



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**

**ACEC REVISION CASE NO. 3 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DIAMOND TRUST BANK LIMITED.....RESPONDENTS**

**AND**

**DAVID NDUNGU WAMBUGU.....INTERESTED PARTY**

**R U L I N G**

1. The application before the court is a Notice of Motion dated 7<sup>th</sup> April 2017, brought under **Section 362 of the Criminal Procedure Code, Cap 175 Laws of Kenya**. The Applicant seeks orders of the court that the orders issued by the Chief Magistrate Court in Misc. Cri. Application no. 1017 of 2017 lifting, the freezing orders which had been issued on 24<sup>th</sup> May 2017 be stayed, pending hearing and determination of this application. That the funds in Diamond Trust Bank Accounts number [particulars withheld in the name of David Ndungu Wambugu (Interested Party) be preserved until hearing and determination of the application.
2. The application is premised on grounds that on 20<sup>th</sup> March, 2017, CPL. Isaac Nakitare, Police Officer attached to the Asset Recovery Agency applied and was granted orders by the Chief Magistrate's court for preservation of funds relating to Diamond Trust bank Account number [particulars withheld held in the name of the Interested Party. On 6<sup>th</sup> April 2017, the Applicant became aware that the Interested Party had applied and was granted orders lifting the freezing orders.
3. On 7<sup>th</sup> March, 2017 the matter was certified as urgent and in addition, the orders issued by the subordinate court on 20<sup>th</sup> March, 2017 were stayed. The funds in Diamond Trust bank Accounts number [particulars withheld] respectively, were preserved until the application is heard and determined.
4. When the matter came up for hearing on 27<sup>th</sup> June, 2017, Mr. Ngumi learned State Counsel appeared for the Asset Recovery Agency (Applicant) and asked the court to review the orders of the subordinate court delivered on 6<sup>th</sup> April, 2017, where the court lifted the preservation orders which the Applicant obtained on 20<sup>th</sup> March 2017. He relied on the supporting and supplementary affidavits sworn by CPL Isaac Nakitare.
5. Counsel contended that the application for preservation of the funds was filed as a result of

investigations conducted by the Applicant and the Directorate of Criminal Investigations on suspicion of the Interested Party being involved in a money Laundering scheme. That the Interested party and other persons, were charged on 28<sup>th</sup> March 2017 with conspiracy to steal Kshs.3.9 billion from Kenya Revenue Authority (KRA).

6. Counsel further submitted that on 6<sup>th</sup> April, 2017 the Interested Party moved the lower court in Misc. App. No. 1017 of 2017 and obtained orders lifting the earlier freezing orders. The Applicant being dissatisfied with the ruling filed the current application to establish whether the orders in the subordinate court met the threshold of propriety.

7. Counsel argued that there was a miscarriage of justice since the application to the subordinate court was not served upon them, and therefore the orders ought not to have been granted. That the coram in the subordinate court's file indicates that there was a prosecutor but KRA was not present. He prayed that the orders of 6<sup>th</sup> April 2017 by the subordinate court be revised accordingly.

8. In reply Mr. Isinta learned Counsel appeared for the Respondent and submitted that it was mischievous for the KRA to say that they did not participate in the proceedings of 5<sup>th</sup> and 6<sup>th</sup> April, 2017 while in fact, there was a prosecutor from the DPP's office who participated in the proceedings. He pointed out that the present application was presented by a Principal State Prosecution Counsel in the office of the DPP.

9. Counsel argued that the subordinate court was not *fanctus officio* and that is why the Interested Party returned to the same court for lifting of the orders and no material had been placed before this court to convince the court to interfere with the directions of the subordinate court. He pointed out that if the court entertains applications from the lower court merely because a party is dissatisfied, without providing sufficient material, the court would be going down a slippery slope.

10. Counsel contended that the trial court was told as was the High Court, that the Respondent was under investigations for money laundering, but the Applicant had not presented a charge sheet for money laundering, or shown why the investigations have taken so long from 20<sup>th</sup> March, 2017 to 23<sup>rd</sup> June 2017 when they filed a supplementary affidavit.

11. Counsel relied on the decision of **Ruth Wendy Wamboi v Republic [2016] eKLR** where the court said that **Section 68** and **Section** of **POCAMLA** provides for notice to the affected party who may apply to vary or rescind the orders. He also referred to the case of **Asset Recovery Agency v Samuel Wachenje and 16 others [2016] eKLR**, which fortified that position. He stated that the order in the subordinate court was conditional, which conditions the Applicant failed to meet.

12. In a brief rejoinder Mr. Ngumi contended that the office of the DPP and the Agency are two distinct bodies, the ODPP being under **Article 157** of the **Constitution**, while the Agency is institutionalized under the **POCAMLA**. Counsel stated that on the 20<sup>th</sup> March 2017 there was a return date within 60 days to report to the court on the progress of investigations and due to the orders given 6<sup>th</sup> April 2017 the proceedings in the subordinate court were stayed pending the hearing and determination of this application.

13. **Section 362** and **364** of the **Criminal Procedure Code** together with **Article 165(6)** of the **Constitution**, grant the High Court supervisory powers over the subordinate court. Under **Section 362 CPC** the court has power to *'call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. It is Section 364* which provides for the powers of the High Court on Revision.

14. This supervisory power is echoed in **Article 165** of the **Constitution** as follows:

*“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior*

*court.*

***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of administration.”***

15. In Revision proceedings there is no room for evidence to be adduced. The mandate of the court under **Section 362 Criminal Procedure Code** is very specific. The High Court is only required to call for and examine the existing record of the criminal proceedings before any subordinate court. The purpose of examining the record is for the court to satisfy itself as to the correctness, legality or propriety of that finding, sentence or order recorded or passed, and as to the regularity of those proceedings of before the subordinate court. The mandate of the court is therefore confined to the parameters set out under **Section 362 Criminal Procedure Code**.

16. In the exercise of the aforestated mandate I have called for and examined the pertinent subordinate court’s proceedings. I note that the parties in the subordinate court were the Republic, the Asset Recovery Agency, Diamond Trust Bank Ltd and David Ndungu Wambugu the Interested Party. There is no evidence in the subordinate court’s record that the Asset Recovery was served with the application dated 5<sup>th</sup> April 2017 nor has it been so asserted, and they were not in court when it was arraigned on 6<sup>th</sup> April, 2017.

17. Indeed the offices of the Asset Recovery Agency and the ODPP are distinct from each other and are operationalized by different instruments of power. Proper service would demand that the Asset Recovery Agency be served, since they were the party on record and they in turn would instruct a counsel of their choice from within or without the institution, or even from other government Agencies to hold their brief.

18. After a careful analysis of the records from the subordinate and the arguments before me, I am satisfied that the proceedings in the subordinate court were irregular. Reasons wherefore the application dated 7<sup>th</sup> April 2017 is found to have merit and is allowed accordingly. The freezing orders are hereby re-instated to abide for 60 days which run from 20<sup>th</sup> March, 2017 but excluding the period when the matter was stayed in the subordinate court pending the hearing and determination of this application. Parties are at liberty to ventilate any application for variation or discharge *interpartes* in the subordinate court.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 26<sup>th</sup> DAY OF July, 2017.**

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**L. A. ACHODE**

**JUDGE**

In the presence of .....Advocate for the Applicant

In the presence of .....Advocate for the Respondent