

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL MISC. APPLICATION CASE NO. 65 OF 2020

BASHIR ADAN ABDI.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

This matter is for the application of the applicant **BASHIR ADAN ABDI** filed on 12.2.2020. The same, principally brought under several articles of the constitution (Article 50(1)(2), 51(1), 159(2)(c), 165(6)(7), 258(1), 259(1)(a-d) and the Criminal Procedure Code (sections, 362, 363, 364, and 365, seeks revision of the lower courts orders (Hon. M. Mutuku, Chief Magistrate) on 31.12.2019 in Miscellaneous Criminal Application No. 4581/2019. The orders aggrieved of were orders freezing the Applicant's account No. [.....] held at the Gulf African Bank Limited, Eastleigh Branch. The application is supported by the affidavit of the applicant. The Respondent also dully filed a replying affidavit, sworn by the investigating officer.

By agreement of the parties, this application was canvassed by way of written submissions. Both sides accordingly filed their set of submissions.

The case for the applicant is that the said freezing orders were issued ex parte and that the same have been extended to run indefinitely, thereby denying the applicant the use and enjoyment of his money held and frozen in the account.

I have had the benefit of perusing the proceedings before the lower court which clearly show the whole chronology of the events in determining this issue. The said orders were first issued on 31.12.2019. The application was ordered to be served and a mention date was fixed for 15.1.2020 for further directions. On the set date, the orders were extended by a further 1 day. And on 16.1.2020, same were extended till 30.1.2020. The same were ordered to be served for the inter partes hearing on 30.1.2020 the same orders were then extended and inter parties hearing then set for 3.3.2020. It appears that the lower court file has not come up since. As rightly postulated in the submissions of the applicant, this can only be explained by the unforeseen and persistent disruptions of court operations as a result of the Covid-19 pandemic.

The above scenario clearly show that the court below, by ordering that the application be served for inter partes hearing of the same, has always shown the intent to hear both the applicant and the Respondent on the issue before the court. And contrary to the submissions of the applicant that the freezing orders have been extended indefinitely, the courts have kept extending the orders for specific periods of time. As it is therefore, the lower court is yet to hear the parties on merit inter partes. The applicant therefore still has the opportunity to present his case before the lower court. Therein lies the distinction with those in the case cited by the applicant.

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 purposes 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”.

From the chronology of the events as stated above, the applicant has not shown any illegality, error or impropriety in the orders issued by the lower court. I also find none. The applicant, who has not has the opportunity to be heard by the lower court, still remains at liberty to move the trial court for the hearing inter partes of the application from which the orders he is aggrieved of emanated.

For the above reasons, I am not convinced that the application of the applicant dated 2.3.2020 and filed herein on the same date has any merits. I dismiss the same accordingly.

HON. JUSTICE D. OGEMBO OGOLA

11th November 2020

Court:

Ruling read out in the presence of Mr. Karanja for the applicant and Ms. Kibathi for the state/Respondent.

HON. JUSTICE D. OGEMBO OGOLA

11th November 2020