



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 27 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

DIAMOND TRUST BANK.....RESPONDENT

RULING ON REVISION

(An application for revision of the ruling by Hon. C. Ogweno,

Resident Magistrate, delivered on 11th July, 2019 in Mombasa

Chief Magistrate's Court Miscellaneous Criminal Application No. 57 of 2019).

1. On 23rd July, 2019, the Director of Public Prosecutions through Ms Alice Mbaeh Mamadi, Prosecution Counsel, filed an application for revision on behalf of the Banking Fraud Investigations Unit, through a letter dated 22nd July, 2019. The said application is grounded on the provisions of Sections 362, 364, 365 and 366 and 367 of the Criminal Procedure Code.
2. This court's understanding of the issues raised by the Office of the Director of Public Prosecutions is that the Banking Fraud Investigation Unit (applicant) moved the lower court on 28th February, 2019 for *ex parte* orders to investigate bank account Nos. [...] held at the respondent bank. The application for the said order was based on a complaint which was made by one Nuru Ali Islam Jeizana director of Anwar Mohamed Bayusuf Limited vide inquiry No. 495 of 2018. The complaint made was that the respondent had manipulated the said bank accounts which were not reflecting the true financial position.
3. The prosecution in its application before this court indicated that the investigations are criminal in nature and are aimed at establishing if there has been any fraudulent appropriation of the money in the said accounts by the respondent, through its directors or officers, contrary to Section 328 (b)(ii) of the Penal Code.
4. In her application, Ms Mbaeh further stated that on 10th April, 2019 the respondent filed an application to set aside the orders issued to investigate the said accounts. Pursuant to the said order issued by Hon. C.A. Ogweno, RM, this court has been requested to call for the record of the said court and examine the same so as to satisfy itself on the propriety, legality or otherwise of the orders of the said Magistrate in reviewing and setting aside her orders of 28th February, 2019.
5. Counsel for the respondent did not file a replying affidavit to oppose the application for revision but opted to file submissions. On 11th September, 2019, Ms Mbaeh filed a list of authorities. Later, on 29th October, 2019 she filed her written submissions. On 16th September, 2019 Mr. Shah filed a list of authorities and on 8th November, 2019 he filed his written submissions together with an additional list of authorities.
6. Ms Mwangeka, Prosecution Counsel had conducted the present application on behalf of Ms Mbaeh. She indicated that they were seeking to revise the ruling of Hon. C.A. Ogweno, RM, delivered on 11th July, 2019 in Miscellaneous Criminal Application No. 57 of 2019, wherein she reviewed and set aside her orders issued on 28th February, 2019.
7. It was submitted that the genesis of the matter was an application which was filed on 28th February, 2019. It was supported by the affidavit of No. 89822 PC Nickson Kiunga, a police officer attached to the office of the Directorate of Criminal Investigations Department of Banking Fraud, Mombasa. The orders sought before the lower court were for issuance of a warrant to the Investigating Officer to access, investigate, obtain information and carry away account documents for bank account Nos. [...]

8. It was stated by the prosecution that an order was issued as prayed on the same day. It was further stated that upon service of the said order the respondent partly complied with the orders by supplying the applicant with documents relating to the said accounts, except for the authority given for internal transfers between the accounts, which were made between January 2009 and December 2011, letter of facility number [...] and mails dated 20th October, 2013 to auditors of the complainant Anwar Mohamed Bayusuf Limited by one Martin Mbithi. It was said that the information which was not given was crucial for the applicant in investigations into the two accounts in question.
9. It was submitted that the respondent failed to fully comply with the orders citing the reason that the applicant did not disclose to the court about the existence of Mombasa HCCC No. 13 of 2013 and the orders issued by the High Court therein on 17th July, 2017. It was further submitted that in setting aside her orders of 28th February, 2019, the Hon. Magistrate cited the reason that the applicant ought to have brought to the attention of the said court the existence of the civil matter on the same subject, before the High Court.
10. The Prosecution Counsel cited the provisions of Article 157(4) of the Constitution of Kenya which provides that the Director of Public Prosecutions (DPP) has a constitutional mandate to direct the Inspector General of the National Police Service to investigate at any stage, any information or allegation of criminal conduct and the said Inspector General shall comply with such directions. It was indicated that under the provisions of Article 157(10) of the Constitution, the DPP shall not be under the direction or control of anyone. Further, that the police have a duty to investigate any complaint which has been made.
11. The Prosecution Counsel indicated that the orders granted to the applicant on 28th February, 2019 were to enable them to investigate a criminal complaint which lies within their mandate. It was contended that by setting aside its orders of 28th February, 2019, the lower court acted in violation of the applicant's constitutional mandate. It was stated that the lower court was not informed about Mombasa HCCC No. 13 of 2013 as it is a civil dispute which involves the issue of determination of a debt between Anwar Mohamed Bayusuf Limited and Diamond Trust Bank Kenya Limited, the respondent herein.
12. The Prosecution Counsel explained that the orders issued by the lower court concerned investigations by the applicant into a complaint made by Nuru Ali Islam Jeizan a director of Anwar Mohamed Bayusuf Limited against the respondent. It was submitted that the applicant's mandate was restricted to investigation of complaints concerning criminal conduct and the matter before the High Court being a civil case was beyond the applicant's scope of authority. It was also stated that the ruling of 17th July, 2017 in Mombasa HCCC No. 13 of 2013 did not bar any criminal investigations into the said matter.
13. It was argued that in her ruling of 11th July, 2019, the Hon. Magistrate did not state if failure by the applicant to disclose the existence of the civil matter before the High Court would have varied her determination or that the application made before her by the prosecution was an abuse of the court process.
14. The Prosecution Counsel relied on the decision in **Republic v Director of Public Prosecution and 2 Others Ex parte Francis Njokwe Maina and Another** [2015] eKLR, where the court while dealing with a subject matter which was similar to the one in this application cited the case of **Kuria and 3 Others v Attorney General** [2002] 2 KLR 69, where the High Court held that it was not enough to simply state that because of a civil dispute case, the entire criminal proceedings commenced based on the same set of facts were an abuse of the court process or that the rights of individuals are under serious threats of being undermined by the criminal prosecution.
15. The Prosecution Counsel was of the view that in the application dated 9th April, 2019, seeking the order to set aside the ruling issued by the Hon. Magistrate in the lower court, the burden was on the respondent herein to place before the court available evidence that the conduct of the applicant herein in preferring the criminal charges in the face of existing civil proceedings was reprehensible and an abuse of the court and legal process and ought to be arrested.
16. It was submitted that the criminal process was not put into motion with a view of intimidating the respondent herein into admitting liability in the civil suit. The Prosecution Counsel relied on the decision in **Republic v Commissioner of Police and Another Ex parte Michael Monari and Another** [2012] eKLR, where the Court found that it had not been demonstrated that the actions of the respondents were motivated by any other motive than the purpose of conducting a fair process and there was no shred of evidence that by preferring charges against the applicants and others in the said case, there was gross abuse of the criminal process.
17. The Prosecution Counsel argued that the ruling by the Hon. Magistrate to set aside the orders granted to the applicant infringed on its constitutional mandate and also contravened Section 193A of the Criminal Procedure Code (CPC) which provides that the fact that a matter is in issue in any criminal proceedings and is also directly or substantially in issue in any civil proceedings shall not be a ground of any stay, prohibition or delay in the criminal process. This court was urged to revise the Hon. Magistrate's decision and set aside the orders issued on 11th July, 2019.
18. Mr. Shah for the respondent highlighted his submissions filed on 8th November, 2019. In doing so, he stated that the application by the DPP was premised on the erroneous belief that the reason why the respondent challenged the *ex parte* orders was because of the existence of a civil dispute. In his view, investigative powers were being abused by the DPP in order to advance a civil case.
19. In making reference to Mombasa HCCC No. 13 of 2013, it was submitted that on 8th November, 2018 in the said case, the plaintiff (Anwar Mohamed Bayusuf Limited) filed a further affidavit annexing criminal proceedings while trying to restrain the respondent's power of sale.
20. It was the respondent's position that the applicant misinterpreted the provisions of Section 328(2)(b) of the Penal Code which deem the acts of a director of a company or a member of a corporation as criminal. Mr. Shah pointed out that the respondent was not a shareholder of Anwar Mohamed Bayusuf Limited.
21. It was submitted that the proceedings before the lower court were that the DPP was investigating an offence by a director. It was stated that the relationship between the respondent and Anwar Mohamed Bayusuf Limited was contractual and the latter entity was the one which should

have been investigated. It was argued by the respondent's Counsel that the application before the lower court should have had better particulars of how the respondent was a party to the said investigation.

22. It was stated that a search warrant was issued for the account of Anwar Mohamed Bayusuf Limited held in the respondent Bank. Mr. Shah relied on the guidelines given by the court in **Africa Spirits Limited v DPP and Another**, High Court Miscellaneous Criminal Application No. 407 of 2019, on what needs to be done when *ex parte* orders are given to investigate a bank account.

23. The respondent's Counsel also submitted that the *ex parte* orders which were issued to the DPP should have been executed within the guidelines outlined in the earlier case of **Ogola and Mujera Advocates LLP v Banking Fraud Investigations Unit and 2 Others** [2018] eKLR. He was of the view that the Hon. Magistrate should not have granted the *ex parte* orders. He prayed for the application for revision to be dismissed.

24. In responding to Mr. Shah's submissions, Ms Mwangeka indicated that with regard to the Mombasa HCCC No. 13 of 2013, the dispute was between **Anwar Mohamed Bayusuf Limited v Diamond Trust Bank**. It was stated that a Director of Anwar Mohamed Bayusuf Limited made a complaint to applicant, to investigate its bank account held in the respondent company.

25. It was reiterated that the fact that there was a subsisting civil case did not act as a bar from investigations going on. It was argued that the ruling by the Hon. Magistrate which set aside her earlier orders infringed on the provisions of Section 193A of the Criminal Procedure Code.

ANALYSIS AND DETERMINATION

26. The bone of contention in this application for revision is whether failure on the part of the applicant to disclose the existence of Mombasa HCCC No. 13 of 2013 in its application before Hon. C.A. Ogweni was a sound reason for the said Magistrate to review her orders of 28th February, 2019.

27. The affidavit which was filed in support of the application dated 28th February, 2019 was very brief. The said affidavit must be considered in the context of the orders which were sought by the applicant and the grounds in support of the said application. The grounds indicate –

“(i) That the applicant, (Banking Fraud Investigations Unit, Mombasa) was investigating a case of fraudulent appropriation or accounting by directors or officer contrary to Section 328(b)(ii) of the Penal Code which was reported by the complainant one Nuru Ali Islam Jeizana director at Anwar Mohamed Bayusuf Limited vide inquiry No. 495/18;

(ii) That the complainant reported that the respondent manipulated the company accounts;

(iii) That the manipulation led the company not to be able to monitor or know the true picture of its financial status; and

(iv) That the orders sought are pertinent to establish the account holder, account statements of the above accounts from the time of opening to date, any transaction slip(s) or cheque(s), letters of offer for any facility granted under the said accounts and any other documents(s) or information which will assist in the investigation of this case. (emphasis added).”

28. The depositions in the affidavit in support of the application dated 28th February, 2019 are more or less similar to the grounds herein restated. On the basis of the *ex parte* application, Hon. C.A. Ogweni, RM, on the same date issued the orders which were sought in the application.

29. On 10th April, 2019, the respondent filed an application under certificate of urgency seeking orders for review, variation or setting aside of the *ex parte* order issued against it on 28th February, 2019.

30. This court has perused the affidavit attached thereto and the grounds in support thereof. The main reason why the respondent herein sought the orders stated above was that the applicant herein failed to disclose before the lower court about the existence of Mombasa HCCC No. 13 of 2013, **Anwar Mohamed Bayusuf v Diamond Trust Bank Limited Kenya Limited**.

31. The respondent herein informed the lower court that Judge P.J. Otieno had on 17th July, 2017 made orders for the respondent to avail documents to the applicant, Court and to the Interest Rates Advisory Centre (IRAC) for accounting. It was further deposed that the said experts prepared a report whereby it was established that Anwar Mohamed Bayusuf Limited owed the respondent.

32. The respondent further deposed that an inquiry into the accounts was already on (sic), pursuant to an order by a competent court and that the application made by the applicant herein on 28th February, 2019 was an abuse of the court process.

33. The respondent averred that the said application sought to coerce the respondent to refrain from exercising its statutory power of sale.

34. Further, that the order obtained by the applicant on 28th February, 2019 was obtained through material non-disclosure and misrepresentation of pertinent information.

35. The respondent expressed the view that the application which had been made by the applicant in the lower court was *subjudice* due to the existence of Mombasa HCCC No. 13 of 2013.

36. The applicant herein filed a response to the respondent's application before the lower court, through a replying affidavit sworn by No. 89822 PC Nickson Kiunga. While his 1st affidavit filed on 28th February, 2019 was brief, his replying affidavit to the application filed by the respondent in the lower court was very detailed and was supported by annexures.

37. In the said replying affidavit sworn on 27th May, 2019, he deposed that he was investigating a case of fraudulent appropriation or accounting by directors or officers (sic) contrary to Section 328(b)(ii) of the Penal Code following a complaint made to the Banking Fraud Investigations Unit vide a letter dated 22nd June, 2018 by one Nuru Ali Islam Jeizan, a director of A.M. Bayusuf Limited.

38. The deponent further stated that the said company operated 2 bank accounts numbers [...] (sic) both accounts domiciled at Diamond Trust Bank, Mombasa Branch. That the complaint was made after an audit was conducted by one D.A.G. Omenye of Omenye and Associates who are the auditors for the complainant.

39. He further deposed that the audit revealed that the two bank accounts were manipulated by numerous irregular internal transfers and reversals and that investigations were initiated by the applicant who has a mandate to conduct investigations on complaints made by any member of the public.

40. It was averred by the deponent that after service of a copy of the orders they were given on 28th February, 2019 on the respondent, it supplied the applicant with documents relating to the accounts except for the internal transfers between the accounts in the months of January, 2009 and December, 2011, the letter of offer of facility for account No. 0200928080 and emails dated 10th October, 2013 to the auditors of the complainant, by one Martin Mbithi.

41. It was averred that the *sub-judice* rule did not apply as the orders issued by the High Court were in relation to Mombasa HCCC No. 13 of 2013 and are not related to the criminal complaint of fraudulent activities by the respondent.

42. The deponent further deposed that the inquiry made into the books of accounts in Mombasa HCCC No. 13 of 2013 were in relation to that case and that the applicant was conducting criminal investigations independent from the civil suit. He also deposed that he had perused the report by the IRAC and their mandate and noted that they only carried out a recalculation of the interest rates to determine the outstanding amounts and not how the facilities were created, which was the basis of the criminal complaint.

43. PC Nickson Kiunga also stated in his replying affidavit filed on 27th May, 2019 in the lower court, that the application which had been made by the respondent, for review of the Hon. Magistrate's orders in order to bar the applicant from conducting criminal investigations was tantamount to asking for orders to bar the applicant from conducting its jurisdiction in criminal investigations, which this honorable court lacks.

44. In a ruling dated 11th July, 2019, the Hon. Magistrate allowed the respondent's application dated 9th April, 2019. In so doing, she set aside the *ex parte* orders she had issued on 28th February, 2019.

45. In the ruling of 11th July, 2019, the Hon. Magistrate stated thus:-

"It is true that the applicant in the present (sic) did not bring it to the attention of the court, the existence of the commercial dispute between the complainant and the respondent before the High Court. I do note that the Applicant was acting within its investigative powers based on a complaint registered with them under inquiry number 495 of 2018.

There were no court orders barring such investigations, even if the civil proceedings were in existence. Be that as it may, the Applicant ought to have brought it to the attention of the court the existence of the civil matter in the High Court. I note that the two accounts subject to the ex-parte application are also part of the accounts under litigation in the High Court. The applicant, although deserving of the orders obtained, failed to disclose material facts concerning the matter under investigation. It is for the said reason that I do set aside the ex-parte orders issued by the court on 28th February, 2019. (emphasis added).

46. As earlier stated, the affidavit sworn on 28th February, 2019 by No. 89822 PC Nickson Kiunga was very brief. In order to gain a better understanding of the application which was filed on the same day, one has to resort to the grounds in support of the application. The grounds which are relevant are that the complaint which had been received by the applicant had been made by one Nuru Ali Islam Jeizan a director of Anwar Mohamed Bayusuf Limited vide Inquiry No. 495/18. The said affidavit, brief as it was, revealed that the nature of the complaint was that the respondent had manipulated the accounts for the said company, which led it not being able to monitor or know the true picture of its financial status.

47. One of the depositions in the affidavit also revealed that the applicant was investigating a case of fraudulent appropriation or accounting by directors or officer contrary to Section 328(b)(ii) of the Penal Code. My understanding of the deposition in paragraph 2 of the affidavit by PC Nickson Kiunga did not mean that the applicant intended to investigate the respondent because the complainant was a director of the respondent bank. Mr. Shah, Counsel for the respondent gave the foregoing deposition a different meaning by implying that Nuru Ali Islam Jeizan, was claiming to be a director of the respondent bank, when he was not.

48. This court's interpretation of the said sentence is that the Banking Fraud Investigations Unit intended to investigate the offence of fraudulent appropriation or accounting by directors or officers of the respondent, Diamond Trust Bank Limited, in the account of Anwar Mohamed Bayusuf Limited, domiciled in the said bank. There is no lack of clarity that Nuru Ali Islam Jeizan who lodged the complaint with the applicant was not a director of the bank, but of Anwar Mohamed Bayusuf Limited.

49. This court has looked into the foregoing with a view of demystifying what the applicant's application was aimed at, since Mr. Shah was under the impression that Nuru Ali Islam Jeizan was claiming to be a director of the respondent bank. It therefore means that nothing turned

from the argument which was advanced by the respondent's Counsel to that effect.

50. In paragraph 6 of a letter dated 22nd June, 2018 attached to the applicant's replying affidavit sworn on 27th May, 2019, NuruAli Islam Jeizan disclosed that in order to stop the advertised auction, they had filed a case challenging the bank action in HCCC 13 of 2013 – A.M. Bayusuf Limited v Diamond Trust Bank Limited. He further stated that the said letter indicated that in the process of executing the case, they proposed to include fraudulent accounting in their court pleadings but the court observed that the matter would better be reported to the Banking Anti-Fraud Unit (Banking Fraud Investigations Unit) and to the Central Bank of Kenya.

51. The letter further indicated that it was written in compliance with the above observations made by the High Court and the recommendations of the Forensic Auditor as contained in paragraph 7 of his report to the effect that they were lodging the complaint for their necessary action. The said Auditor also said that they were similarly lodging the same complaint to the Central Bank of Kenya.

52. This court is of the view that if the applicant had included the information contained in paragraph 6 of the letter from Anwar Mohamed Bayusuf Limited dated 22nd June, 2018 to its application before the lower court, it would have laid bare the reasons why the *ex parte* orders were being sought.

53. Both the Counsel for the applicant and the respondent cited several authorities in support of their rival submissions. The same have been considered by this court when writing its ruling. In this case investigations were partially done by the applicant before the orders of 28th February, 2019 were set aside.

54. In the case of **Manfred Walter Schmidt and Another v Republic and Another** [2013] eKLR, the Court stated as follows on the powers of the Magistrates' Courts under Section 180 of the Evidence Act –

“I would be remiss if I did not comment on the nature of the proceedings before the subordinate court. The duty imposed on the judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual. The court is not a conveyor belt for issuing warrants when an application is made nor must the court issue warrants of search and seizure as a matter of course. When an application is made, the Court is required to address itself to the facts of the case and determine, in accordance with the statutory provisions, whether a reasonable case has been made to limit a person's rights and fundamental freedoms. On the other hand the duty of the State and its agencies, in investigating and prosecuting crime, is to furnish the Court with facts upon which the court can conclude that there is reasonable evidence of commission of a crime by the person it seeks to implicate by the application for search and seizure.”

55. Additionally, in **Republic v Chief Magistrate's Court at Mombasa Ex parte Ganijee & Another** [2002] 2 KLR 703, it was held thus:-

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest (sic). When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth When a remedy is elsewhere provided and available to a person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved.....”

56. In her submissions, Counsel for the applicant relied on the provisions of Section 193A of the Criminal Procedure Code which provides as follows:-

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.” (emphasis added).

57. Despite the fact that the applicant failed to disclose to the Hon. Magistrate about the existence of Mombasa HCCC No. 13 of 2013, this court holds that the foregoing should not have been used as a bar by the said Magistrate to set aside the orders of 28th February, 2019. She could have expressed displeasure in the manner in which the Banking Fraud Investigations Unit withheld the said fact. She should have gone further to consider if in the face of the said circumstances, further investigations of the complainant's bank account domiciled at the respondent bank, was an abuse of the court process or was likely to prejudice the respondent in the civil case before the High Court.

58. In regard to litigants having ongoing civil litigation and a criminal process arising from the same subject matter, the court in **R. v Director of Public Prosecutions and 2 Others Ex parte Francis Njakwe Maina and Another** [2015] eKLR, stated as follows:-

“..... However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings would not ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.” (emphasis added).

59. The respondent's Counsel contended that criminal investigations should not have been launched due to the ongoing civil case. He posited that any criminal proceedings would be *subjudice*. This court has considered the orders which were issued by Judge P.J. Otieno Mombasa HCC No. 13 of 2013. They were very specific and to the following effect-

“(i) That the dispute be resolved by an expert consultant being engaged to avail the account and establish how much is the debt (sic), if at all, between the parties;

(ii) That the interest advisory Centre, to audit the documents and file a report in court within 45 days (from the date of the orders);

(iii) That the parties shall avail to the said accountants the bank statements and any other relevant documents to enable them carry out this mandate.”

60. In order to determine if the aim of the applicant in filing the application dated 28th February, 2019 was to abuse the court process, the orders granted by the High Court must be read alongside the orders which were granted in the lower court and the reasons why they were sought. It is worth noting that the applicant was investigating a case of fraudulent appropriation or accounting by directors or officers contrary to Section 328(b)(ii) of the Penal Code. Further, that it was reported that the respondent had manipulated the accounts for Anwar Mohamed Bayusuf Limited.

61. The said complaint was lodged after the accounts of the said company were audited by Omenye and Associates. The Audit findings would be subject to verification by an Investigator to discern any criminal intent or outcome. The orders which were issued on 28th February, 2019 were as follows-

“(i) That No. 89822 PC Nickson Kiunga be allowed to access, investigate and carry away account opening documents for the following account numbers:

[...]

(b) [...]

(ii) That the respondent:

(a) Do supply statements of the above account numbers from the time of their opening to date;

(b) Do supply any letters of offer for any facility(s) (sic) given under the above account numbers;

(c) Any transaction slips or cheque(s) used for the above account number from the time of opening to date;

(d) Any other document(s) or information relevant to this case which will help in the investigation.”

62. It is clear to this court that the orders granted by Judge P.J. Otieno in Mombasa HCCC No. 13 of 2013 were aimed at giving clarity to the civil debt owed by Anwar Mohamed Bayusuf Limited to the respondent herein, if any, whereas the orders given by Hon. C.A. Ogweni, RM, were aimed at shedding light on whether there was any criminal activity in the manner in which the bank account for Anwar Mohamed Bayusuf Limited domiciled at the respondent was being operated. It is therefore clear that the said company is not holding a double barrel shotgun to the respondent's head by pursuing a civil claim and at the same time instituting criminal investigations against the respondent. It is this court's finding that the *subjudice* rule does not apply in the present application.

63. In **Republic v Director of Public Prosecutions and 2 Others Ex parte Francis Njakwe Maina and Another** (supra), the court when addressing circumstances which were almost similar to the present matter stated thus:-

“The burden was therefore upon the applicants to place before the Court, not by mere allegations, but also by way of available evidence that the respondent's conduct in preferring the criminal charges in the face of existing civil proceedings is reprehensible and an abuse of the Court and legal process and ought to be arrested. As I have said the applicants have failed to produce the crucial evidence in support of their allegations that the evidence presented by the complaint proves their case that the criminal process was put into motion with a view to intimidating them into admitting liability in the civil suit. It must always be remembered that the fact that criminal proceedings are being undertaken at the same time as the civil proceedings does not ipso facto amount to an abuse of the court process. The applicant ought to go further and show that the dominant motive for the institution of the criminal proceedings is to scuttle the civil process or force the applicant into abandoning his civil claim or force the applicant into submitting to the civil claim. If it is shown that the object of the prosecutor is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court. In other words the prosecutor must be actuated more by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose in such circumstances would be to further that ulterior motive and that is when the High Court steps in.” (emphasis added).

64. Having considered the facts outlined in the 2 applications which were before the lower court, as well as the present application for revision, the applicable legal provisions and the authorities relied on, it is the finding of this court that the Hon. Magistrate did not exercise her discretion judiciously when she set aside her orders of 28th February, 2019. The said Magistrate should have borne in mind the provisions of Article 50(2)(k) of the Constitution on the right of giving parties a fair trial. Had she borne in mind the said provisions, this court's view is

that she would have made her decision on merits, notwithstanding that the applicant did not in the first instance disclose about the existence of Mombasa HCCC No. 13 of 2013.

65. This court holds that the applicant was deserving of the orders granted on 28th February, 2019. A review of all the documents filed in the lower court and the submissions and authorities addressed before this court leads to no other conclusion.

66. This court is satisfied that the respondent was not entitled to the orders granted on 11th July, 2019 as the reasoning behind the same was not properly arrived at. In the said ruling, the Hon. Magistrate indicated that although the applicant was deserving of the orders obtained, it failed to disclose material facts concerning the matter under investigation. This court concurs with the said court that disclosure ought to have been made as an act of good faith but this court's finding is that the non-disclosure should not have been used to penalize the applicant in a deserving case.

67. I therefore set aside the orders made by Hon. C.A. Ogweno, RM, on 11th July, 2019, in favour of the respondent in **Mombasa Chief Magistrate's Miscellaneous Criminal Application No. 57 of 2019 Banking Investigations Unit, Mombasa versus Diamond Trust Bank.**

68. The orders granted to the applicant on 28th February, 2019 are hereby reinstated. The applicant shall be at liberty to continue with its investigations from where it had reached. It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of June, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Muthomi, for the DPP - for the Applicant

Mr. Shah for the respondent

Mr. Oliver Musundi- Court Assistant