REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

CORAM: MUMBI NGUGI J

MISCELLANEOUS CRIMINAL APPLICATION NO E202 OF 2020

FREDRICK OCHIENG OTIENO.....APPLICANT

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

KENYA COMMERCIAL BANK.....INTERESTED PARTY

RULING

1. The applicant has lodged the present application under the provisions of sections 118 and 121 (1) and (3) of the Criminal Procedure Code (CPC) seeking the following orders:

1. (spent).

2. THAT this Honorable Court be pleased to direct that the Interested Party, Kenya Commercial Bank to effectively and immediately unfreeze the applicant's bank account number 1121900763 and cause it to be operational.

3. THAT the orders given by this Honorable Court be served upon the Manager, KCB MASHARIKI BRANCH (VIWANDANI) NAIROBI for compliance.

4. THAT the Applicant be awarded costs of this application.

2. The application is supported by an affidavit sworn by the applicant on 29th July 2020 and is based on the following grounds:

1. THAT the 1st Respondent illegally and irregularly directed the Interested Party to freeze the Applicant's Bank account.

2. THAT the 2nd Respondent and the Interested Party failed /declined to furnish the applicant with the appropriate court orders prior to freezing the Applicant's Bank account and the Interested Party proceeded to freeze the Applicant's account without plausible reason or notice.

3. THAT the Interested Party, on frequent basis, sends Short Messaging Services (SMSs) to the Applicant herein that his account is dormant therefore requiring him to re-activate it without which the Interested Party herein would submit his account to the Unclaimed Financial Assets Authority.

4. That it is in the interest of justice that the Interested Party unfreezes the applicant's Bank Account.

3. In his affidavit in support of the application, the applicant avers that he is the holder of Kenya Commercial Bank A/C No. 1121900763 Mashariki Branch (Viwandani), Nairobi. He had, since sometime in 2019, been sent numerous Short Messaging Services (SMSs) from the Interested Party's branch offices stating that his account is dormant and that he should visit the branch offices to reactivate it. He relies in support on a copy (annexure 'FOO1') of a screen shot of the messages that he had received from the Interested Party. He had visited the branch offices on several occasions to reactivate the account but had been informed that the account had been frozen.

4. The applicant avers that he has not breached any of the terms of the Interested Party's banking policy to warrant the freezing of his account. He has also not been served with any court orders requiring the freezing of his account. Despite his Advocate having sent a demand letter dated 17th June, 2020 (annexure 'FOO2') to the bank, he has not obtained any redress. He asks the court to direct the Interested Party to unfreeze his account number 1121900763 and cause it to be operational.

5. The 1st and 2nd respondents oppose the application and have filed an affidavit sworn on their behalf by No. 67707 PC Shem Gichuki Njeru on 3rd September 2020. PC Njeru states that he is an officer working with the Directorate of Criminal Investigations (DCI) Headquarters and attached to the Economic and Commercial Crimes Unit (ECCU) and one of the Investigating Officers in the matter the subject of this application.

6. PC Njeru avers that he is the current investigating officer in respect of cases numbers 2900/2013, 2901/2013, 2902/2013 and 2903/2013 that are pending before the Chief Magistrate's Court in Mombasa. The applicant is one of the accused persons in all the matters. He is charged with the offence of stealing goods on transit contrary to section 279 (g) of the Penal Code. All these cases are in the final stages of hearing at Mombasa Law Courts with at least 5 witnesses remaining in each case. The cases were registered in the Chief Magistrate's Court in Mombasa since the goods were stolen on transit to Mombasa from Nairobi.

7. According to PC Njeru, the money the subject of this application is proceeds from the theft occasioned by the accused. PC Njeu avers that it is in the interests of justice that the funds in the said account are protected and preserved so as to prevent a miscarriage of justice. He avers further that the frozen account is among the many accounts that are suspected to have received proceeds of crime from the stolen goods in transit and forms part of the evidence in the cases. The 1st and 2nd respondents therefore urge the court to dismiss the application and order that the said account remains frozen until the determination of all the cases mentioned above.

8. The applicant filed written submissions dated 25th August 2020 which were highlighted by his Advocate, Mr. Muriuki. He identifies three issues for determination in this application. The first is whether the 1st respondent obtained the requisite court orders prior to directing the Interested Party to freeze his account. He submits in this regard that the requisite provisions of law to be followed in freezing and investigation of bank accounts are set out in section 118 of the CPC and section 180 of the Evidence Act.

9. His submission is that the 1st respondent arbitrarily and without authority directed the Interested Party to freeze his account as there is no evidence that the respondents obtained any court order whatsoever directing them to freeze his account. The applicant cites section 118 of the CPC and section 180 of the Evidence Act to submit that the respondents did not obtain the requisite orders to authorize the freezing of his account.

10. The second issue identified by the applicant is whether the respondents had furnished him with the appropriate preservation orders prior to directing the Interested Party to freeze his bank account. He submits that the requirement to furnish him with the court orders directing the investigation into his account is enshrined in Article 50 of the Constitution which requires that all persons should be granted an opportunity to be heard on matters affecting them. The respondents had a duty to apply for preservation orders prior to instituting investigations into his account and should have subsequently served him with the said orders. The applicant relies on the case of **Ogola Mujera Advocates LLP v Banking Fraud Investigations Unit & Anor Misc. Appn. No. 20, 21 and 22 of 2016** in which the court stated that:

> ***"This however does not take away the duty of the DPP, to serve the parties involved so that they may be represented during the return to court..... The duty is upon the DPP upon executing the warrants freezing the account, to serve the parties affected and notify them of the date for appearing in court."***

11. It is his submission that none of the respondents furnished him with any court order or notice authorizing the freezing of his account. The respondents' direction to the Interested Party to freeze his account was therefore capricious and aimed at circumventing the rule of law.

12. The applicant submits, finally, that the Interested Party did not also furnish him with the requisite notice before freezing his account. Save for the SMSs that he received from the Interested Party on diverse dates indicating that his account is dormant and that he is required to visit the Interested Party's Branch offices to reactivate it, he had not received any notification from the Interested Party regarding the freezing of his account. The applicant relies on the case of **Viable Deco Solutions Limited –vs- Cooperative Bank of Kenya Limited (2014) eKLR** in which the court held that:

> ***"…Therefore, whereas the Applicant agreed "to comply, observe and be bound by the Terms and Conditions made by you [read the Bank] and in force from time to time or as amended by you [read the Bank] pertaining to such account (s) … and the General Terms and Conditions documents", any such terms and conditions so made must be brought, one way or other, to the attention of the Applicant without delay. Equally, any adverse action taken by the Bank on the account held by the Applicant must be brought to the attention of the Applicant without any delay. Freezing an account is an intrusive measure of extreme dimensions and must be fully disclosed to the affected party."***

13. It is his submission that the Interested Party erred in failing to disclose to him the impending freezing of his account, even though he had diligently adhered to the terms of the Interested Party's banking policy. He urges the court to allow his application with costs.

14. Oral submissions were made on behalf of the 1st and 2nd respondent by their Counsel, Mr. Mutuma. While reiterating the averments in PC Njeru's affidavit, Mr. Mutuma submitted that in order to preserve the funds in the applicant's account, the DCI fully complied with section 211 (sic) and 121 of the CPC by making an application to preserve the funds. The Magistrate before whom the application was made, having been satisfied with the application, issued orders to preserve the funds.

15. Mr. Mutuma submitted that the applicant had come to court with an ulterior motive to occasion a miscarriage of justice and defeat the ends of justice. That he knows that he is one of the accused persons in matters pending in the Chief Magistrate's Court in Mombasa and

seeks to access funds which are proceeds of crime which will form part of the evidence before the trial court. It was the respondents' submission that the funds are well preserved and not being wasted, and the respondents prayed that the application be dismissed and the applicant awaits the outcome of the case so that the court will prove the trail of the funds up to their being deposited in the applicant's account.

16. In submissions in reply, Mr. Muriuki observed that the respondents had not complied with section 121 of the CPC which is a mandatory requirement that they return search warrants to the court that issued the warrants. It was his submission that he was in conduct of the matter in Mombasa and the KCB account is not one of the accounts at issue in the case. In his view, nothing would have been easier than for the respondents to attach to their affidavit the order authorizing the freezing of the applicant's account. The respondents had not followed the procedure for freezing accounts, and it was his submission that the orders freezing the applicant's account were therefore illegal and should be vacated and the application allowed.

17. In response to a question from the court with regard to why he had filed the present application at this stage, given that the account appears to have been frozen in 2013, Mr. Muriuki submitted that the applicant has received a notice from the bank that the funds in the account would be released to the Unclaimed Assets Authority should the account not be re-activated.

18. The Interested Party did not file any pleadings or participate in the proceedings in any way.

19. I have considered the pleadings and submissions of the parties in this matter. There is no dispute that the applicant's account number account No 1121900763 held at the KCB KCB Mashariki Branch (Viwandani) Nairobi is frozen, or at least inactive. From the applicant's averments and the documents annexed in support, in particular the letter from his Advocate to the Interested Party dated 17th June 2020, the account *"has been frozen by the KCB Head Office."* He has sought information with regard to how, when and by whom his account was frozen, but has received no response. It is his case that the respondents did not comply with the requirements of section 118 of the CPC and section 180 of the Evidence Act in freezing his account.

20. Section 118 provides as follows:

> ***118. Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.***

21. Section 118A provides that the application under section 118 shall be made *ex parte* to a magistrate, while section 121 provides for the detention of anything seized pursuant to orders issued under section 118 of the CPC. It states as follows:

> ***(1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.***
>
> ***(2) If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.***
>
> ***(3) If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise.***

22. Section 180 of the Evidence Act contains provisions relating to searches of bank accounts. It provides that:

> ***Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book.***

23. In this case, the respondents' argue that the applicant has been charged in cases currently ongoing in Mombasa before the Chief Magistrate's Court. That the cases are nearing completion, with only 5 witnesses remaining. That the funds in the account are believed to be proceeds from theft of goods in transit. That the applicant should await the conclusion of the trials before the Magistrate's Court in Mombasa which will follow the trail of the funds from the theft of goods in transit. And finally, that it is in the interests of justice that the present application be dismissed.

24. The one issue with respect to which the respondents are eloquently silent is on whether or not they had made an application as required under section 118 of the CPC or section 180 of the Evidence Act. While Learned Counsel, Mr. Mutuma, submitted that they had made such an application, Cpl. Njeru, who swore the affidavit in opposition to the application, was silent on the issue of an application under these sections. He did not annex such an application or the resulting order in his affidavit in response. He did not indicate before which court such application was made or order issued, whether a return was made to the issuing court under section 121 of the CPC, and whether or not such order, if any, was ever served on the applicant.

25. It appears, however, that some document may have been served on the Interested Party, which may explain its freezing of the applicant's account. Even this, however, is not certain. It is strange that the Interested Party, having a valid court order from the respondents,

would still send short text messages to the applicant to reactivate his account. The only conclusion that one can arrive at from these rather hazy facts, then, is that the respondents did not obtain an order that authorized them to freeze the applicant's account.

26. Had the respondents applied, as Mr. Mutuma submitted, for orders under sections 118 of the CPC and 180 of the Evidence Act, there would have been in force orders to preserve the funds in the applicant's account until the conclusion of the criminal cases pending before the Chief Magistrate's Court in Mombasa. In its decision in **Samuel Watatua & Another –Vs- Republic Court of Appeal Nai. Criminal Appeal No. 2 of 2013** (unreported), the Court of Appeal stated that:

> ***"A reading of Section 180 of the Evidence Act together with Section 118 and 121 of the Criminal Procedure Code leaves no doubt in anybody's mind that the court, upon application, has the power, not only to authorize access by police to bank accounts of suspected criminals but also to freeze these accounts for the purpose of preserving evidence and the subject matter of the alleged crime…***
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> ***In this case we find that the limitations in Section 180 of the Evidence Act together with Section 118 and 121 of the Criminal Procedure Code are in consonance with Article 24 of the Constitution."***

27. The respondents are authorized by law, under the provisions cited above, to apply for orders freezing the applicant's account. They have criminal proceedings ongoing against the applicant, and it would appear that they had served some kind of orders on the Interested Party, but they have not placed such orders before the court. Thus, while the respondents appear to have had valid reason for obtaining orders to freeze the applicant's account, it would appear that they did not do so. On what basis the said account was frozen, then, is unclear, and in the absence of documents from the respondents showing that they followed the process provided by law to freeze the applicant's account, the freezing of the applicant's account was unlawful.

28. I recognize that there are criminal matters pending before the Chief Magistrate's Court in Mombasa which it is common ground are still ongoing. These matters relate to theft of goods in transit, and the applicant is one of the persons charged in the matter. However, the respondents, as the State organs charged with prosecution of offenders and in whom wide powers are vested with respect to investigation, have an obligation to comply with the law in their investigations. To 'freeze' a suspect's account without complying with the law cannot be permitted without opening a slippery slope with respect to violation of citizens' rights. In the absence of orders issued in compliance with the provisions of sections 118-121 of the CPC and section 180 of the Evidence Act, there is no basis for denying the applicant access to his account the subject of this application.

29. Accordingly, I direct that such 'freezing' orders as were used to freeze the applicant's account shall be lifted and the applicant given access to his account, unless there are lawful orders in place, validly obtained by the respondents, to authorize the freezing of the account.

Dated Signed and Delivered at Nairobi this 21st day of October 2020

MUMBI NGUGI

JUDGE