of the above quoted Bank to issue the following documents relating to above listed bank accounts or any other account in the same names:**
>
> **(a) certified copies of account opening forms.**
>
> **(b) statements of accounts since inception to date**
>
> **(c) Cheques/cash deposits and withdrawal slips, RGTS transfer documents**
>
> **(d) Any other documents/information relating to the above bank accounts which may assist in the investigations.**
>
> **3. THAT an order is hereby compelling the Managers of the above quoted Banks to nominate an authorized person to make and give to No. [Particulars Withheld] Cpl. Fredrick Muriuki a police officer and an investigator attached to the Assets Recovery Agency, a Certificate of production of electronic evidence generated electronically or from and by electronic devise that shall be given in compliance with the law.**
>
> **4. THAT the orders of this Court be served upon all the Bank Manager of Co-operative Bank, Equity Bank, Kenya Commercial Bank, NCBA Bank and Bank of India."**

22. The applicants' are asking this court to quashed the orders pursuant to its supervisory jurisdictions **under Article 165 (6) and (7) of the Constitution and its revision powers under Section 362 of the Criminal Procedure Code. Article 165 (6) and (7) of the Constitution** provide as follows:

> **"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**
>
> **(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."**

23. Section 362, the Criminal Procedure Code provides that:

> **"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."**

24. The issue of the High Court's supervisory jurisdiction over subordinate courts has been canvassed in various high court cases. In the case of **Republic v Jared Wakhule Tubei & Another (2013) eKLR; Republic v Enock Wekesa and Another (2010) eKLR** cited by Learned Counsel for the applicants, the court held:

> "I wish to point out that, the exercise of supervisory power of the High court, particularly under Article 165(6) & (7) of the Constitution and sections 362-364 of the CPC is so wide, and is not limited to situations where there is an error on the face of the record , or new issues having emerged. It covers incorrect, illegal, improper or irregular proceedings, order or finding of the trial court."

25. In the case of **Republic v James Kiarie Mutungei [2017] eKLR** also cited by Counsel for the applicants, Nyakundi J. stated that:

> ***"The enactment of section 362 as read with section 364 of the code is substantially part of the provisions of the statute to actualize the provisions of Article 165 (6) and (7) of the Constitution.***
>
> ***The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo-moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question.....***

As can be seen from this analysis the function of the court under section 362 of the Criminal Procedure Code as read with section 364 is to enable the court to scrutinize and examine the correctness of facts of a subordinate court or tribunal so as to make a finding on legality or propriety. Legality means lawfulness, strict adherence to law, correctness and propriety ordinarily having the same meaning... The interference under section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous, to justness appropriateness and suitability to trial."

26. In the Supreme Court of India case of **Veerappa Pillai vs Raman & Raman Ltd and Others 1952 AIR 192** cited with approval in the case of George Aladwa Omwera Vs R [2016] eKLR it was held that:

"The supervisory powers are obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made…."

27. Arising from the decisions in the above cases in order to succeed the Applicant must demonstrate that the decision of the trial court was incorrect, illegal or irregular or that the court acted without or in excess of its jurisdiction. Having considered the application and the arguments advanced by Counsel for parties, the issue for determination therefore is whether orders issued by the Chief Magistrate's Court in Miscellaneous Criminal Application No. E1423 of 2021 and Miscellaneous Criminal Application No. E1700 of 2021 were illegal, improper, grossly irregular or whether they were made without jurisdiction or in excess of jurisdiction as to warrant this court to interfere.

28. The applicants claimed that the impugned applications and orders are irregular, illegal and incorrect for reason that the subordinate court did not have jurisdiction to hear the applications as the same ought to have been brought under the provisions of the **Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and Section 16 of the Prevention of Organized Crimes Act.** In support of this contention Counsel for the applicant relied on the case of **Ruth Wendy Wambui v Republic [2016] eKLR** where the court stated:-

"Thus in my considered view we now have in our laws, two sets of provisions dealing with issuance of warrants to police officers to search accounts, retrieve documents etc, namely Section 180 of the Evidence Act on the one hand, and Sections 103, 105, 106, 107 of the Proceeds of Crime and Anti-Money Laundering Act, on the other.

19. It seems to me however, that while the Provisions of Section 180 of the Evidence Act, and Sections 118 and 121 of the Criminal Procedure Code do not conflict, regarding the fundamental objects with corresponding provisions of the Proceeds of Crime and Anti-Money Laundering Act, as far as restraint and seizure orders are concerned, the provisions of the Proceeds of Crime and Anti-Money Laundering Act, must prevail. The latter Act assigns the role of making relevant applications for restraint and seizure to the Assets Recovery Agency. Secondly the law prescribes the application of the Civil Procedure to such applications."

On its part the 1st respondent stated that the applications and orders obtained in the subordinate court were for purposes of carrying out investigations and therefore that court had jurisdiction to grant the orders. Counsel for the 1st Respondent relied on the case of **Asset Recovery Agency vs Pamela Aboo [2018] eKLR** where Achode J held that:

"In any case the Chief Magistrate's court is not a court of concurrent jurisdiction. An ex parte application was made before the Chief Magistrate's court under Section 118 of the Criminal Procedure Code, seeking orders of search, access and preservation of fund. The purpose of the application was to commence investigation into the accounts of the Respondent/Applicant to establish whether a formal application should be brought under Proceeds of Crime and Anti-Money Laundering Act (POCAMLA)"

29. I have considered the application, the grounds thereof, the supporting affidavit, the replying affidavit, the impugned orders, the rival submissions and the law. In the case of Hassan Mohammed Vs Ethics and Anti-Corruption Commission and Another [2019] eKLR: Ong'undi J gave the following guidelines Owing to many complaints arising from the ex parte issuance of search warrants by the Magistrate courts under Section 118 and Section 121 (1) Criminal Procedure Code 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 Criminaal Procedure Code the Magistrate must state the duration which the order shall remain in force.

(ii) The duration shall not exceed 14 days.

(iii) The court shall give a return to court a date soon after 14 days for the following purpose:

(a) For the investigation to appraise the court on what he or she has done.

(b) For the affected party to raise any issues it may have.

(c) The Court could extend the search warrant by maximum of 7 days if satisfied of need to do so.

(d) The affected party must be served within 48 hours of the issuance of search warrants.

30. Ong'undi J also stated as follows in the case of Republic Vs Prime Bank and Another [2018]eKLR:- Ong'undi J also stated:-

> "51 In order to keep the process fair, just and in line with Article 50 of the Constitution, the Magistrate's court moved under Sections 118 and 121 of the Criminal procedure Code and Section 180 of the Evidence Act should upon granting the exparte order issue the following directions:
>
> i) Give a return date for a progress report.
>
> ii) Indicate the period when the orders issued will remain in force but should not exceed 14 days.
>
> iii) Hear both parties before any limited extension is given. This calls for direction on service of the application and orders after the first exparte hearing."

31. In giving these directions Ong'ndi J was guided by the decision of the Court of Appeal in the case of Samuel Watutua and Another NBI Criminal Appeal No. 2 OF 2013 (unreported) where citing the case of Kibiti Erastus Kibiti Stephen Vs Euro Bank Limited and Another [2003] eKLR with approval the court opined that exparte orders for freezing accounts should be granted for a short period and thereafter the application should be served upon all persons likely to be affected and no final orders should be made until the matter is heard interpartes with all parties being accorded an opportunity to be heard.

32. Counsel for the applicants impugn the orders issued by the magistrates' court for not complying with the above principles and guidelines. It is the applicants' contention that the orders do not meet the bare minimum and hence are illegal, irregular, improper and incorrect. I am however not persuaded that that is the position in this case. The mere fact that the magistrates court did not adhere to the directions given by the Superior Court does not of itself render the orders illegal or a nullity. In the Samuel Watutua case (supra) the Court of Appeal did not itself define what the "short period" it prescribed was. It is therefore left to the individual judicial officer to ascribe the number of days or period it considers reasonable. It is my finding that the orders made by Ong'undi J in the cases cited by Counsel for the applicants are guidelines intended to inject fairness and consistency in the proceedings in the magistrates' courts and whereas the courts are bound to comply with the same failure to do so merely renders the proceedings un-procedural but does not render the proceedings illegal or make them a nullity. It is my finding therefore that the orders granted by the chief magistrate's court are not illegal merely because they did not have a return date of fourteen days or because they were not served upon the applicants. My finding gets support in the holding of the court in the case of Ogola Mijera Advocates LLP Vs Banking Fraud Investigations unit and 2 others [2016] eKLR that:-

> "In this case, the impugned orders were issued on 27th January 2016 according to the Applicant but no information was shared with it with respect to these orders. The Applicant only learnt of the orders when it sought the services of its bank. This was unprocedural. To avoid the unusual scenario presented by the proceedings before me the police officer as a matter of practice ought to follow the procedure as stated by the Court of Appeal and laid down under the Criminal Procedure Code. It is therefore, advisable on the part of the court issuing the orders to require the Applicant seeking its orders, to serve the application and the orders on the affected parties including the financial institution. The court should also give directions as to when parties will appear before the court for hearing before final orders can be made as to whether or not, to allow continued seizure of the property or freezing of the bank accounts…. It is upon such an order being served that any party would approach the court."

33. It is clear from the above decision as well as the Court of Appeal case of Samuel Watatua and another Vs Republic (supra) that the magistrate's court indeed has jurisdiction to grant the orders sought and hence it did not act without or in excess of jurisdiction when it granted those orders. The orders cannot therefore be impugned merely because they were made by a magistrate rather than a Judge of the High Court as Sections 118 and 121 of the Criminal Procedure Code vests that court with jurisdiction. It is to be noted that the initial orders were granted to aid an investigation into the accounts and were not intended to freeze the accounts as such.

34. In regard to the issue of non-joinder of the applicants I am more persuaded by the reasoning in the case of Humprey Oswago Vs Ethics and Anti-Corruption Commission [2013] eKLR that:-

> "It would defeat the purpose and intention of Section 158 if an application for a search warrant were to be made inter partes, with notice, and for the person in respect of whose property or premises the warrants of search are directed to be heard before such warrants are issued….."

Indeed even the Court of Appeal appreciated that such orders may be obtained exparte – (see the case of Samuel Watatua and another Vs Republic (supra) where that court also stated:-

> "A reading of Section 180 of 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."

35. It is my finding therefore that failure to enjoin the applicant's to the application was not fatal.

36. This same position abides the argument that this application ought to have been made only under the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) or the Prevention of Organised Crimes Act

37. As for the unprocedural irregularity that arose from the omission of the court to make an order for service of the order upon the applicants I find that the same does not also render the proceedings illegal as to warrant this court to quash the same. Once that file was closed and a preservation order was sought and obtained in this court the applicants were afforded an opportunity to appear before the court to impugn the orders as they have sought to do. The preservation orders can only be discharged as provided in the Proceeds of Crime and

Anti-Money Laundering Act (POCAMLA). and not otherwise.

38. As to whether the orders violated the rights of the applicants both to privacy and to property I do agree with Counsel for the 1st Respondent that those rights can be limited and as we have seen the courts have jurisdiction to issue orders that act as a limitation of those rights. One such limitation is the freezing of bank accounts. Moreover in the case of Ethics and Anti-Corruption Commission Vs Prof. Tom Ojienda SC t/a Tom Ojienda Associates and 2 others; Law Society of Kenya Amicus Curiae [2020] eKLR which concerned similar prayers the Supreme Court gave the following order:-

> "[16]
>
> (iii)Neither party to this appeal, or any other person shall use, apply or in any way rely upon the High Court and/or the Court of Appeal decisions in this matter until the said appeal is heard and determined."

39. In the Prof. Tom Ojienda SC case (supra) the Ethics and Anti-Corruption Commission sought and obtained a stay of execution, enforcement and/or implementation of, or reliance upon the judgement and/or decree of the Court of Appeal in Civil Appeal No. 109 of 2016 by which the Court of Appeal up-held the judgment of the High Court that "the warrants to investigate an account given to the officers of the Commission breached the 1st Respondent's right and fundamental freedoms under the provisions of Article s 47 (1) and 47 (2) and 50 (1) of the Constitution and were hence void for all intents and purposes." Clearly therefore the argument that the orders granted by the magistrate's court violated the rights of the applicants to fair administrative action, to property and to fair hearing is not tenable because that argument ought not to have been raised by dint of the stay issued by the Supreme Court.

40. As for the argument that the orders sought were in variance with the pleadings it is my finding that a plausible explanation was given by Counsel for the 1st Respondent that they obtained the orders served upon those other banks in Milimani CM's court Misc. Application 1700 of 2021.

41. In the upshot it is my finding that this application has no merit. Accordingly the same is dismissed.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 16TH DAY OF DECEMBER 2021

E. N. MAINA

JUDGE