



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

MISC CRIMINAL APPLICATION NO 3 OF 2020

PHYLLIS NJERI NGIRITA.....APPLICANT

VS

REPUBLIC.....1ST RESPONDENT

KENYA COMMERCIAL BANK.....2ND RESPONDENT

ASSET RECOVERY AGENCY.....3RD RESPONDENT

OPPORTUNITY KENYA LIMITED.....4TH RESPONDENT

RULING

1. By her application dated 14th January 2020, the applicant, Phyllis Njeri Ngirita, seeks the following orders against the respondents:

1. (Spent).

2. That the Honourable Court be pleased to order the immediate access of account no.XXX and withdrawal of Kenya shillings seven hundred thousand (Kshs 700,000) being held at Kenya commercial bank (KCB) GilgilBranch.

3. That the Honourable Court to issue such orders and/or directions that it deems fit and convenient in the circumstances of this case.

4. That the cost of this suit be provided for.

2. The application is expressed to be brought under the provisions of Article 21, 22, 23, 25, 40, 47,50, 53, and 159 of the Constitution, as well as section 89 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), international conventions and all other enabling provisions of the law.

3. The application is supported by an affidavit sworn by the applicant on 14th January 2020 and is based on some sixteen grounds set out on the face of the application. The applicant states in these grounds that she has been charged in Nairobi Chief Magistrate’s Court Anti-Corruption Case No. 13, 15 and 17 of 2018. She is the holder of Kenya Commercial Bank (KCB) Gilgil Branch account number XXX which has been indefinitely closed on suspicion that she was involved in corruption transactions. She asserts that the orders have caused undue hardship to her family and paralysed the education of her children. She further asserts that the hardship caused to her and her children far outweighs the risk of transferring the property. She contends that her son has been unable to attend school because of the outstanding school fees.

4. The applicant further states that she had borrowed the funds in the account from Opportunity International. She is not engaged in any meaningful employment, and this is why the present application is necessary. She beseeches the court to open the account to allow her to withdraw Kenya Shillings Seven Hundred Thousand (Kshs 700,000/-) as such withdrawal will not prejudice the respondents in any way whatsoever, and her child has a right to education and should not be punished for the acts or omissions of his mother.

5. The applicant further states that well-wishers have unsuccessfully tried to assist her to raise the school fees. She states that she urgently needs to access Kshs 800,000/- in the account to pay school fees for the child, and that the best interests of the child are paramount and should be protected.

6. In her affidavit in support of the application, the applicant reiterates the grounds set out in her application regarding the criminal charges against her and the closure of her account. She avers that she has been struggling to pay her water, electricity and other bills. Before the commencement of the cases against her, she used to engage in legitimate business in which she travelled to Germany in order to take care of her children. She also used to engage in agriculture and livestock rearing but she has not been paid for the produce. The applicant urges the court to assist her to access the funds in her account, which she had borrowed from Opportunity International to pay school fees for her children, as they have no nexus with the charges against her.

7. The application was placed before the court on 16th January and the court directed that it should be served on the respondents for directions on 23rd January 2020. The applicant did not appear on that day and the matter was re-scheduled to the 10th of February 2020. On that day, Learned Counsel, Mr. Ondieki, who appeared for the applicant, informed the court that the applicant's account had been frozen pursuant to orders issued in ACEC Application No. 1 of 2019 (the full title of the case is **High Court ACEC Application No. 1 of 2019- Assets Recovery Agency v Phyllis Njeri Ngirita & Others (Platinum Credit Limited and Opportunity International WEDCO Limited (Interested Parties)**, hereafter referred to as "ACEC Application No. 1 of 2019").

8. He also conceded that the applicant in ACEC Application No. 1 of 2019, Opportunity Kenya Limited, should have been served with the present application. The court accordingly joined the said Opportunity Kenya Ltd as the 4th respondent and issued directions with respect to the hearing of the application. The application was canvassed before me on 4th March 2020.

9. In his submissions, Mr. Ondieki relied on the applicant's affidavit sworn on 14th January 2020 and a supplementary affidavit also sworn by the applicant on 3rd March 2020. He reiterated the prayer for release of Kshs 700,000 to enable her pay school fees for her child. He contended that the amount in the said account has no nexus with the funds from the National Youth Service (NYS) and the applicant was ready to service the loan from which the amount in the account was sourced.

10. According to Mr. Ondieki, if there is a dispute between the applicant and the 4th respondent, Opportunity International, it is a dispute that can be resolved by the commercial court and not by the Anti-Corruption court. This position, according to Mr. Ondieki, was supported by the averments made on behalf of the 4th respondent by one Wycliffe Kiprono in his affidavit in response to the application. The said Kiprono had, according to Mr. Ondieki, confirmed that the amount in the said account was a loan properly advanced to the applicant, and there is no proceeds of crime in the said amount.

11. Mr. Ondieki submitted that the amount of Kshs 700,000 which the applicant was seeking was not connected in any way to a crime, and while the applicant has been charged in Anti-Corruption Case No. 13 of 2018, the amount at issue in this application is not related to the case. Mr. Ondieki reiterated that the amount at issue arises in a commercial case, and even if there was a criminal case the applicant enjoys the constitutional presumption of innocence, and a person is presumed innocent until they exhaust their appeals. Learned Counsel further argued that the applicant is entitled to equal protection of the law under Article 27(1) of the Constitution. If she cannot access her funds which she borrowed commercially, she is denied this equal protection of the law.

12. The applicant further argued that the court had a duty to protect her rights under the Constitution, citing in particular Articles 10 and 21(1) of the Constitution. Mr. Ondieki submitted that the respondents have an obligation to protect the applicant's rights; that they were holding motor vehicle registration number KCH 753U Toyota station wagon which belongs to the applicant, and they cannot hold the motor vehicle and the funds as this would be unfair and highly prejudicial.

The Case of the Director of Public Prosecutions

13. While the application was brought against the 'Republic' without further specification, the office of the Director of Public Prosecutions (DPP) appeared for the State. In its response to the application, the DPP, represented at the hearing by Ms. Kimiri, relied on an affidavit sworn by No. 236117 C.I Paul Waweru attached to the Directorate of Criminal Investigations (DCI), Headquarters, Financial Investigations Unit. CIP Waweru states that the applicant is an accused person in ACC No.10 of 2018 before the Chief Magistrate's Anti-Corruption Court. She has been charged with serious offences involving loss of public funds amounting to Kshs. 455, 259,758.

14. It is his further averment that the DCI has made several applications to freeze the accounts of the applicant and her co-accused in ACC No.10 of 2018 as the funds they received in the frozen accounts are proceeds of crime that they received when they committed the offences. He further avers that the Asset Recovery Agency has in its possession vehicles that the applicant got through proceeds of crime, and that these vehicles have been preserved.

15. CIP Waweru avers that the sum of Kshs. 700,000 obtained by the applicant was received through a loan from Opportunity International Wedco Limited, and the amount is related to a proceed of crime. He states that the security used in obtaining the loan is a motor vehicle registration number XXX Toyota station wagon which is of interest to the DCI as it is part of the proceeds of the NYS 11 corruption scandal. The vehicle has also been preserved.

16. It is his averment further that the account that the applicant wants to have access to has already been frozen in ACEC Application No. 1 of 2019. CIP Waweru exhibits a court order issued in the matter by Hon. Justice Onyiego prohibiting the applicant or any other person from accessing the funds in the subject account. It is his averment that the present application therefore amounts to an abuse of the court process as the court has already pronounced itself on the issue.

17. In her submissions, Ms. Kimiri observed that the present application is *sub judice* and an abuse of the court process and ought to be

dismissed. This is because there is already pending before the court ACEC Application No. 1 of 2019 on the same subject matter and in particular the account the subject of the application.

18. Ms. Kimiri observed that the applicant has not disclosed this material fact to the court. While she was seeking the protection of this court, neither the applicant nor her Counsel, who was also representing her in ACEC Application No. 1 of 2019, had not disclosed the fact of the existence of the matter to the court. A hearing date for the matter had already been given, and the funds should not be accessed for any reason until the issues are heard and determined in ACEC Application No. 1 of 2019. She asked the court not to be misled by the fact that a child is involved while a similar application on the same issues is pending. Should the applicant wish to access the funds, she should have made an application for review of the orders in ACEC Application No. 1 of 2019 and not through the present application. Ms. Kimiri urged the court to dismiss the application for lack of merit and for being *sub judice*.

The 3rd Respondent's Case

19. The 3rd respondent, the Assets Recovery Agency also opposed the application. It relied on an affidavit sworn by No. 60040 S/SGT Fredrick Musyokion 19th February 2020. Submissions were made by its Counsel, Mr. Ngumi.

20. In his affidavit, S/SGT Musyoki, a Police officer attached to the Assets Recovery Agency as an investigator, states that he was part of a team of police officers undertaking investigations relating to offences under the POCAMLA. On or about 26th April, 2018, he had received information on ongoing criminal investigations conducted by the DCI involving frauds and economic crimes at the National Youth Service (NYS).

21. He had opened Assets Inquiry File No. 15 of 2018 to inquire into the activities of various accounts of NYS suppliers with a view to ascertain whether there was commission of any offences of money laundering and subsequent identification of proceeds of crime. On 6th June, 2018, he had applied for and obtained orders of freezing, inspection and production of documents related to various bank accounts held at the Kenya Commercial Bank (KCB) including that of the applicant, Account No XXX, in Nairobi Chief Magistrate's Misc. Criminal Application No 1998 of 2018.

22. On 3rd June 2019, he had obtained a certified true copy of the account statement of the applicant which showed a balance of Kshs 779,849.47 as of the date of issue of the statement. S/SGT Musyokihad, on 10th June, 2019, summoned the applicant to the Agency's offices to record a statement on the source of the funds in her account. The applicant had indicated that the funds in the account was not sourced from the NYS but was a loan advanced to her by Getbucks Kenya and Opportunity Kenya Limited, and that she had used her motor vehicle registration number XXX Toyota Station Wagon as security for the loan.

23. S/SGT Musyoki confirmed that by an application dated 28th June 2019, the 4th respondent, Opportunity Kenya Limited, filed an application in ACEC Application No. 1 of 2019 seeking orders prohibiting the applicant from accessing the proceeds in KCB Account No XXX. Onyiego J had, on 2nd July, 2019, granted the said orders pending the hearing and determination of the said application.

24. S/SGT Musyoki avers that proceeds of crime include property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits. He further avers that the said motor vehicle registration number XXX Toyota Station Wagon which was used as collateral to obtain a loan from Opportunity Kenya Ltd is the subject of Nairobi ACEC Application No. 1 of 2019 in which the Agency seeks to forfeit it to the government for being a proceed of crime. By virtue of the applicant having obtained a loan using a proceed of crime as collateral, the proceeds thereof are proceeds of crime.

25. S/SGT Musyoki avers further that the applicant has not discharged the burden of proof that the operation of the order will deprive her of the means to provide for her reasonable living expenses and that the hardship that she will suffer outweighs the risk that the property concerned may be destroyed. In any event, the present application is an abuse of the court process as the applicant is aware of the orders issued in ACEC Application No. 1 of 2019 in which she is the 1st respondent. Further, that she is also aware of the orders prohibiting access to the funds in KCB Account No 1109800584 yet she has elected to file a different case altogether.

26. In his submissions, Mr. Ngumi observed that only two issues arise for determination in this matter. The first is whether the application dated 14th January 2020 is properly before the court. Mr. Ngumi agreed with submissions made for the DPP and pointed out that orders preserving the funds in the subject account were issued in ACEC Application. No. 1 of 2019. In his view, the present application should have been filed in that matter, and the applicant's actions in filing the present application borders on mischief and is an abuse of the court process.

27. Mr. Ngumi further observed that in the present application, the applicant had not made any reference to those orders, nor had she initially served the 3rd respondent with the application though she had included them in the pleadings as respondents. The 3rd respondent had only got wind of the application through print media, and had then obtained the pleadings from the court registry.

28. The second issue for determination identified by Mr. Ngumi, is whether the applicant has met the threshold for variation or rescission of the orders freezing the subject account. He submitted that the 4th respondent had granted funds in form of a loan to the applicant in exchange for holding a lien over motor vehicle registration number XXX. The vehicle had been preserved in the orders issued in ACEC No. 1 of 2019 on suspicion of being a proved of crime. Mr. Ngumi cited the definition of proceeds of crime under POCAMLA to submit that by the fact that the said loan was obtained in exchange for a motor vehicle that is a proceed of crime, the funds advanced to the applicant can only be considered as proceeds of crime.

29. While relying on section 88 as read with section 89 of POCAMLA, Mr. Ngumi submitted that the applicant has failed to demonstrate the undue hardship that the freezing of the account has made her endure. She had also failed to demonstrate that she cannot meet her expenses

out of the property that has not been preserved. He therefore urged the court to find that the application has no merit and dismiss it.

The 4th Respondent's Case

30. The 4th respondent joined the other respondents in opposing the application. It relied on an affidavit sworn by Wycliffe Kiprono, a Collections Manager with the 4th respondent. Mr. Kiprono notes that the applicant seeks to access monies held in Kenya Commercial Account (KCB) Gilgil Branch Account Number 1109800584 which was preserved by an order given by Hon. Justice Onyiego in ACEC Application No. 1 of 2019. Accordingly, the present application was an abuse of the court process for several reasons.

31. First, the applicant is the 1st respondent in ACEC Application No. 1 of 2019 in which the preservation orders in respect of the account were made. She had opposed the application by way of an affidavit sworn on 19th July 2019. His deposition was that the current application is evidently *sub judice* as the main application in ACEC Application No. 1 of 2019 is pending hearing and final determination, and the order preserving the funds pending the hearing of the application is still in force.

32. Mr. Kiprono further averred that the applicant had failed to disclose to this court the existence of the proceedings and preservation order granted in ACEC Application No.1 of 2019, and there is thus a clear act of deceit by the applicant. In advancing his argument in this regard, Mr. Kiprono noted that the applicant had not even joined the 4th respondent to the application, yet it is the 4th respondent who had applied for and obtained the preservation order in respect of the funds in the subject account.

33. Mr. Kiprono averred further that in any event, in substance, the application still lacked merit. He noted that the 4th respondent had advanced a loan of Kshs. 800,000.00 on the security of motor vehicle registration number XXX Toyota Station Wagon, 2009 registered in the name of the applicant. The said vehicle had subsequently become the subject of forfeiture proceedings in ACEC Application No.1 of 2019. It was his deposition that the applicant should not be allowed to benefit from the proceeds of a loan advanced by the 4th respondent on account of a security that may eventually be adjudged as one emanating from proceeds of crime. In his view, to allow the applicant to benefit from the proceeds of the monies in the said KCB account ostensibly to pay school fees for her child would defeat the very purpose of the enactment of the POCAMLA.

34. Mr. Rono for the 4th respondent agreed with the submissions by the other respondents that the present application is an abuse of the court process and is *sub judice*. He reiterated that it is the 4th respondent who had applied to freeze the funds in the said account, and the parties in ACEC Application No. 1 of 2019 had submitted on the issues before Onyiego J issued the preservation orders on 2nd July 2019. The said orders freezing the account pending hearing and determination of the application were still in force.

35. Mr. Ronoreiterated the averments by Mr. Kiprono that the present application was improper as the applicant had not joined the 4th respondent as a party. However, even had the application been properly before the court, the orders sought were not merited as the applicant has not tendered sufficient grounds to warrant the court lifting the preservation orders.

36. The 4th respondent disputed the contention that the issues in this application were purely commercial. Mr. Rono submitted that the 4th respondent had advanced the funds in the account on the security of motor vehicle registration number XXX which vehicle is subject to forfeiture proceedings. He contended that to allow the applicant to access the funds in the account would be tantamount to allowing her to enjoy funds which may eventually be found to be proceeds of crime. In his view, this would set a very bad precedent as offenders would move in haste to convert any ill gotten assets into a loan by using the assets as security. He observed that in paragraph 5 of her supplementary affidavit, the applicant had conceded that the application should have been made in ACEC No. 1 of 2019, and he urged the court to dismiss the application and allow the freezing orders to remain in force until hearing and determination of ACEC Application No. 1 of 2019.

37. The 2nd respondent did not file a response, nor did it appear at the hearing.

The Applicant's Response

38. In his submissions in reply, Mr. Ondieki submitted that the applicant had, in grounds (c) and (e), indicated that the preservation orders against her account had caused undue hardship to her and her children. He asserted that the orders issued by Onyiego J do not exist and are invalid, and that the applicant has a constitutional right to make an application to court to remedy violation of her rights. Mr. Ondieki contended that under Article 22(d), the court is obliged to make orders without undue regard to technicalities. It was also his submission that ACEC Application No. 1 of 2019 is so convoluted that one cannot have her expectation met if one went through it, and it was in the interests of the child that the present application be made.

39. Mr. Ondieki further submitted that all the respondents had agreed that the amount in the subject account was a loan, and that the motor vehicle (used as security for the loan) is in their custody. His submission, therefore, was that the respondents cannot have both the money and the motor vehicle. Counsel maintained that the issue is a commercial dispute and this court therefore had no jurisdiction. Since the Kshs 700,000 that the applicant seeks to access has no nexus with NYS, which is the subject of ACEC Application No.1 of 2019, this application is properly before the court as there is no tangible evidence to link the funds to NYS. Mr. Ondieki urged the court to invoke Article 27 and 53 on the rights of children, his submission being that the applicant's son has a lifestyle, and the court should protect his rights.

Analysis and Determination

40. I have read and considered the pleadings of the parties, as well as the submissions made by the parties at the hearing of this application. The applicant seeks orders to allow her access to Kshs 700,000 held in her account number XXX at the KCB Gilgil Branch. Access is sought on the basis that the funds are necessary for payment of school fees for her son, a student at Pembroke School.

41. The respondents oppose the application. They argue that the account the subject of this application is also the subject of **High Court ACEC No. 1 of 2019- Assets Recovery Agency v Phyllis NjeriNgirita & Others (Platinum Credit Limited and Opportunity International WEDCO Limited (Interested Parties))**. They assert that there is an order in force issued by Onyiego J on 2nd July 2019 freezing the funds in the said account. The orders had been issued on the application of the 4th respondent, who was joined to the present application by the court on 10th February 2020.

42. From the pleadings and submissions, several matters emerge as undisputed. The first is that the applicant in this matter, Phyllis NjeriNgirita, is the first respondent in ACEC Application No. 1 of 2019. She participated and swore an affidavit in opposition to the application dated 28th June 2019 in which the applicant in the matter, the 4th respondent in this matter, had sought orders prohibiting her from accessing the funds in her account number XXX in KCB Gilgil Branch. The orders had been given by Onyiego J on 2nd July 2019, and are still in force. The application is pending hearing and determination.

43. It is also not in contention that the funds in the account are the proceeds of a loan from the 4th respondent to the applicant. It is not disputed that the funds were secured by motor vehicle registration number XXX Toyota station wagon registered in the name of the applicant. It is not disputed that this vehicle is in the possession of the 3rd respondent, having been preserved in ACEC Application No. 1 of 2019 as one of the assets believed to have been procured by the applicant through proceeds of crime.

44. The applicant has also not disputed the fact that when she filed this application under certificate of urgency, she did not include the 4th respondent as a party, her Counsel, Mr. Ondieki, explaining this omission as inadvertent. The applicant did not serve the 3rd respondent either, and has not challenged the submission by Mr. Ngumi that the 3rd respondent only learnt of the matter through the media, and obtained copies of the pleadings from the court registry.

45. In her supplementary affidavit sworn on 3rd March 2020, the applicant states as follows:

“6. THAT on 2nd July 2019 Onyiego Justice vested the funds to Opportunity Kenya prohibiting the Respondents for (sic) accessing the account Applicants being fully aware of the Order of Onyiego J. ought to have made the Application in No. 1 of 2019.

7. THAT there was no Order prohibiting me from accessing Money in my frozen accounts for my children’s basic needs.”

46. It is not clear to the court precisely what it is that the applicant intended to say in paragraph 6 which I have set out above verbatim. What is clear is that she was fully aware that there was an order regarding her account in a pending matter, where she was the 1st respondent, in which Onyiego J had made a determination in favour of the 4th respondent. That order is still in force, and was to remain in force until hearing and determination of that application.

47. That being the case, can the applicant properly file another matter, raising the same issues as the issues in the matter already pending before the Court? From the material before me, ACEC Application No. 1 of 2019 is a civil application lodged under the provisions of Part VIII of POCAMLA. At issue in the application are, among others, the funds held in the applicant’s account, which she concedes that she had borrowed from the 4th respondent on the security of her motor vehicle aforesaid. There is thus already pending before the court a matter dealing with the subject matter of the present application.

48. The applicant has brought the present application as a miscellaneous criminal application, expressed to be brought under various Articles of the Constitution, and in particular Articles 27 and 53 of the Constitution. It was submitted on her behalf that the court has an obligation to protect her right to equal protection before the law, and also to safeguard the rights of her child.

49. The court agrees that it is under a constitutional obligation to protect the rights of all to equal protection and benefit of the law guaranteed under Article 27. It also agrees that the rights of children guaranteed under Article 53 should be protected. The court, however, cannot be hoodwinked by this plea to ignore the blatant attempt by the applicant to pull the wool over the court’s eyes by filing an application and making absolutely no reference to existing proceedings and orders on the same issue; failing to serve the respondents with the application; and failing to join in the proceedings the 4th respondent, the party who had obtained the orders in ACEC Application No. 1 of 2019.

50. The conduct of the applicant in this matter underscores the need for courts, except in exceptional circumstances and for very clear reasons, not to grant *ex parte* orders. The applicant seems to have been operating under the misapprehension that the allegation that the rights of a child are being violated will move the court to grant orders without inquiring further into the matter. It bears reminding parties that while courts do consider the interests of children and would like to avoid situations in which they are exposed to hardship, the mere allegation that this is the case is not sufficient to move the court to grant orders in favour of an applicant.

51. With the greatest respect to Counsel for the applicant, the only conclusion that the court can reach in this matter is that the applicant, with the aid of her Counsel, was out to hoodwink the court. It is not conduct that the court can condone, and Counsel on record, who are all officers of the court, are reminded of their duty to the court under section 1A of the Civil Procedure Act to assist the court in reaching a just, expeditious, proportionate and affordable resolution of a matter. Concealing material facts, failing to join crucial parties to a matter, failing to serve others, is not conduct that is expected of Counsel.

52. The upshot of my findings is that this matter is without merit and is an abuse of the court process. The issues it raises are already before a court of competent jurisdiction, and there is in force an order addressing itself to the subject matter of this application. The application is accordingly dismissed.

Dated and Delivered at Nairobi this 29th day of April 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent and pursuant to a notice issued on 27th April 2020. The parties have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE