



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JR. MISC. CIVIL APPLICATION NO. 32 OF 2011**

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
BY MIDDLE EAST BANK KENYA LIMITED

AND

IN THE MATTER OF: AN ORDER MADE IN THE MOMBASA CHIEF MAGISTRATE'S  
COURT MISCELLANEOUS CASE NUMBER 25 OF 2011 PURPORTEDLY PURSUANT TO  
SECTION 118 AND 121 (1) OF THE CRIMINAL PROCEDURE CODE AND SECTION 180 OF THE  
EVIDENCE ACT

**BETWEEN**

THE REPUBLIC .....APPLICANT

AND

1. THE CHIEF MAGISTRATE'S COURT AT MOMBASA

2. HON. ATTORNEY-GENERAL .....RESPONDENTS

EX PARTE: MIDDLE EAST BANK KENYA LIMITED

**RULING**

1. In a Notice of Motion dated and filed on 4<sup>th</sup> April, 2011, Middle East Bank Kenya Limited, the ex parte Applicant sought the judicial review orders of -

(1) prohibition directed to Kenya Police and in particular Provincial Criminal Investigation Department – Coast prohibiting it and any officer or servant of Kenya Police Service including Cpl. Ambrose Gichane and Cpl. Millicent Ouko from enforcing or putting into effect or directing others to enforce or obey a purported court order made on 10<sup>th</sup> February, 2011 by the Chief Magistrate's Court in Mombasa in Miscellaneous Case Number 25 of 2011 ordering the Applicant to hand over original Title Deeds and other security documents referred to therein original correspondence and all other relevant documents in its possession to Kenya Police or the said officers;

(2) an order of certiorari to remove into this court and quash the said court order and also the

decision of the Chief Magistrate's Court at Mombasa made on 10<sup>th</sup> February, 2011 in the said Miscellaneous Application No. 25 of 2011.

(3) costs of the Application herein be provided for;

(4) that all directions be given and further orders be made as appropriate.

2. The Notice of Motion (the Application) was filed pursuant to the grant of leave given on 30<sup>th</sup> March, 2011. It was made on the grounds stated in the Statement filed pursuant to Order 53 rule 1(2) of the Civil Procedure Rules and the Affidavit of Philip Bernard Ilako Verifying the Facts sworn on 24<sup>th</sup> March, 2011, and annexed to the Application.

3. The genesis of the Application lies in the orders made in the Chief Magistrate's Court Miscellaneous Case No. 25 of 2011 in which the Respondent granted orders authorizing **No. 44385 Cpl. Ambrose Gichane** and **No. 69231 Cpl. Millicent Ouko**, investigators at the Provincial Criminal Investigation Department Coast to have access and obtain information and carry away the following documents.

(i) Original letter of offer issued by the Bank to Austin Salmon Kitololo in respect of the facility and of loan granted to him by the Bank;

(ii) Original legal charge dated 18/3/1999 and any other security document executed by Austin Salmon Kitololo in respect of the following properties:-

- a. sub-division No. 6800/I/MN (CR No. 23120)
- b. sub-division No. 6799/1/MN (CR No. 23119)
- c. sub-division No. 6798/1/MN (CR No. 23118)
- d. plot No. 780/II/MN (CR No. 10286)
- e. portion No. 83 Mida Creek (CR No. 12485)
- f. portion No. 84 Mida Creek (CR No. 12486)
- g. sub-division No. 1581/1/MN (CR No. 13765)

(iii) Original documents including Title Deeds, board resolutions and directors guarantees executed by Maarifa Developers Limited in respect of the facility granted by the bank to the company;

(iv) All original letters including demand letters and statutory notices issued to Austin Salmon Kitololo and Maarifa Developers Limited;

(v) Bank Statements showing the outstanding debt due from Austin Salmon Kitololo and Maarifa Developers Limited in 1999 and at the time the demand was made for payment of the outstanding debt;

(vi) Bank Statement for 1998 to 1999;

(vii) All other documents in respect to this issue.

4. The Miscellaneous Case No. 25 of 2011 was premised upon the provisions of Sections 118 and 121 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya), and Section 180 of the Evidence Act [Cap 80, Laws of Kenya].

5. The Applicant's counsel's contention was that the proceedings for orders to investigate the ex parte Applicants books in relation to the Interested Party, and the resultant orders contravened the ex parte Applicant's right to fair administrative action because the proceedings were not conducted according to law, and were consequently unlawful.

6. **Firstly**, because the miscellaneous application brought under Section 118 of the Criminal Procedure Code only empowers the presiding magistrate to order seizure of documents for purposes of investigation, but were not produced in court.
7. **Secondly**, the order granted was a **carte blanche** order to carry away the documents. Section 180 of the Evidence Act only grants the court power to order a search and make copies, and not to carry away original documents.
8. **Thirdly**, counsel argued by making the orders and not requiring the Respondents to produce the documents in the court abdicated its duty under Section 118 of the Criminal Procedure Code. In this regard, counsel relied on the case of **MANFRED WALTER SCHMITT & SPARKYBEN VS. ATTORNEY GENERAL & 3 OTHERS [2014] eKLR**, where the court found that the Petitioners were entitled to relief for violation of their right to privacy, protected under Article 31 of the Constitution.
9. **Fourthly**, counsel argued there was no competent Affidavit to support of the Miscellaneous Application before the lower court. This was contrary to Section 118 of the Criminal Procedure Code which requires the Application for an order to carry out a search to be supported by an Affidavit duly signed. Counsel contended that the Affidavit was not signed, and thus rendered the whole application incompetent. In this regard also, counsel found support in the case of **NAROK TRANSIT HOTEL VS. BARCLAYS BANK [2001] LLR 852** where the court found that both the Supporting Affidavit and the Replying Affidavit were not properly before the court for failure to state the place the Affidavit was made and the Commissioner of Oaths before whom the Replying Affidavit was made, and consequently rejected and expunged both the Applications from the record and ultimately dismissed the entire application.
10. From the above cases counsel argued that if there was no competent Affidavit, there would be no competent application, and that the orders made were unlawful.
11. **Fifthly**, counsel argued, comparing the orders sought, and those granted, there was material variance. The orders extracted "*title deeds*" which were not sought in the application. Counsel consequently submitted that the process was illegal and contravened the provisions of Article 47 of the Constitution relating to fair administrative action. There was no copy of the complaint which generated the investigations. Counsel relied on the case of **REPUBLIC VS. ATTORNEY-GENERAL & 2 OTHERS EX PARTE D. H. LALJI** – Misc. Application No. 153 of 2012 (unreported) in which the court held that investigations should entail the consideration of the versions of both the accused and the complainant. Counsel also relied upon the decision in **COMMISSIONER OF POLICE & DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT, ATTORNEY-GENERAL VS. KENYA COMMERCIAL BANK & 5 OTHERS [2013] eKLR** where the court deprecated the use of the criminal justice system in the settlement of what is purely civil dispute being litigated in court. Counsel concluded that the process was unfair.
12. Counsel for the Applicant submitted that the cases cited by the Interested Party related to applications to stop investigations, whereas the Applicant's case is that the orders obtained were unprocedural and contrary to Section 118 of the Criminal Procedure Code, and Section 180 of the Evidence Act. The cases were therefore distinguishable as this was a supervised process, and the presiding court, abdicated its duty.
13. With these submissions, counsel urged the court to allow the application.

### **The Respondent's Case**

14. In opposition to the Application Mr. Wamotsa, counsel for the Respondent relied upon the Replying Affidavit of Cpl. Millicent Ouko sworn on 25<sup>th</sup> November, 2011 in which the deponent avers that investigations were carried out following a complaint by a Director of Maarifa Developers Company Limited of alleged fraudulent disposal of the developer's building known as Multi-Choice Towers in Nairobi Upper Hill area, and various other real properties in Mombasa, and lack of accounting for the sale

price, and possible offences of uttering and making false documents contrary to Sections 347 and 353 of the Penal Code, [Cap 63 Laws of Kenya].

15. Cpl. Millicent Ouko also deponed that she found instances in which moneys were allegedly withdrawn fraudulently thus drawing inference of theft by agent contrary to Section 283 of the Penal Code. Her investigations also found incidents of possible alteration of typed documents by hand, and thus attracting possible charges of forgery contrary to Section 350 of the Penal Code.

16. Cpl. Millicent Ouko concludes in her Affidavit upon advice by her counsel that it is possible for a case to be both civil as well as criminal and the fact that a matter may be civil does not **ipso facto** forbid the Police from investigating suspected fraud or criminal conduct associated with the civil case.

17. In summary, Mr. Wamotsa submitted that there was a probable and lawful cause for the application, the subject of that Ruling and the application should be dismissed.

18. Similarly, Mr. Kabue, who represented the complainant, Engineer Austin Salmon Kitololo opposed the Application. Mr. Kabue's submissions were that –

- judicial review deals with process, not merits of the decision, and the application seeks to impugn the application on its merits;
- the jurisdiction to issue search warrants is provided for in Section 118(2) of the Criminal Procedure Code, under which an application is made ex parte;
- Article 47 and 50 of the Constitution do not lie. The Police have a duty to investigate the Commission of any offence.

19. In **MICHAEL MONARI AND WILFRED OROKO VS. THE COMMISSIONER OF POLICE & DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS [2012] eKLR**, the court said –

**It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the duty of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity, and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”**

20. Similar finding was made in the case of **JAMES HUMPHREY OSWAGO VS. ETHICS AND ANTI-CORRUPTION COMMISSION [2014] eKLR**.

### **Issue for Determination**

21. Counsel also submitted that a defective Affidavit is not a ground for judicial review – reliance was placed on the decision of **GLAD AK VS. MACHARIA [2000] LLR 939**.

22. Despite the spirited submissions by both counsel for the Applicant, the Respondents, and Interested Party (complainant) for and against the Application, the issue here really, is what interpretation to be given to Section 118 of the Criminal Procedure Code (and Section 180 of the Evidence Act) to which sections I now advert.

23. Section 118 of the Criminal Procedure Code is entitled **POWER TO ISSUE SEARCH WARRANT**

and says –

**“where it is proved on oath to a court or a magistrate that anything which is necessary for the conduct of an investigation into an offence, it, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicles, 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 be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.”**

24. And Section 180 of the Evidence Act, is titled –

**“180. WARRANT TO INVESTIGATE**

**1. Where it is proved on oath to a Judge or Magistrate that in fact, or according to reasonable suspicion, the inspection of any banker’s book is necessary or desirable for the purpose of any investigation into the commission of an offence, the Judge or Magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker’s book, and such warrant shall be sufficient authority for the production of any such banker’s book as may be required for scrutiny by the officer or person named in the warrant, and such officer a person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker’s book.”**

**Determination**

25. The Applicant’s main contention is that the Application for issue of the search warrant was incompetent for lack of a statement on oath as required under both Section 118 of the Criminal Procedure Code, and Section 180 of the Evidence Act.

26. I have examined the Notice of Motion dated 10<sup>th</sup> February, 2011, by No. 44384 Cpl. Ambrose Gichane and No. 69231, Cpl. Millicent Ouko, as well as the Supporting Affidavit of the said officers. I notice that the Affidavit was commissioned by a magistrate, but has no date of the commissioning. I note however that the application proceeded before Hon. R. Kirui on the same day 10<sup>th</sup> February, 2011, who having heard the application granted it, and had the Search Warrant issued under his hand as Principal Magistrate.

27. The first objection taken by the Applicant was that the Affidavit was defective, and could therefore not sustain the Application for issue of the Search Warrant.

28. It is of course unclear what happened over five years since the Application was filed. The Affidavit was signed by the officers; it is the commissioner of the Affidavit who failed to date it. The non-dating of the Affidavit was an inadvertent omission on the part of the commissioning magistrate. It was not deliberate, and did not in my view vitiate the application. It would be otherwise if it was not signed by the deponents. To say otherwise would be elevating technicalities to a fetish. It would be contrary to Article 159 of the Constitution.

29. The second objection taken by counsel for the Applicant was that the order extracted and signed by the issuing magistrate was at variance with orders sought.

30. I have examined the Application and the order extracted by way of Warrant. There is no variance. The variance is between the provision of the law, and the orders sought and granted. Whereas Section 118 of Criminal Procedure Code refers to seizure of anything subject of the search warrant, Section 180 of the Evidence Act only permits the taking of copies of any relevant entry or matter in such banker’s book.

31. Where the taking of original documents is permitted, in a warrant, such documents are required to be detained by the court. Section 121 says –

**“121. When anything is so seized and brought before the court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.”**

32. It seems to me that where issues on banker’s book are concerned, the provisions of Section 180 prevails, the Search Warrant would only allow the taking of copies of entries. But where the warrant concerns items such as things carried in a ship, aircraft or deposited in buildings, subject of a search, Section 118 prevails; it is the items sought and specified in the warrant which would be taken in their state.

33. But these are matters of merit. Judicial review is about process. The Application for a search was ex parte. It was made in terms of Section 118 of the Criminal Procedure Code, and Section 180 of the Evidence Act. The action was lawful and procedurally in order. An order of certiorari would issue for illegality or procedural impropriety. There is no material to warrant such a finding. It is rejected.

34. Likewise, an order of prohibition relates to a future action – to prohibit an illegal action. There is no ground for such an order. The warrant was duly issued and executed. There is nothing to prohibit.

35. For all those reasons, the Application dated 24<sup>th</sup> March, 2011 fails and is dismissed with costs.

36. It is so ordered.

**Dated, Signed and Delivered in Mombasa this 18<sup>th</sup> day of March, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

No Appearance for Applicant

Mr. Makuto for Attorney-General

No Appearance for Ex parte Applicant

Mr. Silas Kaunda Court Assistant