



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.117 OF 2019

PETER NZIOKI MUTISO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Peter Nzioki Mutiso filed an application before this court seeking to invoke the revisionary jurisdiction of this court for orders that:

“This honourable court do exercise its discretion in revision of the orders by the Hon. Chief Magistrate made on 08/11/2019 wherein the said magistrate order to freeze the applicant Equity Account No.0250194993525 until the investigation is concluded, which orders was issued exparte in contravention of the Applicant’s constitutional right to be heard.”

The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of the Applicant. He swore an affidavit in further support of the application. In essence, the Applicant states that his said bank account was frozen during investigations. The investigators obtained the orders freezing the account exparte from the court. The Applicant was subsequently charged with the offence of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. He pleaded not guilty to the charge. The trial is yet to be concluded. The Applicant is of the view that there is no reason why the order freezing his account should remain in force yet the prosecution had not given any reason for the said order to remain in force. In the circumstances, he urged the court to revise the order and set it aside.

The application is opposed. Sgt Benjamin Chelanga, the investigating officer swore a replying affidavit in opposition to the application. In the affidavit, he deponed that his investigation had established that the complainant had been defrauded of certain sums of money including sums which were deposited in the Applicant’s account at Equity Bank. It was on that basis that he made the application to have the account frozen pending the conclusion of investigations. His investigations established that a case had indeed been made for the Applicant to be charged with the offence of obtaining money by false pretences. The Applicant had duly been charged and the case is pending trial before the magistrate’s court. He deponed that the sums in the said account should remain frozen pending the outcome of the case, because should the prosecution succeed in its case, the amount is likely to be seized as being proceeds of crime. He therefore urged the court not to interfere with the decision of the trial court and instead order that the said funds be preserved pending the outcome of the trial.

During the hearing of the application, this court heard oral rival submission made by Mr. Mugo for the Applicant and by Mr. Momanyi for the State. The Applicant essentially relied on the contents of the application and the affidavits filed in support thereof while the Respondent relied on the replying affidavit filed by the investigating officer. There are two issues for determination by this court. The first issue is whether the order issued by the magistrate in freezing the Applicant’s account was legal taking into account that the same was issued exparte and the fact that the Applicant was not subsequently served with the order freezing his account. **Section 118** as read with **Section 121** of the **Criminal Procedure Code** grants the magistrate’s court the power to issue an order freezing an account when an application is made by an investigator. Indeed, in **Republic v Asset Recovery Agency & 2 Others Exparte John Wachira Wahome [2019] eKLR**, Onyiego J held thus:

“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 Exparte Applicant's case is that the continued freezing of the bank account is against the law. The above provisions 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 exparte due to the nature of the orders, Sections 118 and 121 have a condition of a return to court, and as 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."

In the present application, the investigator obtained orders from the Magistrate's Court to freeze the Applicant's account while investigating suspected commission of crime. After obtaining the order to inspect and freeze the account, the investigator established that indeed some of the funds that were the subject of investigation had been deposited in the said account. Upon conclusion of his investigation, he established that a case had been made for the Applicant to be charged with a disclosed offence of **obtaining money by false pretence** under **Section 313** of the **Penal Code**. Indeed, the Applicant has so been charged. The trial is pending determination in the magistrate's court. The Applicant complains that the continued freezing of the said account was not justified in law and in fact. He argued that he is presumed innocent until proven guilty by a court of law. In the circumstances, he urged the court to favourably consider his application and grant an order unfreezing the account. The application, of course, was opposed by the prosecution.

This court's evaluation of the rival argument made on this issue leads it to the irresistible conclusion that the account in question cannot be unfrozen while trial is pending. **Section 121(3)** of the **Criminal Procedure Code** prohibits the unfreezing of such an account if the owner of the account "**is committed for trial**". The issue as to whether the initial exparte order issued is valid in law is an issue that has been overtaken by events. Once the Applicant was charged in connection with the funds that are in the account, the court that has jurisdiction to address the issue is the court that will try his case. This court cannot therefore interfere with the trial court's jurisdiction by issuing orders regarding the account in question unless it is established that the account was not the subject of the trial. In the circumstances therefore, this court cannot fault the trial court for assuming jurisdiction in regard to whether or not the funds in the subject account should be released to the Applicant.

The second and final issue for determination is whether on the basis of affidavit evidence, this court can issue an order unfreezing the account in question. It was clear to this court that the contents of the affidavits in support of the application are essentially the Applicant's defence to the charge laid against him by the prosecution. On the other hand, the replying affidavit sworn by the investigator is a restatement of the prosecution's case before the trial court. As an Appellate court, this court cannot be called upon to give an opinion regarding evidence which is yet to be presented before the trial court and tested on cross-examination to determine its veracity and credibility.

This court formed the view that the Applicant was seeking an opinion from this court in regard to evidence which is yet to be presented before the trial court, which in the first instance, has jurisdiction and competence to hear the matter. This court therefore declines the invitation by the Applicant to offer an opinion on a matter that has yet to be tried and determined by the trial magistrate's court. In any event, it will be premature for this court to issue the order craved for by the Applicant because the trial court has not determined whether or not the funds in the account had been deposited therein by the complainant and whether or not the said funds are proceeds of crime and ought therefore to be restored to the said complainant.

The upshot of the above reasons is that the Applicant's application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE