IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR. MISCELLANEOUS CIVIL APPLICATION NO. 578 OF 2016

BETWEEN

ANALISA ACHIENG OBONGO alias OKUMU..................................1ST APPLICANT

THE TRUSTEES OF MAISHA

DEVELOPMENT TRUST ORGANIZATION..2NDAPPLICANT

VERSUS

THE CHIEF MAGISTRATE MILIMANI LAW COURT NAIROBI......1stRESPONDENT

THE COOPERATIVE BANK OF KENYA LIMITED.........................2ND RESPONDENT

AND

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS...1ST INTERESTED PARTY

NGOS CO-ORDINATION BOARD.....................................2ND INTERSTED PARTY

RULING ON LEAVE

1. Vide an application by way of Chamber Summons dated 10th November,2016, the exparte applicants **ANALISA ACHIENG OBONGO alias OKUMU and THE TRUSTEES OF MAISHA DEVELOPMENT TRUST ORGANIZATION** seek from this court the following orders:

a. That the Honourable court be pleased to grant leave to the applicants to apply for an order of ***Certiorari directed at the chief Magistrate of Milimani Court Nairobi quashing his decisions made on the 14th day of September 2016 and 26th day of September 2016*** directing the Branch Manager of Homa Bay Branch of the Co-operative Bank of Kenya Limited to prevent the signatories of the applicant's accounts from operating the said accounts.

b. The Honourable court be pleased to grant leave to the applicants to apply for an order of mandamus directed at the ***Manager of Homa Bay Branch of the Co-operative Bank of Kenya Limited compelling him to allow the signatures of Accounts Nos. 01128456481800;***

01128456481801;01128456481802 and 03100456481800, in the name of Maisha Development Trust Organization 01109019498600,01103019498600 and 01132019498604 in the name of Analisa Achieng Obongo alias Oluku to operate the same and be able to withdraw funds there from.

c. The Honourable court be pleased to issue an order of costs to be awarded to the applicants.

2. the grounds upon which the application is based are that:

a) The order served on the Manager of Co-operative Bank of Kenya did not disclose the offence being investigated or the name of the suspect and the names of the holders of the listed accounts whose funds were ordered to be preserved.

b) There was no evidence of forensic investigation having been done which disclosed prima facie that the accounts held stolen funds or funds illegally obtained so as to justify the freezing of the accounts.

c) The search warrants relates to an entity known as Maisha Trust Development Organization which order was executed on Maisha Development Trust Organization.

d) The court acted ultra vires in issuing the order stopping the operation of the accounts before the investigations have been carried out to determine the allegations and without according the applicants a chance of being heard contrary to the rules of natural justice of *audi alteram partem.*

e) The Bank also acted ultra vires by preserving all the funds and refusing the account holder from operating the said account being satisfied that an offence had actually been committed by the account holder.

f) The investigations into the said account be carried out without necessarily closing the account and the delay in doing the investigations now being over 30 days is inordinate.

3. The application is also supported by the statutory statement, the verifying affidavit of the first applicant Analisa Achieng Okumu alias Obong'o and several annextures.

4. According to the exparte applicants, they were not accorded a hearing before the Chief Magistrate's' Court at Milimani issued an order freezing all their bank Accounts held with the 2nd respondent Cooperative Bank of Kenya at Homa Bay. Further, that the Bank should not have preserved all the accounts and that investigations into the alleged theft of funds could still proceed without freezing the accounts named herein.

5. The 1st interested party DCIO who was enjoined to these proceedings as the office that applied for the freezing orders presented a replying affidavit sworn by its investigating officer deposing through the investigating officer P.C. Ogutu who also swore an affidavit and obtained the freezing order from the Chief Magistrate's Court at Milimani Nairobi; that they received a complaint from the office of the Director of Internal Affairs dated 31st August 2016 (which was annexed and marked IO 1A in the replying affidavit of P.C. Isaac Ogutu, requesting for investigations into a complaint by Margaret Akinyi Anditi on embezzlement and diversion of donor and NGO funds by the 1st applicant herein **ANALISA ACHIENG OBONGO alias OKUMU.**

6. That during the investigations, the officer identified accounts belonging to **Maisha Development Trust Organization** and those belonging to the 1st applicant as accounts of interest as the allegation was that funds belonging to the organization had been embezzled and diverted for personal gain by the 1st applicant **ANALISA ACHIENG OBONGO alias OKUMU**.

7. That the officer, P.C. Ogutu who was assigned the case sought preservation orders in Milimani CMC Miscellaneous Application **No. 2994 of 2016 and 3073 of 2016** in order to safeguard the subject matter of the investigations. The orders also sought leave to interrogate the said bank accounts in order to unearth any acts that were alleged to be fraudulent.

8. That when the investigating officer, P.C. Ogutu, scrutinized the bank accounts; he noted unexplained direct deposits in the 1st applicants accounts linked with withdrawals from the NGO's accounts. The DCI maintains that in the absence of satisfactory explanations, the 1st applicant **ANALISA ACHIENG OBONGO alias OKUMU** has not provided any information that would lead to any other conclusion other than what the investigations reveal that there were fraudulent transactions based on the 1st applicant's breach of fiduciary duty where funds intended for public benefit were utilized for personal benefit.

9. In the circumstances, the 1st interested party urged the court to find that the DCI acted within its powers and reasonably under the circumstances in that the orders granted to the 1st Respondent Chief Magistrate's court Miscellaneous Application No. 2994 of 2016 and 3073 of 2016 allowed the 1st interested party to perform its legitimate functions of investigating the accounts of Maisha Development Trust Organization and those of the 1st applicant ANALISA ACHIENG OBONGO alias OKUMU, which information would ultimately allow the 1st interested party to make a decision that is based on evidence and not conjecture. Further, that the order was granted by a court with the requisite jurisdiction after considering that a probable cause had been established.

10. The above position by the DCI is supported by the NGO Coordination Board who were also enjoined to these proceedings as the 2nd interested parties. The NGO Board disclosed that on diverse dates in 2016 they received complaints regarding the misappropriation of funds for the organization by the 1st exparte applicant Analisa Achieng Obongo and her brother. The NGO Coordination Board was also asked by the DCI to provide certain information regarding registration and compliance.

11. According to the NGO Board, it was important that the accounts for the organization are frozen in order to protect the available funds as the 1st exparte applicant and her brother the treasurer of the organization were diverting funds for their own personal use hence the Exparte order obtained from the Milimani Chief Magistrate's Court while investigations continued and that so far, no charges have been filed in court against the 1st exparte applicant.

12. Parties advocates also filed written submissions which they wholly adopted in urging their respective positions and which mirror the allegations and contentions in their respective affidavits which i have considered such that it is superfluous to reproduce them here since they are exactly the same as what i have reproduced herein in terms of the affidavits and grounds.

DETERMINATION

13. The main issue for determination is whether the applicants are entitled to the orders sought in the Chamber Summons dated 10th November, 2016? The court notes that the exparte applicants have gone to great lengths to urge the application as if it is a judicial review motion thereby delving into the merits of whether the Chief Magistrate's court was justified in issuing the impugned freezing orders and or whether the Cooperative Bank of Kenya should have preserved all the named accounts hence, whether the Bank should have obeyed the court orders issued by the Chief Magistrate's Court at Milimani.

14. The principles that guide the grant of an order for leave to institute Judicial Review proceedings were explained by a three judge bench decision comprising Bosire, Mbogholi-Msagha & Oguk, JJ in **Matiba Vs Attorney General Nairobi HC Miscellaneous Application No. 790 of 1993** wherein the court held that leave is supposed to exclude frivolous or vexatious applications which, prima facie appear to be abuse of the court process or those applications which are statute barred.

15. Nyamu J in **Republic Vs Land Disputes Tribunal Court Central Division and Another Exparte Nzioka [2006] 1EA 321** held that leave should be granted, if on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving he pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious.

16. In the **Exparte Worth [1985] STC 564 cited in Regina v Criminal Injuries Compensation Board Exparte A (AP)** by the **House of Lords HL 1998-1999** it was held:

> ***"…….The judge's task on the exparte application was to do no more than to decide that there was an arguable case for Judicial Review** <u>**and not to "determine any issue finally in favour of the applicant.**</u>**"***

17. In the same case, the House of Lords stated:

> ***"On an exparte application, leave to apply for Judicial Review can be refused, deferred to the substantive hearing or given."***

18. In the instant case, the court at the first instance certified the matter as urgent but deferred the hearing of the application for leave for interpartes hearing. in **Re-International SA Bureau VERITAS [2005] EA 43**, the court stated:

> ***" Application for leave to apply for orders of Judicial Review are normally exparte and such an application does restrict the court to threshold issues namely, whether the applicant has an arguable case and whether if leave is granted, the same should operate as stay. Whereas Judicial Review remedies are at the end of the day discretionary, that discretion is a Judicial discretion and , for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the court's discretion. There should be an arguable case which , without delving into the details could succeed and an arguable case is not ascertained by the court tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings,*** **the scope** ***of the Judicial Review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps given a applicant his day in court instead of denying him. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry J. In the case of John V Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."***

19. The above position was also stated in **Republic Vs County Council of Kwale & Another Exparte Kondo & 57 Others, Mombasa HC Miscellaneous Application No.384/1966,** as cited by Honourable Odunga J in extenso in **Re of John Wachira Wambugu vs The Disciplinary Tribunalof the Law Society of Kenya [2015] e KLR.**

20. Again in **Meixner & Another V Attorney General [2005] eKLR 189** cited in the **John Wachira Wambugu** (supra) case, it was held that the leave of the court is a pre requisite to making a substantive application for Judicial Review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave of otherwise involves an exercise of judicial discretion.

21. In **Mirugi Kariuki Vs Attorney General CA 70/1991 [1992]KLR 8** the court **stated:**

> ***" if the applicant fails to show, when he applies for leave, a prima facie case, on***

reasonable grounds for believing that there has been a failure of public duty the court would be in error if it granted leave. The curb is represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the court to prevent abuse by busy bodies, cranks and other mischief-makers…"

22. The common thread in all the above cases is that the grant of leave to institute Judicial Review proceedings is not a mere formality and that the court shall not grant leave as a matter of course. The applicant who seeks leave of court is obliged to demonstrate to the satisfaction of the court that they have a prima facie case that is arguable at the substantive stage.

23. However, the applicant at this leave stage is not expected to delve into the depth of the application as that would determine the substantive motion which is yet to be filed and for which leave is being sought. The applicant must, nonetheless demonstrate that he has not come to court after an inordinate delay and or that the application is not frivolous, malicious or futile.

24. In the decision of **Kenafric Industries Ltd & Another V Anti – Counterfeit Agency & 3 others [2015] e KLR** the court held that leave to apply for judicial review and stay to issue would issue when the decision has not been implemented or where the same is in the course of implementation and secondly, as highlighted in the rationale column, that where the imminent outcome of the decision challenged is likely to render the success of the Judicial Review proceedings nugatory or an academic exercise then the court is entitled to stay the said proceedings, the strength or otherwise of the applicant's case notwithstanding.

25. Honorable Odunga J citing several other decisions held inter alia:

"……it must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charges with the responsibility of making the decisions to charge act in a reasonable manner, the High court would be reluctant to intervene."

26. On the duty to investigate crimes following a complaint, the case of **Republic vs Commissioner of Police and Another exparte Michael Monari & Another [2012] e KLR cited** in **Kenafric** Industries (supra) case is instructive. In that case, it was observed:

"The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High court would be reluctant to intervene."

27. In the instant case, therefore in order for the applicant to succeed in the application for leave, she must show that the investigations which were commenced by CID leading to the order obtained from the Chief Magistrate's court at Milimani freezing the accounts of the 2nd applicant which are held by Cooperative Bank of Kenya Limited the 2nd respondent were prima facie, laced with ulterior motives; that the predominant purpose of conducting the investigations against her and the organization is to achieve some collateral result; not connected with vindication of an alleged commission of a criminal offence; that there has been failure on the part of the respondents and interested party DCIO to perform a public duty; that the decision to freeze the Organization's accounts held with Cooperative Bank of Kenya Limited is irrational, illogical and irregular and amounts to abuse of process.

28. As earlier stated, the rationale for the requirement that leave be sought and obtained before instituting judicial review application is to exclude frivolous vexatious or applications which *prima facie* appear to

be abuse of the process of the Court or those applications which are statute barred. However, leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case.

29. Leave stage is therefore a filter whose purpose is to weed out hopeless cases at the earliest possible time, thereby saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious. These are the principles set out in the cases of **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993; Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321; and Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

30. In the instant case, the file in which the order for freezing of the accounts was obtained is still open. The applicant has not been charged with any offence as investigations are still underway and the DCI only wanted a conservatory order so that at the end of it all, the investigators would not be mere pious explorers in their investigations into the complaint. The Bank on the other hand only obeyed orders of the court as it was duty bound to do so.

31. It has not been alleged that the Chief Magistrate’s court had no jurisdiction to grant the conservatory order. It has also not been alleged that the said court acted illegally or irrationally. Even if that were to be the case, the door to justice before the Chief Magistrate’s court is not closed as the applicant who is affected by the exparte order can still approach that court and seek for the review, setting aside or vacation of the orders issued against her exparte. She has not attempted to do so. It can therefore not be true that the exparte applicant's herein were condemned unheard or that the order by the Chief Magistrate was issued without taking into account relevant considerations.

32. There is no law that bars a court of competent jurisdiction to issue exparte orders for the preservation of the subject matter of the suit or matter under investigations.

33. The Police on the other hand have the power conferred on them under section 24 of the National police Service Act to investigate complaints and in doing so, in this case, they sought to temporarily freeze the accounts which were suspected to be the conduits for misappropriation. I find no illegality, irrationality/unreasonableness or bad motive in their actions.

34. Section 9 of the Fair Administrative Action Act, 2015 stipulates that the High Court shall not consider judicial review application unless the parties to the judicial review have exhausted the internal review or appeal mechanisms where provided by law. Further, that in exceptional circumstances, the court can, on application, exempt the applicant from exhausting alternative remedies or internal review mechanisms. In this case, the applicants have neither applied to set aside the orders of the Chief Magistrate which were issued exparte, nor applied to be excused from making such an application for review or setting aside of the said orders, before seeking to challenge the said exparte orders by way of judicial review application.

35. In **Samson Chembe Vuko V Nelson Kilumo& 2 others& 2others [2016] e KLR** the Court of Appeal, citing other decisions with approval, among them: Speaker of the **National Assembly Vs Karume [2008] 1 KLR 425** where the Court of Appeal held, inter alia:

> ***“……..where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed.”***

36. In **Mutanga Tea& Coffee Company Ltd vs Shikara Limited &Another [2015] e KLR** the Court of Appeal reiterated the foregoing as follows:

> ***“…….where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be followed…. And further held as follows……***

“…….this court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume (supra) was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by the Constitution.”

37. In granting the order, the court made the often quoted statement :

“ where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.(See also Kones v Republic &Another exparte Kimani Wanyoike& 4 Others[2008] e KLR (ER) 296. “

It is readily apparent that in the above cited cases the court was speaking on issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first, that Article 159 (2) (e) of the Constitution has expressly recognized alternative forms of alternatives forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article 159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reaching of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. Secondly, such alternative dispute resolution mechanisms normally have an advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner…..

…..We are therefore satisfied that the learned judge did not err by striking out the appellant’s suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of an appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2) (c) and the very raison d’etre of the mechanisms provided under the two Acts……”

38. In **Revital Healthcare (EPZ) Ltd & Another Vs Ministry of Health & 5 Others [2015] Emukule J,** citing with approval the case of **Damian Belforite V the Attorney General of Trinidad & Tobago CA 84/2004** held:

“ where there is a parallel remedy, constitutional relief should not be made unless the circumstances of which the complaint is made include some feature which made it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate to seek constitutional relief in the absence of such feature would be misuse, abuse of the court process.”

39. Thus, what the applicants are challenging before this court is an order issued by a court of competent jurisdiction and which court they are free to access to seek to set aside the orders which they complain are oppressive.

40. Judicial review looks at the process and not the merits of the decision. On the material placed before this court, I find that what the applicant is challenging is seeking to challenge is the merits of the order by the Chief Magistrate's court. A court exercising judicial review jurisdiction is not an appellate court which has the power under section 78 of the Civil Procedure Act in civil cases to reexamine and reevaluate the evidence on record and arrive at its own independent decision.

41. The Police are empowered by law to investigate any complaint that a crime has been, may be or has been committed. To grant leave to apply for judicial review in this case would be to prohibit investigations into serious allegations of misapplication of NGO Funds which are donor generated for the benefit of the public. The order for leave would also serve as having granted the applicants leave to appeal against the order of the Chief Magistrate when there is a clear appeal process stipulated in section 65 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules.

42. In the **Kenafric Industries** (supra) case the court was clear that:

> ***"The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High court would be reluctant to intervene."***

43. I reiterate that the power to investigate crimes is statutory power vested in the DCI by dint of section 24 of the National Police Service Act. Therefore, this court cannot prohibit the DCI from performing his statutory and constitutional mandate unless it is demonstrably clear at this stage that the DCI is abusing his powers to warrant a check on that power through Judicial Review. No such prima facie evidence of abuse of power is shown.

44. On the other hand, even if this court were to grant the leave to apply for Judicial Review orders of certiorari, what will be challenged is not the charging of the applicant with the offence of stealing. The police are in their nascent stages of investigating the alleged misapplication of the NGO's Funds and an order of the Chief Magistrate's Court preserving the subject matter of the investigations which are the funds being held in the named accounts with Cooperative Bank of Kenya, Homa Bay Branch cannot be an illegal order, which order, as I have stated, can be reviewed, set aside or vacated upon an application being made in the same Miscellaneous cause and before the same court that issued it.

45. It is for the above reasons that I find the prayer for leave not merited, premature and misguided. I hereby dismiss it.

46. As there is no prayer for stay pursuant to Order 53 Rule 2 of the Civil Procedure Rules, I need not delve into the arena of whether or not stay should be granted, as this court is not obliged to consider that which is not sought and more so when the prayers that stay would be anchored are found to be unavailable to the exparte applicants.

47. Accordingly, I find that the application by the exparte applicants is not merited. I dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 28th day of March, 2017.

R.E.ABURILI

JUDGE

In the presence of:

N/A for Applicant

N/A for Respondents

Miss Soi h/b for Otieno for 2nd interested party (NGO Coordination Board)

CA: George & Gitonga