



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO 173 OF 2017

FRANCIS NJAU NJOROGÉ &

ELIZABETH WANJIKU MUIGAI t/a

FRANCROM GENERAL MERCHANTS.....PETITIONERS

AND

INSURANCE REGULATORY AUTHORITY.....1ST RESPONDENT

CI SOLOMON BOIT.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT

MILIMANI LAW COURTS NAIROBI.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

BANK OF AFRICA KENYA COMPANY LIMITED.....6TH RESPONDENT

JUDGMENT

1. The Petitioner is a Limited Liability Company. It filed a petition against Insurance Regulatory Authority, Chief Inspector of Police Solomon Boit, Chief Magistrate's Court Milimani Nairobi, Director of Public Prosecutions, The Honourable Attorney General, and Bank of Africa Company Kenya Limited, the 1st to 6th Respondents.

2. The facts of this petition are that *Francis Njau Njogu*, one of the proprietors of Francrom General Merchants, took out various life Insurance policies with *Jubilee Insurance Co. Ltd*, the insurance company, including policy Nos. 188299, 200066, 199752 and 20070076 around May 2008. The insurance company was to receive premiums in form of direct payments deducted from the Petitioners' account with the 6th respondent.

3. *Francis Njau* applied for loans from the insurance company against the policies between 2015 and 2017. It was stated that *Francis* repaid the loans on diverse dates leaving no arrears outstanding. It was averred that in 2017, *Francis* applied for other loans of Ksh.1902, 356, 541,634, 630,000. 550.000 and 540,000 but instead of getting the loans, he was surprised to receive a copy of search warrants dated 21st April 2017 allowing the 2nd respondent to obtain bank statements between January 2015 and January 2017 from the petitioners' account with the 6th respondent. It was pleaded that although *Francis* challenged that warrant, the Court declined to set it aside on grounds of jurisdiction.

4. *Francis* contended that he had no contract with the Insurance company hence the search warrants were obtained illegally and in contravention of Articles 2(1), 20, 27, 23(1) (3), 28, 29(a), 31(a) (b) 39 and 40 of the Constitution on grounds that it was an infringement of the petitioners' right to privacy and was made due to misleading information.

5. Based on the above facts, the petitioner sought the following reliefs:-

(i) Judicial Review by order of Certiorari to re move into the Court and quash the search warrants issued on 21st February 2017 in Misc. Criminal Application No 655/2017 Republic Insurance v Bank of Africa.

(ii) A declaration that the warrant to investigate books of accounts issued by the Nairobi Criminal Chief Magistrates Court Milimani Law Courts in Misc. Criminal Application No 655 of 2017 Republic (Insurance Fraud Investigation Unit) v bank of Africa breached the petitioner rights and fundamental freedoms under the provisions of Articles 27(1), 27(2), 27(5), 31, 40(1)(2) 47(1)(2) and or 50 of the Constitution of Kenya hence void for all intent and purposes.

(iii) The petitioners be awarded costs of the petition.

1st, 2nd and 4th respondents' response

6. The 1st, 2nd and 4th respondents filed a replying affidavit by **Chief Inspector Solomon Boit**, sworn on 16th May 2017 and filed on 18th May 2017. **CI Boit**, who is the investigating officer in that case, deposed that on 19th January 2017, his Unit received a complaint from the Insurance Company alleging conspiracy to defraud it perpetuated between its employees and policy holders through manipulation of electronic data relating to loan repayments.

7. **CI Boit** deposed that upon carrying out investigations, he ascertained that offences had been committed by employees in collusion with policy holders. He arrested an employee and had him charged in Court; that further that investigations revealed that **Francis** held several policies among them those mentioned in the petition; that after obtaining policy documents, he applied for search warrants which enabled him obtain information including bank standing orders by Francis at the 6th respondent but they showed that the amount was not received by the insurance company and the account did not belong to **Francis**.

3rd and 5th respondent's response

8. The 3rd and 5th respondents filed grounds of objection dated 10th July 2017 and filed on 1st August 2017 opposing the petition. They contended that the petitioners had not demonstrated violation or threatened violation of their fundamental rights and the manner of violation by the 3rd and 5th respondents; that the 2nd respondent was well within the law to carry out investigations; and that the petitioners only seek to circumvent the mandate of the 1st, 2nd, 3rd and 4th respondents.

The petitioners' submissions

9. At the hearing, the petitioner's counsel relied on their written submissions. The respondents were absent but had filed written submissions. For the petitioner, it was submitted that the 1st respondent embarked in a fishing expectation without notice to the petitioner by obtaining search warrants; that the bank account involved was limited to deducting monthly premiums of **Kshs11903/-** and **9,115/-** and that the insurance company had no authority to deduct any other sum. According to the petitioners' counsel, the document the 1st respondent used to secure the search warrants was signed in 2008 when the policy was activated and no other arrangement exists between insurance company and the petitioner.

10. It was submitted that the 1st and 2nd respondents had no intention of involving the petitioners in the investigations thus violated the petitioners' right to a fair trial. Regarding freedom and security of the person, it was submitted that as a result of the arbitrary search, leading to the 1st respondent obtaining the search warrants, the same was based on unsubstantiated facts and, therefore, subjected the petitioners to illegal searches with the intention of instituting malicious prosecution through unlawful and trampled up charges.

11. The petitioners' further submission was to the effect that the search warrants lacked basis in law and infringed the petitioners' right to privacy. They therefore sought to have the petition allowed. They relied on the decisions in **Republic v Anti-corruption Commission & 2 Others Ex Parties ABC Melta Iluigas Ltd** [2009]eKLR; **Tom Ojienda t/a tom Ojienda & Associates Advocates v Ethic and Anti-Corruption Commission & 5 Others** [2016]eKLR and **David Lawrence Kigere Gichuki v Aga khan University Hospital** [2014]eKLR.

3rd And 5th respondents' submissions

12. The 3rd and 5th respondents filed written submissions dated 19th March 2018 and filed on 20th March 2018. It was submitted that the 2nd respondent acted in accordance with his mandate under section 24 of the National Police Service Act; and that the investigator placed material before the Court and on being satisfied it issued search warrants in accordance with section 118 of the Criminal Procedure Code and section 180 of the Evidence Act. It was therefore submitted that the 3rd respondent was within the law when issuing the search warrants, hence the institution of the criminal case cannot be said to be unjust. They relied on the case of **Republic v Commissioner of Police & another Ex parte Michael Monari & another** [2012] eKLR cited in **Ken Afric Industries Ltd & Another v Anti-Counter Feit Agency & 3 Others** [2015] eKLR.

13. The 3rd and 5th respondent urged the Court when making its determination to be guided by the decision in **Republic v Attorney General & 4 Others Ex Parte Kenneth Kariuki Githii** [2014] eKLR for the proposition that the Court ought not to usurp constitutional mandate of the DPP.

14. On whether the petitioners demonstrated violation of the Constitution by the respondents, it was submitted in the negative, with the 3rd

and 5th respondents contending that the right to privacy under Article 31 of the Constitution is not absolute but is limited in terms of Article 24(1) (c) (1), so that enjoyment of this right should not prejudice rights of others. They contended that the Criminal Procedure Code and the Evidence Act are clear when the right to privacy can be interfered with and when the Court can issue search warrants. They relied on the South Africa Case of Benstein V Bester No [1996] (2) SA 751 and Cord & Others v Republic of Kenya & Others Petition No 628 of 2014.

15. They concluded that the petitioners are not entitled to the reliefs sought and relied on the case of Lt Col. Peter Ngari Ngumi & Others v Attorney General Petition No 128 of 2006, for the submission that he who alleges has the burden of proving the allegations of violation of rights.

Determination

16. I have considered this petition; the responses thereto; submissions made on behalf of the parties and the authorities relied on. The question that arises for determination is whether the petitioners' constitutional rights were violated through the issuance of the search warrants.

17. **Francis** admits to have taken out insurance policies with the Insurance Company sometime in 2008 and issued standing orders for monthly payment of premiums through an account with the 6th respondent. He also admitted to have taken loans using the policies as security. He contended however, that he repaid the loans but receipts had been misplaced when he changed offices. Sometime in 2017, the insurance company reported suspected fraud and after investigations were carried out in the petitioners' bank accounts upon the 3rd respondent obtaining search warrant, the petitioners filed this petition contending that their constitutional rights to privacy had been violated.

18. The police have constitutional and legal obligations to prevent crime and protect life and property. Article 24(1) of the Constitution is clear on the mandate of the police. Section 24 of the Police Service Act also gives the police mandate to carry out investigations. Further, where the police have good reasons for carrying out further investigations, section 118 of the Criminal Procedure Code allows them to obtain search warrants to enable them carry out investigations. The question that arises is; did the issuance of the search warrant violate the petitioners' right to privacy?

19. The right to privacy is protected under Article 31 of the Constitution which provides that **"Every person has the right to privacy, which includes the right not to have— (a) their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed."** However, the right to privacy is not one of the non-derogable rights in Article 25 of the Constitution. It is a right limited in terms of Article 24(1) of the Constitution in that it cannot cushion someone who is himself violating rights of others. The Constitution is clear that the fact of enjoyment of this right should not result in prejudicing rights of others.

20. **Francis** took out life insurance policies which he was to pay for through check off system He went ahead and took loans using the policies as guarantees. However the insurance company later discovered that there was the possibility of internal fraud to the effect that premiums were not being paid and wanted investigations done. Subsequent investigations after obtaining search warrants confirmed that indeed there had been some fraud.

21. Issuance of search warrants for purposes of enabling investigations on commission of a criminal offence cannot amount to violation of constitutional rights. Courts are mandated to assist the police in combatting crime and one of the ways of doing so is through issuing of search warrants where it is necessary to aid investigations. And that is what the Court did from the facts of this petition. It did not in my view, infringe the petitioners' rights.

22. I say so because section 118 of CPC provides that;

"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."

23. Admittedly, a search warrant may constitute a serious encroachment on the rights of the individual, thus a careful scrutiny by the courts is necessary at the point the court is approached for one. In Minister of Safety and Security v Van der Merwe & others[1] [2011] (5) 61 (CC), (par 55-56) the Constitutional Court of South Africa dealt with what constitutes a search warrants stating; **"...a valid warrant is one that, in a reasonably intelligible manner:-(a) states the statutory provision in terms of which it is issued; (b) identifies the searcher; (c) clearly mentions the authority it confers upon the searcher; (d) identifies the person, container or premises to be searched; (e) describes the article to be searched for and seized, with sufficient particularity; and (f) specifies the offence which triggered the criminal investigation and names the suspected offender"**.

24. The court went on to emphasize on the guidelines to be observed by a court when considering the validity of the warrants that is; (a) the person issuing the warrant must have authority and jurisdiction;(b)the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts; (c) the terms of the warrant must be neither vague nor overbroad; (d) a warrant must be reasonably intelligible to both the searcher and the searched person; (e) the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and (f) the terms of the warrant must be construed with reasonable strictness.

25. On the same issue, the Supreme Court of Appeal of South Africa observed in the case of Goqwana v Minister of Safety NO & others (20668/14) [2015] ZASCA 186 that **"A search warrant is not some kind of mere, interdepartmental correspondence "or note." It is, as its**

very name suggests, a substantive weapon in the armoury of the State. It embodies awesome powers as well as formidable consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere, checklist approach.

26. In the present petition, the search warrant was issued for purposes enabling the police investigate possible fraud. The petitioner has not alleged that the court that issued the impugned search warrants did not follow the law, or that the procedure for issuing the warrants was not followed. There is also no allegation that the court that issued the search warrants did not have jurisdiction to do so. The magistrate had authority by virtue of section 118 of the CPC, and was satisfied based on the affidavit placed before court that it was necessary to issue the warrants to enable proper investigations. There is no allegation either that the effect that the warrants were vague or overbroad to make them invalid. It would be difficult therefore to impugn the warrants that were issued in accordance with the law.

27. The petitioners contended that their right to privacy was violated by that search. Whereas it is true that the right to privacy is guaranteed by **Article 31** of the **Constitution**, this right as it has been stated earlier, is not absolute. As long as the law was followed in obtaining the warrants from a court that has powers to issue the warrants, there cannot be justification for challenging their legality.

28. The petitioners argued that they were not given notice or informed of the intended investigations and as a result, their rights were violated. Addressing the issue of whether a notice should be given before the search warrant is issued, the court observed in the case of ***Okiya Omtatah & 2 others v Attorney General & 4 others*** [2018] eKLR that “[116] ***On whether the third petitioner ought to have been given notice prior to the issuance of the warrant, we are persuaded that the Criminal Procedure Code provides a simple yet effective mode of obtaining authority through the court. The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of the investigations.***” If notice was to be issued, there was every likelihood that the evidence would be destroyed or made to disappear thus frustrate investigations.

29. In ***Mape Building & General Engineering v Attorney General & 3 others*** [2016] eKLR the court was clear that for purposes of the efficacy of investigations taking into account advancement of technology where money movement could take place in a matter of minutes, ***“the warrants and freezing orders were evidently necessary for the purposes of the investigation, and for the efficacy of the warrants and the investigations the investigator was, justified in making the application for both the warrants and freezing order ex parte.”***

30. Regarding the contention that there was violation of the Article 47(1) on the right to fair administrative action, it is in my view, inapplicable to this case. This was an investigation to establish whether there was fraud. Once that is done, the petitioners were to be accorded an opportunity to say something about it and if an offence was established, they would be given an opportunity to defend themselves in the ensuing trial. I therefore see no violation of the right to fair administrative action as alleged.

31. The petitioners also stated that they challenged the order before the Magistrate’s Court but their challenge was dismissed. If indeed the application challenging the warrants was dismissed, how does that make that a constitutional issue? This obviously raises the question whether a constitutional petition was the proper mode of challenging the decision declining to set aside the warrants. Having applied to set aside the warrant and failed, the petitioners could have appealed against that decision or order dismissing their application but not more this court by way of a constitutional petition. This was, in my view, a wrong move since the Magistrate’s court acted within the law. The constitutional petition was not the appropriate mode of challenging the refusal to set aside the order issuing search warrants.

32. In this regard, I agree with the observation by **Lord Diplock** in the case of ***Harrikissoon v Attorney General of Trinidad and Tobago*** [1980] AC 265 where he decried the tendency of people rushing to institute constitutional petitions alleging violation of fundamental freedoms where there was none. His Lordship stated;

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court”

33. From the facts of this petition, the law and precedent, I am unable to agree with the petitioners that this petition satisfies the threshold for intervention by this court. First, there is no evidence that the warrants were not issued in accordance with the law; second, there is no allegation that the warrants were used for purposes other than intended; third, whether or not the petitioners repaid for the loans and or paid premiums for the insurance policies, are matters that to be determined in the criminal trial and not in a constitutional petition.

34. In the circumstances therefore, the conclusion I come to is that this petition is unmeritorious and must fail. Consequently, the petition dated 28th April 2017 is declined and dismissed with costs.

Dated, Signed and Delivered at Nairobi this 31st July 2018

E C MWITA

JUDGE
