



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL MISC. APPLICATION CASE NO. 165 OF 2020**

**WINNIE JEBICHI KOECH.....APPLICANT**

**CAROLINE CHEMUTAHI KOECH.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**STANDARD CHARTERED BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

The 2 applicants **WINNIE JEBICHI KOECH** and **CAROLINE CHEMUTAI KOECH** files a joint application herein on 5.6.2020. By a Notice of Withdrawal dated 21.8.2020, the 2<sup>nd</sup> applicant withdrew her application, leaving the 1<sup>st</sup> applicant as the sole applicant in these proceedings. The application, principally seeks that this court do exercise its supervisory jurisdiction and set aside the restrictions placed by the Chief Magistrate's court in Chief Magistrate's Miscellaneous Criminal Application No. 1355 of 2020, regarding account number [...] at Standard Chartered Bank of Kenya Limited, and Account No. [...] at Cooperative Bank of Kenya Limited. The said application is supported by the affidavit of the advocate for the applicant, Elvis Begi Nyachieo A, Abenga. Both the Respondent and the Interested Party, Michael Gitonga, opposed this application.

Me. Abenga for the applicant submitted that this application for revision based on grounds of gross injustice. That in the original Miscellaneous Criminal Application No. 1105/2020, the investigating officer had sneaked in restrictions orders freezing bank accounts the application was later withdrawn. Instead a new application was filed, being Miscellaneous Criminal 1355/2020, seeking similar orders. The freezing orders were then granted despite protests, and the same orders still remain in force. Counsel went on that in the original application (Miscellaneous 1105/2020), the claim was of forgery of signatures, which in the latter one (Miscellaneous 1355/2020) it is one of breach of contract, which is a civil claim.

Counsel submitted that the Respondents are using a criminal process in a civil matter. He relied on the case of Tomothy Isaac Bryant and 2 others Versus Inspector General of Police and others (2014)eKLR on the holding that freezing orders on accounts ought to be of last resort.

On the side of the interested party, Mr. Omaiyo submitted that the complainant was made after complainant complained of having been defrauded by the applicant and the other in a joint business venture. That Miscellaneous Criminal 1105/2020 was withdrawn and the applicant never objected. And the applicant did not object when Miscellaneous Criminal 1355/2020 commenced, and orders were issued restricting or freezing the accounts. That the applicant and the other had already fled the country in December 2019. This is confirmed by the Affidavit of Caroline Koech that they had both fled to Rwanda.

Counsel went on that the applicant has been evasive to the investigators and even to court as she has never appeared in court. That the amounts in the accounts are about 50 million, and she is still making applications while outside the jurisdiction of the court. That the explanation based on Covid – 19 restrictions do not hold any water any cove, as shown by the 2<sup>nd</sup> (former) applicant who has since come back from Rwanda.

Counsel relied on the case of Miscellaneous Criminal 33/2016, A to Z infracture Limited Versus BFIU and another (2016)eKLR, and Samuel Watwitwa Versus Republic Criminal Application No. 2/2013 that the magistrates' court has power to order freeze of bank accounts to preserve same. He therefore denied that the lower court lacks jurisdiction to freeze bank accounts as submitted by the applicant.

On further submissions, Mr. Mwangi, also for the interested party, submitted that the applicant has never participated in either of the 2 miscellaneous applications before the lower court, and that the applications before the lower court, and that the applicant only wants to fraudulently access the monies.

On behalf of the state (Respondents), Ms. Chege submitted that this matter emanated from the complaint by the interested leading to the filing of Miscellaneous Criminal 1105/2020. That after issues came out regarding orders not prayed for and satisfactory explanation was

given. She maintained that there is no bar to the filing of a subsequent application, and that the mistake of the investigating officer ought not be meted out against the party.

She went on that this is a case of fraud by directors and that movement of money is at a click of a button. That one of the reasons for lifting the veil of directions is fraud, and that both criminal and civil processes can run concurrently. Lastly, that the police have a duty to investigate any complaint brought to them. She urged that this application be dismissed.

In further reply, Mr. Abenga submitted that the issue is not whether the lower court has jurisdiction, but whether the jurisdiction was exercised judiciously as to merit a freezing order. That the applicant has not failed to cooperate with the investigators, but rather that due to the freezing orders, she is stranded in a foreign country. Counsel otherwise committed that fraud is a ground for lifting of a corporate veil.

I have considered the submissions of the parties herein. I have also considered the pleadings filed and the authorities relied on by the parties. The facts surrounding this matter are fairly well agreed on by the parties. That pursuant to a complaint made with the police (BFIU) by the interested party against the applicant and the former 2<sup>nd</sup> applicant, the investigation officer moved to court to obtain freezing orders of the 3 bank accounts. The said orders were issued but upon the applicant filing an application to challenge the same, the application, being Miscellaneous Criminal Application Number 1355/2020. Orders freezing the 3 named accounts were again issued. The orders were subsequently extended and from the records, the same were extended to last till 27.10.2020.

It appears that the applicant herein did not participate in these proceedings (i.e Miscellaneous Criminal 1355/2020). Instead aggrieved with the said orders, the applicant has moved to this court seeking that the said order of the lower court be revised.

The Respondent has produced authorities that confirm that the lower court has jurisdiction to issue the orders that it issued following the application of the Respondent. These ..... High Court Miscellaneous Criminal Application No. 33/2016, Ato Z Infrastrure Limited Versus BFIU, Criminal Application No. 2 of 2013 (CA), Samwel Watwatwa Versus Republic. The Applicant has conceded the submissions of the Respondent that the lower court indeed had the jurisdiction to issue the said orders.

The 2 issues that the applicant has raised for determination, and on which the submissions of the parties were based were:-

**i) Whether the trial court had sufficient justification to issue the orders of freezing of the 3 accounts.**

**ii) Whether this application, seeking the lifting of the said orders has merit.**

On the first issue above, it is worth noting that before the lower court issued the orders aggrieved of, the investigating officer, No. 82087, Corporal Hassan Hirbo, moved the court and filed an affidavit detailing on the complaint filed by the interested party. The said complaint related to the offences of forgery contrary to section 345 as read with section 349 of the Penal Code, and stealing contrary to section 268(1) as read with section 275 of the Penal Code. The investigating officer further deponed on the mandate of the Banking Fraud Investigations Unit to investigate into complaints of fraud and related criminal acts. There is no doubt as to whether fraud and theft are Criminal offences under Kenyan law.

With the affidavit of the investigating officer, the prosecution laid a basis for the issuance of the freezing orders so that investigations regarding the twin issues of fraud and theft could be carried out. To, me, this satisfies the requirements set out in the case cited by the Applicants of Timothy Isaac Bryant 2 others Versus Inspector General of police and others (2014)eKLR, that there need to be a basis laid on the complaint made before orders of freezing of account can issue, and that such order ought to be as a last resort.

Secondly, this court notes that the applicant has never presented herself before the investigating officer despite being summoned to do so. It has been explained that she is stranded outside the jurisdiction of the court. That she is unable to travel back to Kenya from Rwanda. This may very well be so. But the important thing to consider is the effect of her unavailability. The complaint that the interested party lodged with the police were directed against the applicant. If would in that event be impractical to conduct and conclude the investigations without the participation of the applicant. It may very well turn out that the complaint lacks merit against her just like it did against the Winnie Jebichi Koech, who was jointly complained against with the applicant, but who on presenting herself for interrogation, has so far not been arrested or charged in court. In short therefore, the investigations into this matter have remained stalled partly be reason of the absence of the applicant.

Another factor to consider is the effect of the orders sought in this application. The application seeks orders setting aside the freezing orders issued by the lower court. The freezing orders have the effect of putting on hold any transaction or operations in the 3 accounts so that the money held therein remains as such pending the conclusion of the investigations into the complaint of the interested party. The contrary would be the case were the freezing orders be vacated or set aside. In that case, any of the signatories to the account would be in a position to operate the accounts; The applicant who is away in Rwanda, would be able to operate the accounts even while out of the jurisdiction of Kenya. This, in my view would be absurd in as far as it would interfere with the on-going investigation surrounding the 3 accounts.

This matter before this court as I understand it, only relate to the criminal nature of the complaint lodged by the interested party. This court shall therefore refrain from making any deductions or pronouncements that could fall into the realm of civil law or disputed between the parties.

Under section 362 of the Criminal Procedure Code;

***“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 recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.***

The above provisions dictates that for a party to succeed under the High Court powers of revision, it must satisfy the court as the incorrectness, illegality and impropriety of the orders of the subordinate court. With respect, I am not convinced that the applicant quite met this standard or at all.

I therefore find this application of the applicant dated 8.6.2020 totally lacking merit. I dismiss the wholly.

**HON. JUSTICE D. OGEMBO OGOLA**

**27<sup>th</sup> November 2020**

Court:

Ruling read online in the presence of Ms. Lubanga holding brief for Mr. Abenga for applicant, Mr. Omaiyo and Ms. Mwangi for the interested party and Ms. Kibathi for the state.

**HON. JUSTICE D. OGEMBO OGOLA**

**27<sup>th</sup> November 2020**