



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APP. NO. 235 OF 2017**

**SAMUEL KARIKO GITHINJI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The dispute in this matter involves the freezing of the Applicant's account number [xxxx] held at Barclays Bank of Kenya Queensway Branch. The Applicant initially filed a Notice of Motion application dated 7<sup>th</sup> August, 2017 seeking orders to unfreeze the account. The Director of Public Prosecutions had on 17<sup>th</sup> July, 2017 obtained an order from the Chief Magistrates' Court at Milimani Law Courts in Misc. Cr. Application No. 2266 of 2017 in which the said account was frozen.

2. The application of 7<sup>th</sup> August, 2017 was compromised after the Applicant's counsel and the Respondents through State Counsel consented to continue freezing only the sum of Kshs. 1.2 million which was the amount being investigated by the police. The Respondents thereafter undertook to conduct thorough investigations with a view to charging the Applicant if found culpable. Meanwhile, the Applicant was at liberty to operate any amount that was in excess of Kshs. 1.2 million. The consent order was recorded on 14<sup>th</sup> August, 2014 before this court.

3. Since this date, no action was taken by the Respondents with a view to either summoning the Applicant to record statements or to charge him. The Applicant holds the account as a client's account as he is an Advocate of the High Court of Kenya. Aggrieved that the money frozen is not his money but the client's money, he filed the instant application dated 26<sup>th</sup> February, 2019 asking the court to entirely unfreeze the account because it was causing him and his clients harm and inconvenience.

4. Since the date of filing, the matter has been in court four times. More than three months down the line, the Respondents did not file a response in opposition to the application. A last adjournment was granted on the third appearance in court on 20<sup>th</sup> May, 2019. Previously, on 3<sup>rd</sup> April, 2019, and 9<sup>th</sup> April, 2019, the Respondents requested for time to seek instructions on how the investigations were proceeding after which they would file a replying affidavit. As at 22<sup>nd</sup> May, 2019, when the court directed that the application must proceed, no reply or grounds of opposition had been filed by the Respondent. The Respondents were accordingly directed to proceed on points of law only.

5. The gist of the application was that the Respondents had failed to conclude investigations of the account or even inform the Applicant what charges they intended to prefer against him. It was advanced that since the money in the account belonged to clients, it was only fair that the account be reopened. Mr. Githui, counsel for the Applicant submitted that the closure of the account was causing the Applicant embarrassment as he has had to explain to Kenya Revenue Authority the reasons for the closure and the amounts frozen therein. This, according to the counsel, predisposed the Applicant to disciplinary action.

6. Ms. Sigei for the Respondents submitted that investigations had begun following a complaint of theft of money and that the account was closed in a legal manner pursuant to provisions of Section 180 of the Evidence Act and Section 118 of the Criminal Procedure Code. She urged the court not to open the court because the investigations were not complete. Furthermore, the complainant under the Victims Protection Act had a right of protection through ensuring that investigations were completed and the Applicant brought to book through a fair trial. She urged the court to dismiss the application.

7. In rejoinder, Mr. Githui submitted that Article 123 of the Constitution guaranteed the right to property of an individual. In that case, the powers of the police had to be checked where they were violating the rights to property.

8. I have considered the application and the respective rival submissions and I take the following view of the application. I entirely concur with the Respondents that police have a right to investigate any complaint of a criminal nature filed with them. In this respect, they were entitled to start investigations against the Applicant and his account if it related to theft of monies. To secure the complainants interest, one of

the steps in the investigations they undertook was to cause the freezing of the subject account. To that extent, the police did the right thing.

9. I however differ with the Respondents that investigations take endless time. As at this date, the police have not informed the complainant of the progress in the investigations and what offence they intend to prefer against him. In fact, a look at the proceedings attest that each time the matter came up for hearing, the Respondents were seeking time to get instructions on how far the investigations had proceeded. There is also on record leave upon confirmation of the progress in investigations to file a response to the application. For a period of close to one year since the account was frozen, no instructions were given to the office of the DPP by the investigators on what they intended to do with the Applicant and his account. It can only be concluded that police had lost interest in the investigations and were not bothered about whether any charges would be preferred against the Applicant.

10. I agree that a complainant is entitled to a fair trial after investigations are completed. A complainant as a victim is protected by the justice system in this regard. However, the right to the protection cannot be exercised at the expense of violating the right of the suspect. The suspect too has a right to expeditious disposal of the investigations and trial. In the present case, it was not disclosed what is pending in the investigations, when the investigations are likely to end and what charges are likely to be preferred against the Applicant. This is definitely injurious to the Applicant. He is entitled to the protection of the law.

11. I am minded that the frozen account is not an individual's but a client's account. At stake are monies belonging to the clients. No culpability in a period of close to one year has been established against the Applicant. Whereas the police are empowered to conduct their work without due 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 the freezing of the account was done with an extraneous motive.

12. The court envisages a situation where the investigators are deliberately violating the Applicant's fundamental rights by depriving him of his property which he holds in lieu of his clients. They cannot plead their right to conduct investigations when the same is not done in fair administrative manner. They have been indolent to do their part which indolence flows to violating the Applicant's right to property.

13. With these observations, it is my humble view that the application is merited. There is no need to continue freezing the Applicant's account. The application succeeds with an order that the Applicant's account number [xxxx] held at Barclays Bank of Kenya Queensway branch be forthwith unfrozen and the Applicant be accorded unlimited right of access to it. This order be served upon the manager of the bank for compliance.

**Dated and delivered at Nairobi This 30<sup>th</sup> Day of May, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Mr. Githui for the Applicant*

2. *Miss Kimaru for the Respondent.*