



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 347 OF 2016

IN THE MATTER OF: ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2 (1), 3 (1), 10 (1), (2), 19 (2), 27 (1), 35 (1), 38 (1) (2) & (3), 47 (1) (2), 48, 50 (1) (2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF BREACH THE RIGHT TO PRIVACY & ADVOCATE-CLIENT OF CONFIDENTIALITY & THE ISSUANCE OF EX-PARTE WARRANTS

BETWEEN

**OMWANZA OMBATI T/A NCHOGU, OMWANZA & NYASIMI
ADVOCATES.....PETITIONER**

VS

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT.....1ST
RESPONDENT**

CPL. EMMANUEL KANYUNGU.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

CHIEF MAGISTRATE, MILIMANI LAW COURTS.....4THRESPONDENT

JUDGEMENT

Factual Background

1. On 11th August 2016, the third Respondent herein applied for and obtained warrants under the provisions of section 118 and 121 of the Criminal Procedure Code^[1] Kiambu Chief Magistrates Court Misc. Case No. 2655 of 2016, allowing an investigator from the first Respondent to investigate and collect the documents listed in the said warrant relating to account number [...], African Banking Corporation, Koinange Street Branch.

2. I must point out that even though said application (as is required in applications under the above provisions) was grounded on the affidavit of the third Respondent, the petitioner herein only annexed the application and omitted to annex the said affidavit. As explained below, the said affidavit is a crucial document while applying for warrants under the above provisions and in my view it ought to have been annexed to the petitioners documents.

3. The core ground in support of the application for the warrants was that the applicant was undertaking investigations relating to an alleged offence of obtaining money by false pretences contrary to section 313 of the Penal Code.[\[2\]](#)

4. Pursuant to the application, an order was issued addressed to the Manager, African Banking Corporation Ltd, couched in the following words:-

"WHEREAS it has been proved to me on oath that for the purpose of an investigation into the commission of an offence, it is necessary or desirable to obtain documents at account for Nchogu, Omwanza & Nyasimi Advocates A/C No. [...], African Banking Corporation Ltd, Koinange Street Branch,

NOW THEREFORE I authorize No. 92208 PC Emmanuel Kanyungu of Land Fraud Investigation Unit-DCI Headquarters, by this warrant to investigate the said account and collect:-

- *Account opening documents of the aid account of Nchogu, Omwanza & Nyasimi Advocates.*
- *Statements of account for the period between 2nd January 2012 and 30th August 2012.*
- *Certified copies of cheque images paid from the account for the period mentioned above.*

5. The petitioner prays that this court declares the said warrant void for all intents and purposes on ground that it violates his constitutional rights[\[3\]](#) and also seeks orders of *certiorari* and *prohibition* to quash and quash the said investigations.

6. It is the petitioners case that no notice of the intended investigations was served upon him, yet, orders adverse to him were issued relating to his clients account, hence the warrants were tainted with grave abuse of discretion. Further, the petitioner avers that he ought to have been afforded an opportunity to be heard before the warrants were issued, hence his rights under article 50 of the constitution were violated.

7. The petitioner also states that the information sought is privileged client communications and infringes on privacy and section **134 (1)** of the Evidence Act[\[4\]](#) in that the information sought "includes disbursement of monies from client including notes of meetings, minutes thereof and acknowledgement receipts." I am not persuaded that the foregoing information particularly notes of meetings, minutes and acknowledgement receipts are kept in the Bank. In any event the said documents are not mentioned in the warrants details of which are reproduced above.

8. The petitioner also states that the account in question is his property and ought not be searched without his express permission, hence, the search complained of violates his constitutional right to privacy and is a breach of his right to fair administrative action.

First and Second Respondents Response

9. The crux of the first, second and third Respondent's case is:- a complaint was lodged by the Vice Chancellor of United States International University relating to alleged grabbing of its land number L.R. 12597/2, Muthaiga North. Investigations revealed that the petitioner acted for retired president Daniel Toroitich Arap Moi in the sale of parcel of land number 12422/19 (being part of L.R. No. 12597/2) to Muthaiga Luxury Homes in the year 2012 and that the petitioner received Ksh. 255,000,000/= from the purchasers advocates.

10. Investigations also established that the vendor had allegedly sold the same property to Maestrol Connections Health System for Ksh. 500,000,000/= in 2016. Upon being summoned by the C.I.D., the

petitioner was not able to demonstrate that he received instructions from the vendor. He only availed a letter with no letter head dated 18th December 2012, seven months after the sale was concluded. Thus, after failing to avail the requested details, the investigating officer moved to court to obtain a warrant to investigate the matter. The Respondents' aver that this petition aims at stalling the criminal proceedings and that the police acted legally and maintained that the issues raised herein ought to be raised in the criminal trial.

11. The fourth Respondents stated that it acted within its constitutional mandate and that the petitioner ought to obtain redress under section 382 of the Criminal Procedure Code[5] and reiterated that judicial intervention ought to be limited to acts which are in breach of the law and that no breach of constitutional rights has been established.

Petitioners Advocates submissions

12. The petitioners counsel attacked the propriety of the proceedings before the learned magistrate who issued the warrants in question and argued that the warrant was issued *ex parte* in violation of the petitioners right to be heard, and in breach of fair administrative action, rights to privacy and a violation of advocate/client privilege.

13. Counsel correctly submitted that prior to issuing a search warrant, there must be reasonable suspicion of commission an offence[6] and that the court must be satisfied that there are reasonable grounds to issue a search warrant.[7] Counsel cited *Tom Ojienda SC T/A Tom Ojienda & Associates vs Ethics and Anti-Corruption Commission & 6 Others*[8] where the court observed that proceedings before the magistrates court seeking issuance of warrants as in this case must conform with the constitutional provisions of article 50.

14. The above decision was rendered by a court of coordinate jurisdiction. A decision of a court of co-ordinate jurisdiction is not binding.[9] While decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity which is the respect one court holds for the decisions of another. As a concept it is closely related to *stare decisis*. In the case of *R. v. Nor. Elec. Co.*,[10] McRuer C.J.H.C. stated:-

“.....The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: “The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary...”. (*Emphasis added*).

15. Given the nature of the investigations, I find myself in agreement with the finding by Onguto J in *Mape Building & General Engineering vs A.G & 3 Others*[11] discussed below. Consequently I would be reluctant to be persuaded by the reasoning of the court in *Tom Ojienda SC T/A Tom Ojienda & Associates vs Ethics and Anti-Corruption Commission & 6 Others*[12] in view my reasoning discussed later in this judgement. I also agree with the submissions by counsel for the first and second Respondent discussed below on this point who in my view correctly distinguished the said decision from the facts of the present case.

16. Petitioners counsel also cited what he described as that lack of full and frank disclosure when applying for the warrant and submitted that it is a ground to set it aside[13] and emphasized on protecting the privilege between client and advocate information and cited jurisprudence from several jurisdictions.

Respondents Advocates submissions

17. Counsel for the first and second Respondent insisted that the warrants were issued lawfully pursuant to the provisions of section 180 of the Evidence Act.[14] He also submitted that the petitioners rights are not absolute, and that the issuance of search warrants is aimed at preventing unlawful searches. He reiterated that there were reasonable basis for the investigations, and that warrants to investigate accounts

under section 180 of the Evidence Act[15] by the police does not require prior notice to the account holder, hence, the decision rendered[16] in *Tom Ojienda SC T/A Tom Ojienda & Associates vs Ethics and Anti-Corruption Commission* [17] is distinguishable from this case since it related to section 27 and 28 of the Anti-Corruption and Economic Crimes Act. Further, giving prior notice in cases of this nature will defeat the purpose of the investigations since money moves fast.[18]

18. Counsel for the fourth Respondent cited the functions of the first Respondent under section 35 of the National Police Service Act which include undertaking investigations. Also cited are the provisions of section 180 (1) of the Evidence Act[19] which mandates the first Respondent to investigate the petitioner's bank accounts. Counsel also stated that judicial authority is vested in courts and reiterated the provisions of section 118 of the Criminal Procedure Code[20] arguing that the said provision is aimed at helping authorities to secure incriminating evidence.[21] In the event the petitioner is aggrieved by the said provision, then his recourse is provided under the provisions of section 382 of the Criminal Procedure Code[22] and urged the court to frown the practice of approaching the court to avoid court processes.

19. Counsel submitted that the circumstances of this case are such that to issue a notice in order to comply with article 47 of the constitution would defeat the entire exercise since the account in question could easily be interfered with.

Analysis of the law, facts and authorities

20. At the outset, I must point out that provided there is no abuse of process, the issuing of search warrants and the seizure of articles consequent thereupon is a vital, indeed necessary, element in the effective combating of crime. On the other hand, all citizens have constitutionally enshrined rights to dignity, privacy, freedom, security, trade and property.[23] Thus, courts must strike a wholesome balance between, on the one hand, the dignity and privacy of every citizen and, on the other, support for the State in combating crime.[24]

21. Section 118 of the Criminal Procedure Code[25] 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.”

22. A brief outline of the basic principles relevant to search warrants is accordingly apposite. In *Minister of Justice & others vs Desai*[26] the South African court made it clear that it has long been recognised in law that a search warrant constitutes a serious encroachment on the rights of the individual? and that careful scrutiny by the courts is required.[27]

23. In yet another leading South African decision on the subject, that is, *Minister of Safety and Security vs Van der Merwe & others*[28] Mogoeng J, delivering the unanimous judgment of the court, in paras 55 and 56 stated:- "What emerges from this analysis is that 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.

In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:-

(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."

24. I deliberately reproduced the contents of the warrants complained of above so as to subject it to the above guidelines and the clear provisions of section 118 cited above. I regret that the petitioner omitted to attach the affidavit which forms the basis of the issuing of the warrant. To me, this was a serious omission if at all the petition intended to mount a credible attack of the warrant as explained below.

25. The opening words of section 118 are "*Where it is proved on oath...*" I have no reason to doubt that the application for the warrants was supported by an affidavit as required. The guidelines stated above include:- **(a)** the person issuing the warrant must have authority. I have no doubt that the magistrate had authority. Secondly, **(b)** the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts. In absence of the affidavit it is not clear how the petitioner hopes to convince the court that there was no material sufficient to satisfy the magistrate. I also find that the terms of the warrant are not vague or overbroad; and lastly I find that the warrant was reasonably intelligible to both the searcher and the person to be searched.

26. I am aware that search warrants ought to be scrutinised with "sometimes technical rigour and exactitude."^[29] This is because as the Supreme Court of Appeal of South Africa observed:-

"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." ^[30](Emphasis added)

27. In the absence of evidence of abuse of power or a gross violation of the rights of a person to be searched, a court would be slow to find that a search warrant is unlawful on purely technical grounds.^[31]

28. The right to privacy is expressly guaranteed by **Article 31** of the **Constitution**, while the statutory procedure for conducting search and seizure by the police has three inbuilt requirements to be met. Such requirements are that:- **(a)** prior to the search and seizure the police should obtain a search warrant; (b) such warrant should be issued by a judicial officer; and (c) lastly there should be proof on oath that there is reasonable suspicion of commission of an offence. To me, the above inbuilt requirements are present in this case.

29. What is clear from the position of the law is **first**, that Police officers or other state agents therefore cannot without a search warrant, lawfully enter upon and search any premises, nor can they carry away any property without the authority of the Court. **Second** that from the provisions of the Criminal Procedure Code[32] set out above, the onus is on the person seeking the search warrant to prove the necessity for such warrant. To me, the above requirements have not been proved to be absent in the proceedings leading to the issuance of the warrant.

30. In *Vitu Limited vs The Chief Magistrate Nairobi & two others*[33] the court stated that:-

“It is therefore expected that when a police officer or any other investigator approaches the Court for a warrant, there must be reasonable suspicion of an offence being about to be committed or having been committed...”

31. On whether the petitioner ought to have been given notice prior to the issuance of the warrant, I am persuaded that the Criminal Procedure Code[34] 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.

32. The order or warrant is never to be granted as a matter of course. To me, to give the notice to the person to be investigated can easily jeopardize the incriminating evidence. On this ground, I entirely agree with Onguto J in the earlier cited decision in *Mape Building & General Engineering vs A.G & 3 Others*. [35] Clearly, it is understandable why warrants or seizure orders are obtained *ex parte* when any matter is still at the investigation stage. The justification seems to fall within the provisions of Article 24 (1) of the Constitution, hence, I find that the allegation for breach of article 50 fails.

33. Onguto J put it bluntly in *Mape Building & General Engineering vs Attorney General & 3 others*[36] when he stated that:-

“In the circumstances of this case, the warrants and freezing orders were evidently necessary for the purposes of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations the 2nd Respondent was, in my view, justified in making the application for both the warrants and freezing order ex parte.”

34. I find no basis to hold that there has been a violation of the Petitioner’s rights to be heard or violation of rights under article 47 of the constitution or rights to property all of which are not non-derogable rights. To me, there were reasonable justifications as required under Article 24 of the Constitution.

35. On the alleged threat to advocate/client privilege, the basic law of attorney client privilege is as follows:- although specifics may vary by jurisdiction the attorney-client privilege protects confidential communications between a client and an attorney (both in-house and outside legal counsel). The privilege applies both to communications by the client to the attorney and to communications by the attorney to the client, if made in confidence and for the purpose of seeking or rendering legal advice. All communications between the client and legal counsel, so long as they are made confidentially and for the purpose of obtaining legal advice, enjoy a “seal of secrecy” and are shielded from the view of third parties no matter how probative, damaging or embarrassing the privileged communication may be. The party asserting the protection of the attorney-client privilege bears the burden of proving that the privilege applies. This requires proof not only of the existence of the attorney-client relationship but also that the communication was made in confidence, for the purpose of obtaining or providing legal advice, and that the privilege has not been waived. The privilege extends only to the confidential communication itself, not to the underlying facts.

36. The privilege is intended to promote full and frank communications between attorneys and their clients in order to promote justice and preserve clients’ dignity. Yet, privilege is strictly construed and the burden of proving a communication is privileged rests with the individual asserting the privilege.

37. At its most basic, the privilege ensures “that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered.”^[37] Thus, the underlying principle of the privilege is to provide for “sound legal advice [and] advocacy.”^[38] With the security of the privilege, the client may speak frankly and openly to legal counsel, disclosing all relevant information to the attorney and creating a “zone of privacy.”^[39] In other words, shielded by the privilege, the client may be more willing to communicate to counsel things that might otherwise be suppressed. In theory, such candor and honesty will assist the attorney in providing more accurate, well-reasoned professional advice, and the client can be secure in the knowledge that his statements to his lawyer will not be taken as an adverse admission or used against his interest.^[40] Indeed, armed with full knowledge, counsellors at law are better equipped to “satisfy all of their professional responsibilities, uphold their duties of good faith and loyalty to the client, and [contribute] to the efficient administration of justice.”^[41]

38. My reading of Sections 134 and 137 of the Evidence Act^[42] demonstrates that the client-advocate privilege is not protected in case of commission or omission that amounts to illegality, fraud, or when crime is committed or suspected to have been committed.

39. The proviso to section 134 of the Evidence Act^[43] supports this view. The entire proviso provides that:-

134. (1) Provided that nothing in this section shall protect from disclosure—

(a) any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

40. It is also important to point out that a fair and effective investigation is essential to a properly functioning criminal justice system and to the maintenance of law and order. The individuals involved in a crime – the victim, the accused, and the witnesses – as well as society as a whole have an interest in the decision whether to investigate and for what offence, and in the outcome of the prosecution if the case proceeds to court. Thus, it is in public interest that police undertake investigations provided there is reasonable suspicion and that the investigations are undertaken in accordance with the law.

41. I appreciate that every case is unique and must be considered on its own merits but there are general principles which should underlie the approach to investigation. First, there must be reasonable grounds to believe that a crime has been committed. The warrant must be applied for as provided under the law. The guidelines outlined earlier must be complied with. The investigators must at all times uphold the rule of law, the integrity of the criminal justice system and the right to a fair trial and respect the fundamental rights of all human beings to be held equal before the law, and abstain from any wrongful discrimination.

42. From my analysis of the facts of this case as presented by both parties and upon analysing the opposing arguments rendered by counsel for the parties herein, and upon due consideration, I find the warrants to investigate the petitioners account issued in criminal case number 2655 of 2016 were issued in conformity with the law.

43. I also find that the petitioner has not established a case for the court to grant the orders of *certiorari* and *prohibition* as sought. The grounds for granting such orders are well settled. These are **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The issuance of the warrants has not been shown to be illegal or *ultra vires* and outside the functions of the fourth Respondent.

44. In all honesty, I find nothing in the material before me to demonstrate unfairness or that the petitioners rights have been threatened or violated. There is no tangible evidence to demonstrate that the Respondents acted maliciously or that the investigations was commenced without proper or reasonable foundation.

45. Accordingly, I find that this petition has no merits. Consequently, I disallow this petition and dismiss it with no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 22nd day of **September** 2017.

John M. Mativo

Judge

[1] Cap 175, Laws of Kenya

[2] Cap 63, Laws of Kenya

[3] Under articles 27(1), 27 (4), 27 (5), 31, 40 (1), 40 (2), 47 (1) (2) and 50 (1) of the constitution

[4] Cap 80, Laws of Kenya

[5] Cap 75, Laws of Kenya

[6] Alex M. Morume vs R {2014} eKLR cited

[7] Abubakar Shariff Abubakar vs A.G & Another {2014}eKLR cited

[8] {2016}eKLR cited

[9] R. v. Nor. Elec. Co., [1955] O.R. 431; R. v. Groves (1977), 17 O.R. (2d) 65.

[10] Ibid

[11] {2016}eKLR

[12] Supra

[13] R(Golfrate Property Management Ltd} vs Southwark Crown Court {2014}EWHC 840 (Admini) cited

[14] Supra

[15] Supra

[16] Supra

[17] Supra

[18] See Onguto J in Mape Building & General Engineering vs A.G & 3 Others {2016}eKLR

[19] Supra

[20] Supra

[21] Counsel cited Mumbi J in James Aggrey Oswago vs Ethics and Anti-Corruption Commission Pet No. 409 of 2013

[22] Supra

[23] See Articles 28, 31, 29, 43, 40, and 24 of the Constitution of the Republic of South Africa, 1996. See also, in general terms, *Mistry v Interim Medical and Dental Council of South Africa & others* 1998 (4) SA 1127 (CC); *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors(Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others & others v Smit NO & others* 2001 (1) SA 545 (CC); Thint (fn 5 above) and Van der Merwe (fn 4 above).

[24] Iridescent in *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others & others v Smit NO & others*, 7 Thint and Van der Merwe is the requirement that the courts must strike a wholesome balance between, on the one hand, the dignity and privacy of every citizen and, on the other, support for the State in combatting crime.⁸

[25] Cap 75, Laws of Kenya

[26] Supra Note 24

[27] Ibid at page 403

[28] *Minister of Safety and Security v Van der Merwe & others* 2011 (5) 61 (CC)

[29] *Ex parte Hull* (1891-1892) 4 SAR TS 134

[30] *Goqwana v Minister of Safety NO & others* (20668/14) [2015] ZASCA 186 (30 November 2015)

[31] Ibid

[32] Supra

[33] **H.C. Misc. Criminal Application No. 475 of 2004 (Osiemo J.)**

[34] Supra

[35] Supra Note 11

[36] Ibid

[37] *United States v. Grand Jury Investigation*, 401 F. Supp. 361, 369 (W.D. Pa. 1975).

[38] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[39] Cathryn M. Sadler, *The Application of the Attorney-Client Privilege to Communications Between Lawyers Within the Same Firm: Evaluating United States v. Rowe*, 30 ARIZ. ST. L. J. 859, 859 (1998).

[40] Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 969-70 (1999).

[41] Bufkin Alyse King, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621, 622 (2002) (citing *Upjohn*, 449 U.S. at 391 (quoting Model Code of Prof'l Responsibility EC 4-1 (1980))).

[42] Supra

[43] Supra

