**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC PETITION 33 OF 2018**

**IN THE MATTER OF AN APPLICATION BY JOHN WACHIRA WAHOME**

**FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF NAIROBI CMCR MISC NO. 1997 OF 2018**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**ASSET RECOVERY AGENCY.....1ST RESPONDENT**

**CHIEF MAGISTRATE MILIMANI**

**LAW COURTS NAIROBI.....2ND RESPONDENT**

**ATTORNEY GENERAL.....3RD RESPONDENT**

**AND**

**JOHN WACHIRA WAHOME.....EX-PARTE APPLICANT**

**RULING**

1 Through exparte chamber summons dated 18th September 2018 filed at Nakuru High Court, the exparte applicant sought leave to institute Judicial review proceedings against the respondent. The file was subsequently transferred to Milimani High Court for hearing. By consent, leave was granted on 4th December and the applicant directed to file a notice of motion which they did and served upon the respondents who opted not to respond at all.

2 Consequently, by a Notice of Motion dated 13th December 2018 filed under Order 53 of the Civil Procedure Rules and sections 8 and 11 of the Fair Administrative Actions Act, the Exparte -Applicant herein John Wachira Wahome sought the following orders:-

> **1. THAT the Honourable court be pleased to issue an order of certiorari and mandamus to remove into this Honourable Court by way of varying, quashing and or vacating the decision by the respondents in the Nairobi CMCR MISC NO. 1997 of 2018 to freeze and/or preserve the operations of the exparte's Applicant bank account number 0130195544435 held with Equity Bank Limited Nakuru Gate House, Branch.**
>
> **2. THAT the Honourable Court be pleased to issue an order of prohibition to restrain the respondents either in persons or through their agents, employees and servants from freezing/preserving the operations of the ex-parte Applicant's bank account number 0130195544435 held with Equity Bank Limited Nakuru Gate House, Branch either through proceedings initiated in Nairobi CMCR MISC NO. 1997 of 2018 or any other related proceedings.**

**3. THAT costs of this application be borne by the respondents.**

3 The application was supported by the affidavit of the Ex-Parte Applicant sworn on the 13th December 2018 averring that he is the immediate previous legal bonafide owner of a portion measuring (0.12ha) forming part of L.R. NO. 8208(herein after also known as "suit premises''). Apparently, he acquired the suit premises from one James Michael Wambia and Irene Wambui Wambia who were the suit premises legal owners vide a sale of land agreement (JWW 1) executed on the 8th November 2012.

4 Consequently, upon acquisition of the suit premises from its immediate previous owners, he immediately commenced the process of excising the suit premises from L.R NO. 8208 by acquiring the requisite approvals and legal documents to facilitate the process. He attached a copy of the deed plan **(JWW II).** Simultaneously with the process of acquiring subdivision documents, he developed the suit premises with a residential house at a cost of Kshs. 13,000,000/= after which he occupied the same together with his family as their matrimonial home. He attached copies of photographs marked as **JWWIIa** and **JWW IIIb** as proof of the said development.

5 He further averred that the estimated value of the suit premises after completion of the erection of the matrimonial home together with servant quarters, a modern electric perimeter fence plus other incidental developments was approximately Kshs. 30,000,000/= taking into consideration the location of the suit premises and high rate of inflation experienced currently in the country.

6 However, sometime in the year 2016, after consulting with his wife and children, they decided to sell the suit premises to any prospective buyer at the current market price together with all the improvements therein. Subsequently, on 29th November 2016, he sold the suit premises to one MILLICENT MATINGI KUNDU at a cost of Kshs. 25,000,000/= vide a sale agreement **(JWW IV)** of even date.

7 Pursuant to clause 31 of the aforementioned sale agreement, part of the purchase price consideration was paid to him through the firm of M/s Sheth & Wathigo Advocates through his bank account details held at Equity Bank Nakuru Gate House , Branch account number 0130195544435 and partly through his bank account held with First Community Bank Nakuru, Branch Account Number 0169500397501

8 Subsequently, the Respondents froze the operations of his account at Equity Bank through a Court order issued in Nairobi CMCR No. 1997 of 2018 directed against him and other persons suspected to be involved in the economic fraud and corruption cases touching on the National Youth Service. He attached copies of the Notice of Motion dated 6th June, 2018 marked JWW and JWW b.

9 Apparently, he came to learn about the existence of the said court order sometimes in July 2018 when he visited Equity Bank Nakuru in the course of accessing his funds. That he had neither been served with the said order nor invited or summoned by any of the Respondents to shed light or assist them in arriving at a just, comprehensive and or objective investigative report despite several efforts to reach the Asset Recovery Agency.

10 According to him, the source of the funds paid to him by the said MILLICENT MATINGI KUNDU was not known to him at the time of executing the aforementioned sale agreement for the reason that he did not know her trade, employment status and /or business dealings at the time as they had met for the sole reason of entering into a commercial transaction pertaining to the suit premises.

11 Hence, it was his contention that the transaction between himself and the said Millicent Matingi Kundu was a commercial dealing regulated by the law of contract and the National Youth Service was not privy to the transaction. He averred that, in the event that Millicent Matingi Kundu is indicted in any dealings between him and National Youth Service, the proper cause of action is to recover the suit premises from him but not to bring in 3rd parties who are not associated to any dealings with National Youth Service.

12 Lastly, he contended that he has been subjected to irreparable damage since his family has been denied the right to decent housing as the funds was intended to be utilized towards developing an alternative matrimonial home for his family and the same cannot be utilized unless the honourable court grants the prayers sought herein.

13 The Respondents on their part even after being served did not file any response to the Ex-parte Applicant's application hence the matter proceeded exparte. During the hearing, Mr. Wakwaya holding brief for Mr. Chege counsel for the Applicant simply adopted the averments contained in the affidavit in support of the Application.

**DETERMINATION**

14 Having laid out the Exparte Applicants case, the following issues stand out for determination:

**a) Whether the lower Court had jurisdiction to grant the inspection and freezing orders on the basis of the cited provisions of the law.**

**b) Whether it was proper to uphold the orders sought without granting the Applicant a fair hearing**

**c) Whether the Application has been rendered moot by expiry of the freezing order period.**

14 Considering that none of the Respondents filed any response to the Application, it follows that the factual averments of the ex parte applicant's averments are uncontroverted. Accordingly, determination to the application can only be sustained on matters of law. The law governing consequences for failure to file response to a claim by a party in a suit was aptly captured in the case of **Mohammed & Another vs. Haidara [1972] E.A 166** *at page 167* paragraph F-H where, **Spry V.P, J** considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

> **"The respondent made no attempt to reply to these allegations and they therefore remain unrebutted…Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied…"**

15 Similarly in **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR** the court stated as follows:

> **"In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."**

**On Jurisdiction to issue orders to inspect and freeze bank account**

16 The provisions of the law that were relied on in seeking the warrants to investigate and search exparte Applicant's accounts by the 1st Respondent in Nairobi chief magistrate's court Misc. Cr. Case No.1997 of 2018were **Sections 118** and **121** of the **Criminal Procedure Code** and **180** of the **Evidence Act.**

17 **Section 180** of the Evidence Act provides for the initial procedure to facilitate investigation into a bank account as follows;

> *(1) **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.** (emphasis provided).*

The Act, by this provision, takes into account acts that have been done to necessitate investigation into the possibility of commission of a criminal offence. This provision alone authorizes the Court to issue exparte orders of investigation. It does not give powers to order the freezing of a bank account

18 A similar observation was made by Waki, J. (as he then was) in the case of **Erastus Kibiti Stephen vs. Euro Bank Ltd. and the Commissioner of Police Criminal Application No. 9 of 2003,** which is of persuasive value. The judge noted that:

> *"**Section 180(1) does not encompass the freezing of a bank account. On the plain reading of the Section, this is indeed so. But one may loudly wonder why the law should permit the inspection of Banker's books…when it does not safeguard the funds existing in those accounts…How else would the investigator ensure that the horse has not bolted from the stable as it were before he finalizes his inspection? The answer, I think, lies in enacting a law whether substantive or procedural to resolve that difficulty."***

19 The limitation of **Section 180** therefore warrants the need to invoke the provisions of **Section 118** and **121** of the **Criminal Procedure Code**. **Section 118** provides:

> ***"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."***

20 The foregoing section should be read together with **Section 121(1)** which goes further to provide that:

> ***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.***

21 On whether **Section 118** does not apply to bank accounts as it provides for seizure of an item in premises that is, a '*place, building, ship, aircraft, vehicle, box or receptacle'* I do associate myself with the sentiments expressed by the Hon. Judge in the case of **Erastus Kibiti Stephen** (***Supra***), concerning the lacuna in the provisions of **Section 180** of the **Evidence Act**. The section fails to make a further provision for safeguarding evidence in the form of money held in a bank account.

22 In the case of **Samuel Watatua & Another v Republic, Court of Appeal, Nairobi, Criminal Appeal No. 2 of 2013 (unreported),** the Court held a contrary view by stating as follows;

> ***"A reading of Section 180 of the Evidence Act together with Sections 118 and 121 of the Criminal Procedure Code leaves no doubt in anybody's mind that the Court, upon application, has power not only to authorize access by police to bank accounts of suspected criminals but also to freeze those accounts for the purposes of preserving evidence and the subject matter of the alleged crime."***

And further,

> ***"In this case, we find that the limitations in Section 180 of the Evidence Act together with Sections 118 and 121 of the Criminal Procedure Code are in consonance with Article 24 of the Constitution."***

23 On the basis of the above logical and convincing reasoning, I find that the lower Court had jurisdiction to issue the orders of inspection and freezing of the subject bank account. Incidentally, Section 118 of the CPC should be read in a purposive manner and objectively to achieve the intended and broader objective or goal of preserving the property in question or subject to investigation or seizure which in this case is money and which by its very nature cannot be confiscated or be taken away from the bank hence preservation through freezing the account pending completion of investigations. It is my finding that the order was procedurally obtained.

**failure to accord the Applicant a fair hearing**

24. It is the applicant's view that he was not accorded fair administrative treatment when his accounts were frozen without any notice hence condemned unheard contrary to Article 50 of the constitution. In my view, fair administrative actions Act imports the rules of natural justice. To fail to adhere to the rules of natural justice may render an administrative action procedurally improper and procedural impropriety is no doubt one of the grounds for grant of judicial review remedies. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

25 **The Exparte Applicant in his affidavit** argued that the proper procedure was not followed in freezing the subject bank account, in that he was unaware of the existence of the said freezing order and only became aware of it when he wanted to access money in his bank account. That to date, he has not been charged with any offence

26 Indeed **Section 83** of the **Proceeds of Crime and Money Laundering Act** requires that where a preservation order is made, the Agency Director is required to within twenty one (21) days, issue a notice of the order to all persons who have an interest in the property which is subject of the order and further to publish a notice in the Kenya Gazette.

27 **Section 118** of the **Criminal Procedure Code** on the other hand requires that once anything is seized in execution of a warrant, it should be taken "*before a court having jurisdiction to be dealt with according to law*." A further reading of **Section 121(1)** of **Criminal Procedure Code** indicates that further detention of seized items is to be done with the direction of the Court. **Section 121(3)** further directs that:

> ***(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.***

28 The Ex-parte Applicant's case is that the continued freezing of the subject bank account is against the law. The above provision emphasizes the earlier fact that once anything is seized,there must be a return to the court for the thing so seized to be dealt with in accordance with the law. The purpose of this requirement is to inform the court of the outcome of the search and inspection, and to get direction whether or not the seizure of the subject matter will be maintained.

29 Since the warrants are often granted *ex parte* due to the nature of the orders, **Sections 118** and **121** have a condition of a return to Court, and as **Section 121** implies, further detention of the subject items is upon the direction of the Court. It is therefore implied that, the persons so affected would have an opportunity at this stage to challenge the seizure of items. The purpose for laying down the conditions is to ensure that the Court continues to maintain a supervisory role over the police or in this case the 1st Respondent.

30 A bank account being a special kind of place, not capable of seizure in the sense of the word, would, in practical terms be 'frozen' so as to preserve the contents of the account until further direction of the court. This requirement is important as it is in accord with the constitutional requirement under **Article 50**, that all persons should be granted an opportunity to be heard on matters affecting them.

31 As stated by the Court of Appeal in **Samuel Watatua & Another v Republic (Supra)**

> ***"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 partes with all parties, pursuant to Article 50 of the Constitution accorded an opportunity to be heard."***

32 In this case, the impugned orders were issued on 6th June 2018 according to the annextures attached by the Ex-parte Applicant. However, no information was shared with him in respect to these orders. The Ex- parte Applicant only learnt of the orders when it sought the services of its bank. This was un procedural since the asset recovery officer as a matter of practice ought to follow the procedure as stated by the

Court of Appeal and laid down under the Criminal Procedure Code.

33 .However, the issuance of the exparte order in this case perse was procedural and lawful. Since the transfer of the property of the applicant was not complete, the said property was still legally the applicant's property and the freezing and preservation order was intended to safeguard the money allegedly obtained by the purchaser through fraudulent means from being concealed or wasted before recovery.

34 Nevertheless, it is advisable on the part of the Court issuing the orders to require the Applicant seeking its orders, to serve the application and the orders on the affected parties including the financial institution. The court should also give direction as to when parties will appear before the Court for hearing before final orders can be made as to whether or not, to allow continued seizure of the property or freezing of the bank account.

**Whether the application has been rendered moot**

35 The Application before me was filed in December 2018 almost seven months after the impugned orders were issued. There is no apparent reason why the Asset Recovery Officer did not return to Court to report on the outcome of the execution of its orders and seek further directions from the Court.

36 Considering the time that has lapsed and the fact that none of the Respondents even bothered to respond to the above application, the averments by the Ex-parte Applicant for the purpose of this judicial review application remain un opposed. As a consequence thereof and taking into account the above findings ,I will allow the Exparte applicant's application in the following terms:-

**a) An order of certiorari is hereby issued to remove into this Honourable Court by way of quashing and or vacating the decision by the respondents in the Nairobi CMCR MISC NO. 1997 of 2018 to freeze and/or preserve the operations of the exparte Applicant's bank account number [...] held with Equity Bank Limited Nakuru Gate House, Branch.**

**b) An order of prohibition is hereby issued restraining the respondents either in persons or through their agents, employees and servants from freezing/preserving the operations of the ex-parte Applicant's bank account number [...] held with Equity Bank Limited Nakuru Gate House, Branch through proceedings initiated in Nairobi CMCR MISC NO. 1997 of 2018**

**c) That the applicant shall be at liberty to access his bank account subject to existence of any other lawful order issued by a competent court.**

**d) Costs be borne by the 1st respondent.**

**DELIVERED DATED AND SIGNED THIS 27TH DAY OF MARCH 2019 IN OPEN COURT AT NAIROBI.**

**J. N. ONYIEGO**

**JUDGE**