REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

IN THE ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

CRIMINAL REVISION APPLICATION NO 6 OF 2020

ASSETS RECOVERY AGENCY......................................APPLICANT

VS

LAWPRO CONSULTANT LTD.............................1ST RESPONDENT

ALI REZA BASSIR..2ND RESPONDENT

ECO BANK..3RD RESPONDENT

KELVIN MAYNE SYLVIA JULIETTE.........INTERESTED PARTY

(Being an application for revision of the ruling and order of Hon. M. Mutuku (SRM) dated 3rd March 2020)

RULING

1. The applicant, the Assets Recovery Agency, lodged the present application seeking revision of the orders made in the ruling of the Chief Magistrate's Court in Misc. Criminal Application No 3515 of 2019 dated 3rd March 2020.

2. The application, which is dated 5th March 2020, is brought under the provisions of Articles 22, 23, 50 and 165 (6) and (7) of the Constitution; section 118,118A, 121, 362 and 364, of the Criminal Procedure Code, section 180 and 181 of the Evidence Act Cap 80 Laws of Kenya, section 54 of the Proceeds of Crime and Anti Money Laundering Act 2009 and all other enabling provisions of the law. The applicant seeks the following orders from the court:

1. (spent)

2. THAT the Honourable Court be pleased to issue an order recalling for purposes of review the Chief Magistrate's Court at Nairobi Miscellaneous Criminal Application Number 3515 of 2019 for purposes of satisfying itself as to the legality, correctness or propriety of the order issued on 3rd March 2020 and as to the regularity of the proceedings.

3. THAT the Honourable Court be please to issue an order reviewing the ruling of the Chief Magistrates Court at Nairobi Miscellaneous Criminal Application Number 3515 of 2019 delivered on 3rd March 2020.

4. THAT the Honourable Court be pleased to issue an order staying the ruling in Nairobi Chief Magistrates Court in Miscellaneous Criminal Application No. 3515 of 2019 delivered on 3rd March 2020 lifting, the restriction of debits in respect to Eco-Bank Account Number xxxx held in the name of Lawpro Consultants Limited issued on 10th September 2019, pending inter-party hearing and determination of this application.

5. THAT the Honourable Court be pleased to issue an order restricting debits in respect to Eco-Bank Account Number xxxx held in the name of Lawpro Consultants Limited for a further period of 90 days to enable the Applicant to obtain Mutual Legal Assistance from Canada to finalize investigations as to case of Money Laundering.

6. THAT there be no orders as to costs.

3. The application is supported by an affidavit sworn by No. 75821 Cpl. Sautet Jeremiah and is based on the following grounds:

> ***i. THAT on 9th September 2019, the Assets Recovery Agency (hereinafter the Applicant), received information that Eco-Bank Account Number xxxx held in the name of Lawpro Consultants Limited received USD 300,000/- suspected to be proceeds of crime and a money laundering scheme of funds acquired from International fake gold trade scam.***
>
> ***ii. THAT pursuant to its mandate under the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), the Applicant vide Nairobi Chief Magistrates Court Miscellaneous Criminal Application No. 3515 of 2019 filed an application on 10th September 2019 pursuant to its policing powers under Section 53A (5) to enable it identify, trace, seize and recover proceeds of crime.***
>
> ***iii. THAT the Applicant obtained search and seizure warrants and an order freezing/restricting debits in respect to Eco-Bank Account Number xxxx held in the name of Lawpro Consultants Limited vide Miscellaneous Criminal Application No. 3515 of 2019.***
>
> ***iv. THAT the 1st and 2nd Respondents' filed applications seeking the vacation of the Court Order restricting debits issued on 10th September 2019 in favour of the Applicant on 20th September 2019 and 15th October 2019 respectively.***
>
> ***v. THAT on 7th November 2019, the Interested Party, a victim of the 1st Respondent's scheme, filed an application dated 29th October 2019, seeking inter-alia to confirm and extend the orders issued on 10th September 2019 specifically restricting debits in Eco Bank account number xxxx pending completion of the Inquiry No. 23 of 2019 carried out by the Applicant herein.***
>
> ***vi. THAT in a ruling delivered on 3rd March 2020, the Chief Magistrates Court granted the Applicant an extension of the orders restricting debits for 30 days to finalize the investigations, which were computed from 4th February 2020, when the three applications were heard inter-partes.***
>
> ***vii. THAT the Chief Magistrates Court ruling delivered on 3rd March 2020, is irrational, lacks legal basis and or propriety as the effect of the ruling was only to extend the order restricting debits for a period less than 24 hours.***
>
> ***viii. THAT the Applicant is aggrieved by the said ruling as the investigations are transnational in nature involving the country of Canada from where the funds were transmitted from.***
>
> ***ix. THAT the Applicant has initiated the process of Mutual Legal Assistance to the country of Canada in respect to the suspicious transactions and we are waiting for a response.***
>
> ***x. THAT the ruling delivered on 3rd March 2020, did not take into account the transnational nature of the investigations and the Interested Party's interest in respect to the investigations.***
>
> ***xi. THAT the subject matter of the proceedings are funds of USD 133,998.73 and there is real apprehension and imminent danger that the funds may be withdrawn, transferred and or dissipated rendering the ongoing investigations and the Mutual Legal Assistance request nugatory.***
>
> ***xii. THAT Sections 362 and 364 of the Criminal Procedure Code as read together with Article 165(6) of the Constitution grants the High Court supervisory powers over the subordinate court to 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 or of any proceedings of the subordinate court.***
>
> ***xiii. THAT unless this Honourable Court grants the orders sought, the economic advantage derived from the commission of crimes will continue to benefit a few to the disadvantage of the general public interest.***
>
> ***xiv. THAT it is in the interest of Justice and in the public interest that the application be allowed to preserve the subject matter of the ongoing investigations.***

4. On 6th March 2020, this court granted orders staying the impugned ruling for a period of 14 days pending hearing and determination of the application. The orders were subsequently extended on 19th March 2020.

5. At the core of the application is the question whether the decision of the court made on 3rd March 2020 extending time for the applicant for 30 days from 4th February 2020, effectively granting the applicant a day's extension of the orders in contention, is reasonable and should be allowed to stand.

6. In his affidavit in support of the application, Cpl. Sautet Jeremiah, a police officer attached to the applicant, avers that on 9th September 2019, he had received information that Eco Bank Account Number xxxx held in the name of Lawpro Consultants Limited (the 1st respondent) had received USD 300,000/- suspected to be proceeds of crime. He had further received information that the account was used to execute complex money laundering schemes of funds acquired from international fake gold trade scam. Accordingly, on 10th September 2019, in exercise of policing powers under section 53A (5) of the Proceeds of Crime and Anti-Money Laundering Act, he had applied vide Nairobi Chief Magistrates Court Miscellaneous Criminal Application No. 3515 of 2019 for search and seizure warrants under sections 118

and 121 (1) of the CPC and section 180 of the Evidence Act. He had obtained the search and seizure warrants and an order freezing and restricting debits in respect of the subject account. The order was served upon Eco Bank, the 3rd respondent.

7. It is his averment that upon an analysis of the bank statement in respect to the said account number xxxx held in the name of the 1st respondent, it had been noted that the account had received on 26th August 2019 USD 108,212 from Sylvia Juliette, the Interested Party, and USD 97,994 on 30th August 2019 from Alexander Shurbanoviro. It had also been noted that there had been an attempt to recall the said funds from the 1st respondent's account on grounds *inter alia* of fraud. However, the attempt to recall the funds was futile as the funds were either utilized or withdrawn in quick succession upon being credited to the 1st respondent's account. Cpl. Sautet avers that the information relating to the transactions of 26th August 2019 and 30th August 2019 was placed before the court in his replying affidavit filed in court on 7th January 2020.

8. The 1st and 2nd respondents had them filed applications on 20th September 2019 and 15th October 2019 respectively seeking vacation of the court order issued on 10th September 2019 restricting debits. On 7th November 2019, the interested party, a victim of the 1st respondent's fraudulent scheme, filed an application dated 29th October 2019 seeking, *inter alia*, to confirm and extend the orders issued on 10th September 2019 specifically restricting debits in Eco Bank account number xxxx pending completion of the Inquiry No. 23 of 2019 carried out by the applicant. Cpl. Sautet avers that he had filed a further replying affidavit on 28th January 2020 in which he had informed the court that he had established, through the travel history of the 2nd respondent, the holder of Canadian Passport Number AD 795584, that he was not present in Kenya on 15th October 2019 when he purportedly signed the supporting affidavit to his application filed on 15th October 2019 in support of his application seeking to vary the order restricting debits.

9. It is his averment that there is reasonable ground to believe that the 1st respondent's account number xxxx held in Eco Bank is involved in fraudulent activities targeting unsuspecting and innocent foreign nationals.

10. Cpl. Sautet notes that in the ruling delivered on 3rd March 2020, the Chief Magistrate's Court granted the applicant an extension of the orders restricting debits for 30 days to finalize the investigations. The 30 days were, however, computed from 4th February 2020 when the court heard the applications by the respondents and the interested party. The orders restricting debits were in force until 4th March 2020. It is his deposition that the court ruling delivered on 3rd March 2020 is irrational, lacks legal basis and or propriety as the effect of the ruling was only to extend the order restricting debits for a period less than 24 hours. He avers that the applicant is aggrieved by the ruling as the investigations in the matter are transnational in nature involving Canada, among other countries, from where the funds were transmitted.

11. He further avers that the 1st respondent and its account number xxxx held in Eco Bank is suspected to be engaged in the international fake gold trade scam, an international syndicate, and is used for purposes of money laundering. The applicant's investigations have established that Kenya's financial institutions are used to launder the funds gained from the illicit international fake gold trade, which has and continues to undermine the financial integrity of the country in the international community.

12. According to Cpl. Sautet, the applicant has initiated the process of Mutual Legal Assistance with Canada in respect of the suspicious transactions and is awaiting a response. It is his averment that the ruling of 3rd March 2020 did not take into account the transnational nature of the investigations which is solely dependent on the requested country's reception of the Mutual Legal Assistance request. He avers that the further 90 days' period that the applicant requests for in the present application restricting debits in the subject account is to enable the applicant to obtain Mutual Legal Assistance from Canada to finalize investigations on the suspected money laundering. Should the orders not be granted, the funds in the account may be withdrawn, transferred and or dissipated, thereby rendering the ongoing investigations and the Mutual Legal Assistance Request nugatory.

13. In its submissions in support of the application, the applicant argues that the circumstances of this case are of such a nature as would warrant the exercise of the court's inherent jurisdiction under section 1A and 1B of the Civil Procedure Act. It further relies on section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Act with respect to the powers of the court on review. It relies on the case of **Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR** in which the court held that:

> ***"It is clear that while Section 80 of the Civil Procedure Act grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason."***

14. The applicant further relies on Article 165 (6) and (7) of the Constitution which sets out the supervisory jurisdiction of the High Court over subordinate courts. It reiterates the factual background leading to the present application as set out in the affidavit of Cpl. Sautet and maintains that in the ruling of 3rd March 2020, the Chief Magistrate's Court gave the applicant an extension of the orders restricting debits for 30 days to finalize the investigations but computed the days from 4th February 2020 when the three applications were heard *inter parties*. It submits that the ruling was therefore irrational, lacks legal basis and or propriety as its effect was to only extend the order restricting debits for a period of less than 24 hours.

15. The applicant cites the words of the court in **National Bank of Kenya Ltd vs Ndungu Njau** which were cited in **Zablon Mokua v Solomon M. Choti & 3 others (Supra)** in which the Court of Appeal, in an application for review, had stated:

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."***

16. The applicant reiterates that its investigations are transnational in nature involving Canada from where the funds were transmitted. It has initiated Mutual Legal Assistance in respect to the suspicious transaction and is awaiting a response. Further, the interested party, who it submits is a victim of the 1st and 2nd respondents, is a citizens of the United States of America.

17. The applicant further reiterates that the Chief Magistrate's Court erred in law *prima facie* as its extension only amounted to a 24 hour period necessitating this application as it is a well-founded principle of law that courts do not act in vain. It further cites portions of the decision in the **Zablon Mokua v Solomon M. Choti & 3 others** (supra) to buttress its submissions with respect to the grant of orders on an application for review, including the need for there to be an error or mistake apparent on the face of the record or the discovery of new and important evidence which was not available to the applicant after the exercise of due diligence at the time when the order was made, or for sufficient reason. The applicant further cites several other decisions with respect to what *'error on the face of the record'* in an application for review means.

18. In addressing itself to the provisions of section 362 of the Criminal Procedure Code, the applicant submits that this court is clothed with the power to review the decision of the subordinate court. It further submits that the ruling of the court falls within the purview of section 382 which contains provisions with respect to reversal of findings or sentences by reason of error or omission in charges or other proceedings. It submits in this regard that the ruling the subject of this application has occasioned a failure of justice as there is real apprehension and imminent danger that the funds under investigations may be withdrawn, transferred and or dissipated, thus rendering the ongoing investigations and Mutual Legal Assistance request nugatory. It further notes that the Chief Magistrate's Court failed to take into account the transnational nature of the investigations even though the applicant had made it clear to the court that it had made a request for Mutual Legal Assistance under the provisions of sections 5(2), 23 and 24 of the Mutual Legal Assistance Act No 36 of 2011.

19. The applicant concludes that its application meets the threshold for review to correct the failure of justice and to correct the error apparent on the face of the record. It further submits that parties are bound by their pleadings and cites in support several decisions with respect to this principle.

The Response

20. Ali Reza Bassiri, the 2nd respondent, opposes the application and has filed an affidavit in opposition. He states in the affidavit that he is a Canadian citizen and a businessman running a company known as A.R.B INC that offers consultancy services in the financial industry. On 12th September 2019, he had entered into an agreement with the 1st respondent to provide escrow services after the 1st respondent confirmed that he (sic) could do so to enable the deponent transfer funds and purchase property in the country in order to expand his investment portfolio. Pursuant to the said agreement, he had wired on 13th September 2019 USD 133,000 USD to the 1st respondent through its account number xxxx held in the 3rd respondent bank. The 1st respondent had acknowledged that the said funds had reflected in his account. The 2nd respondent was therefore shocked to learn that the funds had been frozen in the 1st respondent's account on the basis of the order issued on 10th September 2019. He had instructed his Advocates to file an application with respect to the unfreezing of the orders issued in the matter.

21. The 2nd respondent avers that he had confirmed, as averred by Cpl. Sautet in the affidavit sworn on 7th January 2020, that his signature as it appears in the affidavit in support of the application dated 15th October 2019 and 14th November 2019 differed from his signature on his passport and letter of engagement dated 12th August 2019. Upon examination of the said supporting affidavits, he had confirmed that the affidavit had been executed without his prior knowledge or authority and he had instructed his current Advocate to make a complaint to the Law Society of Kenya against his previous Advocate's firm once he receives access to his funds. He avers, however, that the mistakes of an Advocate should not be visited on the client.

22. The 2nd respondent avers that the frozen account is not an individual account but an escrow account. He further avers that no culpability against the 1st respondent has been established in the period of more than six months (since orders restricting debits from the account were issued), and neither has the 1st respondent been charged with any offence. The 2nd respondent notes that the bank statements provided to the applicant by the 3rd respondent with respect to account number xxxx clearly shows that he had deposited into the account on 13th September 2019 the sum of USD 133,000 out of the total sum of USD 133,998.73 sought to be preserved by the applicant. This was three days after the applicant had obtained freezing orders. These orders, he avers, had been obtained on the basis that the 1st respondent had received the sum of USD 300,000 suspected to be proceeds of crime from sale of fake gold.

23. The 2nd respondent avers that the investigations against the 1st respondent with respect to money laundering were not raised before the Chief Magistrate's Court and have only been raised in this application to justify the applicant's prayer for freezing of the 1st respondent's account for ninety days. This, he avers, is despite the fact that the applicant has had over six months to conduct the Mutual Legal Assistance request. It is his deposition therefore that the ruling of the Chief Magistrate was not irrational and does not lack legal basis as the applicant had requested for an extension of the freezing orders for a period of one month to enable it conclude its investigations.

24. The 2nd respondent notes that the Chief Magistrate had noted in her ruling that she was minded that the frozen account was not an individual's but an escrow (client's) account. He avers that no culpability had been established against the 1st or 2nd respondent for a period of close to six months. The court had further noted that whereas the police are empowered to conduct their work without undue interference by the court, justice demands that such investigations are conducted in an expeditious, efficient, reasonable and fair manner. Where these tenets are not observed, the court can only conclude that freezing of the account was done with an extraneous motive.

25. The 2nd respondent avers that the applicant's contention that the effect of the ruling by the court was irrational, lacks legal basis and or propriety as the effect of the ruling was to extend the order restricting debits for a period of less than 24 hours is a blatant lie as it is akin to stating that during the period when the ruling was pending, the applicant had been stopped from conducting its investigations. He notes that by the time the court delivered its ruling on 4th March 2020, the applicant had not furnished the court with its findings with respect to the investigations regarding the sum of USD 300,000 on which basis the freezing order had been issued.

26. Since the USD 133,000 had been deposited on 13th September 2019, they are clearly in no way connected to the investigations with respect to the funds received on 26th August 2019 and 30th August 2019 by the 1st respondent. He was surprised to learn that the 1st respondent is being investigated on the basis that there are reasonable grounds to believe that he is involved in fraudulent activities targeting unsuspecting and innocent foreign nationals. He avers that he is a law abiding citizen and business man of repute in Canada and has never been involved in fraudulent dealings. He has informed the applicant of his readiness to co-operate with its investigations and has provided all documents necessary to identify himself. He has also instructed the 1st respondent to return his funds to him once he is granted access to his account. He requests the court to revise the ruling of the lower court to the extent of ordering the 3rd respondent to wire back the funds to his account held in TD Bank, Canada, account number xxxx.

27. In his submissions, the 2nd respondent reiterates the factual background leading to the present application which has been substantially captured earlier in this ruling. He submits that prior to the hearing of the applications before the Chief Magistrate, the court had given the parties sufficient time to file the necessary documents in support of their respective positions. During various mentions of the matter, the applicant had, through its Counsel on record, requested for time to enable the applicant conduct Mutual Legal Assistance and to file their investigation report. During the hearing of the applications on 4th February 2020, the applicant had sought for an additional thirty (30) days to enable it complete its investigations and file its report.

28. The 2nd respondent submits that the Chief Magistrate granted the applicant an extension of the orders restricting debits for an additional 30 days as prayed during the *inter partes* hearing. That in exercising her judicial discretion, the court computed the thirty days from the 4th of February 2020 when hearing of the application took place.

29. The 2nd respondent cites section 362 and 364 of the Criminal Procedure Code, Article 165(6) and (7) of the Constitution, as well as the cases of **Republic v Diamond Trust Bank Limited & another [2017] eKLR** and **Ogola Mujera Advocates LLP v Banking Fraud Investigation Unit & 2 others [2016] eKLR** to submit that this court has the authority to review and revise the ruling of the Chief Magistrate impugned in the present application.

30. The 2nd respondent also relies on **Republic v Diamond Trust Bank Limited & another** (supra) for the proposition that there is no room for evidence in revision applications, and that the High Court is only required to call for and examine the existing record of the criminal proceedings before any subordinate court. Further, that the court is required to satisfy itself as to the correctness, legality or propriety of the finding or order passed.

31. The 2nd respondent submits that a perusal of the statement of account annexed to the affidavit of Cpl. Sautet Jeremiah sworn on 7th January 2020 shows that he had deposited the sum of USD 133,000 into the 1st respondent's account on 13th September 2019, three days after the applicant had obtained orders freezing debits from the said account. He further submits that the applicant acknowledges by way of a letter dated 17th December 2019 addressed to the Canadian High Commission that its preliminary investigations have established that the USD 133,998 held in the 1st respondent's account were sent by the 2nd respondent. It is his submission that the funds are not connected in any way to the investigations commenced by the applicant and the continued preservation of the said funds is an affront to his rights.

32. The 2nd respondent asserts that the present application has also been brought in bad faith as no report was filed in the trial court with respect to the findings of the investigations despite the applicant having had over six months to conduct the investigations, and the trial court having adjourned the matter several times to allow the applicant to file its report on the investigation.

33. The 2nd respondent further submits that the applicant did not follow due process once it obtained the court order as it did not serve the 1st respondent. Further, the nature of the order was indefinite as there was no return date. Reliance is placed on **Miscellanous Criminal Application No. 124 of 2014** (the names of the parties are not indicated) in which the court made reference to the Court of Appeal decision in **Samuel Watatua & Another v Republic, Criminal Appeal No. 2 of 2013 (unreported)** where the court stated that:

> ***"In certain cases as stated in the Kibiti case (supra) where properties or monies in bank accounts may be dissipated before the matter is heard inter partes, ex parte orders may be granted but only for a short period. Thereafter the application should be served upon all persons likely to be affected by any ensuing orders and no final order should be made until the matter is heard inter-parties with all parties, pursuant to Article 50 of the Constitution, accorded an opportunity to be heard."***

34. Reference is also made to the case of **Ambrose Dickson Otieno Rachier & others v Ethics And Anti-Corruption Commission & 2 Others [2019] eKLR** in which the court emphasized the need for parties to be served with the application within reasonable time once an order under section 180 of the Evidence Act or section 118 of the CPC has been obtained, and that *ex parte* orders under the said sections should not be open ended or indefinite. Reference is also made to **Mape Building & General Engineering v Attorney General & 3 others [2016] eKLR** with regard to the need to respect the rights of persons under investigation.

35. The 2nd respondent submits, on the basis of the authorities and statutory provisions that he has cited, that the court should find that the ruling delivered on 3rd March 2020 is not an illegality given the circumstances of this case, and to lift the order issued in this case staying the ruling of the court lifting the restriction of debits in respect to Eco bank Account Number xxxx held in the name of Lawpro Consultants Limited. The 2nd respondent further asks the court to issue an order revising the order issued on 3rd March 2020 and directing the 3rd respondent to wire back the money sent by the 2nd respondent to his sending account in Canada.

36. The 1st and 3rd respondents did not file responses or participate in the proceedings.

Analysis and determination

37. I have before me an application that seeks revision of the ruling of the Chief Magistrate (Hon. M. Mutuku) dated 3rd March 2020. The application is brought under various provisions of the law. While it is evidently an application for revision under section 362 and 364 of the Criminal Procedure Code, the applicant seems to have wandered in the course of its submissions and argued at length on the powers of the court in an application for review under order 45 of the Civil Procedure Code. While the authorities cited by the applicant in that regard are correct in so far as an application for review in a civil matter is concerned, the applicant is clearly mistaken in conflating an application for revision under section 362 of the Criminal Procedure Code and an application for review under Order 45 of the Civil Procedure Code. The former arises where the High Court, in exercise of its supervisory jurisdiction, calls for and examines the record of the subordinate court in a criminal matter. The latter relates to the exercise of powers of review in a civil matter by a court which rendered a judgment or ruling. Such powers of review are exercised where, *inter alia*, there is an error apparent on the face of the record. It is not clear why the applicant was not able to discern the clear distinction between the two processes.

38. Section 362 of the Criminal Procedure Code under which applications for revision may be brought provides as follows:

> ***Power of High Court to call for records***
>
> ***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.***

39. The 2nd respondent concedes that the court has jurisdiction to exercise powers of revision in relation to the decisions and orders of subordinate courts. Its argument, however, is that this is not a case in which such a power should be exercised.

40. Section 362 empowers the court to call for the record of the subordinate court and satisfy itself as to the "***correctness, legality or propriety of any finding'*** of the order or finding. In my ruling of 5th March 2020, I observed as follows:

> ***"...That being the case, it is evident that the order made on 3rd March 2020 and issued on 4th March 2020 and which indicates that it would remain in force until the same day of its issue would not serve the purpose for which it was intended, which is to preserve the funds held in the accounts the subject of the application. It cannot have been the intention of the court to grant an order that is basically of no purpose whatsoever."***

41. The 2nd respondent argues that the ruling of the court was not irrational as it properly exercised its discretion to compute the time from the 4th of February when the application the subject of the ruling before the court was argued. He further contends that the applicant cannot say it was granted an extension that was limited to 24 hours since there had been no order for stay of its investigation. However, in my view, an order extending time should be one that serves some purposes, and if a period of time is indicated as having been granted, it should be such period as is prospective, not retrospective. In the present case, the extension of time, from a date 30 days prior to the ruling, was no extension of time at all. I say this while taking into consideration that given the normal course of practice, a party would be entitled to expect that the extension of time, should it be granted, would run from the date when the court renders its ruling, not the date on which the application for extension of time was canvassed before the court.

42. By way of analogy, if a court were to purport to give an order for extension of time to file an appeal that is computed from a period pre-dating the order, then it would be an order in futility. In my view, therefore, the order issued on 3rd March 2020 was irrational and properly the subject of revision under section 362 of the Criminal Procedure Code.

43. Section 364 of the Criminal Procedure Code sets out the powers of the court on an application for revision in the following terms:

> ***(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—***
>
> ***(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;***
>
> ***(b) in the case of any other order other than an order of acquittal, alter or reverse the order.***

44. I will address myself first to the order sought by the 2nd respondent. The 2nd respondent has asked the court to revise the order of the Chief Magistrate issued on 3rd March 2020 and direct the 3rd respondent to wire the money in the 1st respondent's account to the 2nd respondent's sending account in Canada. While submitting, on the basis of legal authority, that an application for revision is not one in which evidence should be placed before the court, he nonetheless makes averments of fact intended to show that he is the rightful owner of the USD 133,000 which he avers that he deposited in the 1st respondent's account on 13th September 2019.

45. However, having considered the powers of the High Court provided for under section 364 of the Criminal Procedure Code set out above, it is my view that such order as the 2nd respondent seeks does not fall within the jurisdiction of the High Court in exercise of its powers of revision in a criminal matter. The issue of the USD133,000 that the 2nd respondent avers he deposited in the 1st respondent's account is a matter between the respondents within their contractual relationship, the court noting that the account in the 3rd respondent bank is in the name of the 1st respondent. The 2nd respondent is at liberty to take action in respect of the funds as against the 1st and 3rd respondent.

46. On its part, the applicant sought, first, an order staying the ruling of the Chief Magistrate lifting the restriction of debits in respect to the subject account pending hearing and determination of the application. This order was granted in the ruling of this court made on 5th March

2020. The applicant sought, secondly, an order restricting debits in respect to Eco Bank account number xxxx held in the name of Lawpro Consultants Limited for a further period of 90 days to enable it obtain Mutual Legal Assistance from Canada to finalize investigations on its money laundering investigations against the 1st respondent.

47. I note that the orders restricting debits in this matter were obtained on 10th September 2019. By the time the application to lift the orders was argued before the Chief Magistrate's Court in February 2020, the orders had been in force for about five months, which is a fairly lengthy period of time. The applicant was granted a stay of the Chief Magistrate's ruling on 5th March, 2020, three months ago. Given the facts and circumstances of this case, the applicant should have been motivated at that point to expedite its investigations and obtain such mutual legal assistance as it required from Canada. As observed by the Chief Magistrate in her ruling of 3rd March 2020, justice requires that the applicant carries out its investigations expeditiously, efficiently, reasonably and in a fair manner.

48. The court does take judicial notice that the Covid 19 pandemic and the resulting limitations in movement may have had an impact on various activities around the world, but it takes the view that the nature of inquiries required in this matter would have proceeded, the pandemic notwithstanding. It is my finding therefore that a further period of 90 days as prayed for in the application is not merited and would result in injustice.

49. Accordingly, taking into account the fact that the orders restricting debits were issued in September 2019 and a stay of the ruling lifting the orders made on 5th March 2020, the applicant is granted 14 days from today to complete its investigations and take such steps as it deems legally necessary in respect of the funds in the subject account, failing which the orders restricting debits from the said account shall stand lifted.

Dated Delivered and Signed at Nairobi this 17th day of June 2020

MUMBI NGUGI

JUDGE

<u>ORDER</u>

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having 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