



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 498 OF 2013

BROWN FIELD DEVELOPERS LIMITED..... PETITIONER

VERSUS

BANKING FRAUD INVESTIGATIONS UNIT.....1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

DIAMOND TRUST BANK LIMITED.....3RD RESPONDENT

JOHN KAGO NDUNGU.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner is a realtor. It deals with property within Nairobi and its environs. It buys and sells real property. The Petitioner is the account holder of bank account No. 0006190001 (“ the subject bank account”) domiciled in the 3rd Respondent bank. The Petitioner complains that its business and undertaking has ground to a halt as a result of the 1st and 2nd Respondents’ action in causing the Petitioner’s subject bank account to be frozen.

2. The Petitioner contends that the 1st and 2nd Respondent’s action were unconstitutional and further that the Petitioner’s right to property as guaranteed under Article 40 of the Constitution has been infringed. The Petitioner seeks orders declaring the 1st and 2nd Respondents’ actions unconstitutional and also an order to vacate the continued freezing of the subject bank account.

3. The Petition is contested by the 1st, 2nd and 5th Respondents while 4th Respondent supported the Petition. The 3rd Respondent played an innominate role.

Background facts

4. It is common cause that; (i) the Petitioner is a legitimate corporate entity conducting legal trade and

business in the form of real property sales, purchases and development , (ii) the Petitioner is the account holder of the subject bank account No. 0006190001 with the 3rd Respondent, (iii) the Petitioner agreed to sell to one Charity Wangui Gethi various plots of land known as Plot Nos. 22, 24, 33, 35, 36, 37 and 38 on Kiambu Municipality Block 5 (Kiamumbi) for the aggregate price of kshs.47,200,000/=, (iv) that the deposit amount of Kshs.4,720,000/= was paid to the Petitioner on behalf of the purchaser by the 4th Respondent, (v) the payment was made by way of the Real Time Gross Settlement (RTGS) on 25 May 2015 to the subject bank account, (vi) that the Purchaser's Advocates M/s Glinis Kigera & Company Advocates then requested the Petitioner to amend the Sale agreement and have the 4th Respondent reflected as the purchaser, (vii) that the 1st and 2nd Respondents have been investigating a multi-million fiddle at one of the national governments' bodies being the National Youth Service, (viii) that the investigations led the 1st and 2nd Respondents to the 4th Respondent and ultimately to the Petitioner's bank account where the 4th Respondent had deposited the Kshs.4,720,000/=, (ix) that on 7th October 2015, the 1st and 2nd Respondent caused or occasioned the freezing of the subject bank account and, (x), that no criminal proceedings or prosecution have been preferred against the Petitioner or any one of its directors or officers but criminal proceedings have since been commenced against both the 4th Respondent as well as the original purchaser Charity Wangui Gethi in relation to the alleged fraudulent transactions at the National Youth Service.

5. The stated facts are largely not in controversy.

The Parties' cases

The Petitioner's case

6. The Petitioner's case is simply that its constitutional rights have been violated.

7. In particular, the Petitioner pointed to Article 40 of the Constitution and stated that its right to property and to benefit or enjoy property as envisaged under Article 40 has been infringed by the 1st and 2nd Respondents' actions and directions to the 3rd Respondent to freeze the subject bank account No. 0006190001.

8. The Petitioner's case is that the 1st and 2nd Respondents action was unwarranted and illegal and has prejudiced the Petitioner as the Petitioner is unable to conduct its ordinary business. The Petitioner continues to suffer mammoth economic loses as the Petitioner is unable to honour its loan and other financial obligations.

9. The Petitioner added that the 1st, 2nd and 5th Respondents are under an obligation to act fairly but in the instant case they have not. Further the Petitioner contended that there is no justification for the limitation imposed on the Petitioner's right to own and enjoy its property.

10. In consequence the Petitioner sought orders that the 1st and 2nd Respondents actions were and are illegal in so far as the 1st and 2nd Respondents have not opted to have the Petitioner or its directors face any criminal charges.

The 1st and 2nd Respondents' case

11. The 1st and 2nd Respondents case may be retrieved from the Replying Affidavit of Sautet Jeremiah Matipei, an investigator attached to the 2nd Respondent.

12. The 1st and 2nd Respondents contended that having received reports of attempted fraud at the National Youth Service, they commenced investigations on the same and the investigations revealed that an amount of Kshs.791,385,000/= had actually been fraudulently obtained from the National Youth Service. That further investigations revealed that part of the monies fraudulently obtained from the National Youth

Service had been deposited in the Petitioner's subject bank account.

13. The 1st and 2nd Respondents contended that they were under a constitutional and statutory obligation to investigate the alleged fraud and in particular to recover any sums on behalf of the public hence the action and orders for freezing the Petitioner's bank account. The 1st and 2nd Respondents further contended that the investigations are not yet complete hence the continued freezing of the Petitioner's subject bank account.

The 3rd Respondent's case

14. A Replying Affidavit was sworn and filed on 23rd November 2015 by Stephen Odumbe, the 3rd Respondent's Company Secretary.

15. The 3rd Respondent contended that the subject bank account was opened in 2012 and further that in February 2015, the 3rd Respondent advanced the Petitioner an amount of Kshs.85,000,000/=. The 3rd Respondent asserted that the Petitioner's account had been properly and regularly operated in the ordinary course of business and had never raised any suspicion.

16. The 3rd Respondent, additionally, stated that it simply complied with the court order issued in Nairobi Chief Magistrate's Misc. Criminal Application No. 2034 of 2015 which directed that all the funds in the subject bank account No. 0006190001 be withheld. The 3rd Respondent also affirmed that it has no interest in the funds in the said account.

The 5th Respondent's case

17. Relying on the Replying Affidavit filed on behalf of the 1st and 2nd Respondents, it was the 5th Respondent's case that the Petitioners' right to property and to face administrative action had not been violated as the limitation or interference occasioned by the order freezing the Petitioner account is justified and falls within the precincts of Article 24 of the Constitution.

18. The 5th Respondent also contended that the orders to freeze the Petitioners bank account were issued by a court of competent jurisdiction and pursuant to statutory provisions. Additionally, the 5th Respondent contended that public interest also dictated that the account as frozen was not interfered with as it was the only way to help unravel the puzzling fraudulent transactions at the National Youth Service.

Arguments in court

19. The Petitioner was represented by Mr. Michael Muchemi at the hearing. The 1st and 2nd Respondents on the other hand urged their case through Mr. Mule, while Ms. Wambugu urged the 3rd Respondent's case. Mr. D. Mosota and Mr. Mohamed appeared for the 4th and 5th Respondents respectively.

The Petitioner's submissions

20. Mr. Muchemi submitted that the Petitioner had shown that its constitutional rights had been infringed by the 1st and 2nd Respondents unilateral freezing of the bank account. Counsel submitted that the 1st and 2nd Respondents should not have frozen the entire bank account but only the amount of Kshs.4,720,000/= if the investigations were truly genuine and not prompted by any malice.

21. It was further submitted on behalf of the Petitioner that the amount of Kshs.4,720,000/= had been received in the ordinary course of business and had subsequently been forfeited by the Petitioner following default on the 4th Respondent's part to complete the transaction. As the amount of Kshs.4,720,000/= was now the Petitioner's property, the 1st and 2nd Respondents were in violation of the provisions of Article 40 by denying the Petitioner access to both to the bank account in general and the

amount in particular.

22. Additionally, counsel submitted that the bank account could not be frozen without the Petitioner itself being investigated or charged with any offence. For completeness, the Petitioner's counsel submitted that the investigations as undertaken by the 1st and 2nd Respondents were unfair, yet the 1st and 2nd Respondents were under a duty to act fairly and afford the Petitioner a fair opportunity of answering any questions in the course of investigation. In the instant case the Petitioner had not been contacted at all.

23. According to Mr. Muchemi, investigators and investigative bodies were under a duty to strictly observe the rules of natural justice and to act fairly. For the latter proposition, counsel relied on the case of **Regina vs. Race Relations Board Ex p. Selvarajan (1976) All ER 12**.

1st and 2nd Respondents' submissions

24. Mr. Mule submitting in opposition to the petition stated that the 1st and 2nd Respondents were simply exercising a statutory duty and had followed the requisite procedure. Counsel stated that the Petitioner had failed to demonstrate that in causing the subject bank account to be frozen the 1st and 2nd Respondents had acted in excess of jurisdiction or in violation of the Constitution or any statute.

25. Counsel submitted that the court ought not interfere with constitutional or statutory mandates of the 1st and 2nd Respondent in investigating or preventing crime.

26. The 1st and 2nd Respondents' counsel placed reliance on the case of **George Joshua Okungu & Another vs. Chief Magistrate's Court and Others [2014] eKLR** to demonstrate that the police have a duty to investigate any complaint made as failure to do so would be a failure to detect and prevent crime.

3rd Respondent's submissions

27. The 3rd Respondent's Counsel submitted that the 3rd Respondent had not acted unconstitutionally in any way. Counsel stated that any participation in having the bank account frozen was pursuant to a court order and not for any other reason.

4th Respondent's submissions

28. The 4th Respondent's counsel Mr. Dennis Mosota submitted that the 1st and 2nd Respondents' action was unjustified and amounted to a violation of Article 40 of the Constitution. Counsel stated that the Petitioner was unnecessarily being prejudiced. Counsel also added that, in the worst case scenario, the 1st and 2nd Respondents ought only be allowed to attach the amount of Kshs.4,720,000/= even in the investigations.

The 5th Respondent's submissions

29. The 5th Respondent's Counsel Mr. Mohammed made submissions to the effect that the 1st and 2nd Respondents in causing the subject bank account to be frozen were simply executing a statutory duty.

30. Mr. Mohammed contended that the Petitioner had not shown that its constitutional rights had been violated in any way and further that the court need to exercise a lot of caution prior to exercising its supervisory role over the Magistrate's court that issued the account freezing orders.

Discussion and Determinations

Issues

31. The sole issue for determination is whether the Petitioner's right under Article 40 and right to fair

administration action under Article 47 have been violated, especially by the 1st and 2nd Respondents action in causing the Petitioner's bank account to be frozen.

32. It is important to appreciate that the jurisdiction of the court is to interrogate the alleged violation of constitutional rights and fundamental freedoms as alleged by the Petitioner and thereafter grant such remedies as may be necessary: See **Koinange vs. Attorney General [2007] 2 EA 256**. The court ought to not unnecessarily get involved in the realm of advising and issuing directives to the parties.

Analysis

33. In determining the reserved issue, it must be stated that where a party alleges that its constitutional rights and freedoms have been infringed, the party must show through admissible evidence and on a balance of probabilities that his rights have been violated. See **Meme vs. Republic [2004] eKLR** and **Catholic Commission for Justice & Peace in Zimbabwe vs. Attorney General [1993] 2 LRC (Const) 279**. The Respondent is not obliged to do anything until after a case has been made out, when the Respondent must then show that any such infringement was constitutionally justified.

34. In a bid to prove its case, the factual basis laid by the Petitioner was that the 1st and 2nd Respondent without notification proceeded to obtain orders ex parte and caused the Petitioner's bank account to be frozen. To the Petitioner, the 1st and 2nd Respondents not only infringed on the Petitioner's right to property through such freezing orders but also acted unfairly and in violation of the provisions of Article 47 of the Constitution.

35. By reason of the uncontested fact that the Petitioner was not notified of the intended action by the 1st and 2nd Respondents and further that the freezing order obtained by the 1st and 2nd Respondents denied the Petitioner access to its property in the form of monies in the frozen account, it is prudent to infer that there is a violation of both Articles 47 and 40 of the Constitution. The question must then be whether the Respondents were justified in so acting.

36. The 1st and 2nd Respondents' contention is that the 1st and 2nd Respondents were simply executing their constitutional and statutory duties, and further that in such execution the Respondents observed the due process of the law. In these respects, the 1st and 2nd Respondents contended that having received a complaint about a possible criminal conduct or activity in the form of fraudulent transactions at the National Youth Service, the 1st and 2nd Respondents commenced investigations and the investigations led them to the 4th Respondent as one of the persons who had obtained monies fraudulently from the National Youth Service. The 5th Respondent chipped in and added that it was not only about the execution of a statutory duty but also the recognition of public interest that pushed forth the Respondents' action. The public interest dictated that the alleged crime be investigated and monies allegedly stolen recovered.

37. There certainly ought to exist no doubt that the 1st and 2nd Respondents who both fall under National Police Service as constituted under Article 243 of the Constitution have a constitutional obligation to investigate crime or complaints touching on criminal activity and criminal conduct. Article 245(4) of the Constitution expressly donates this power. The same applies to Sections 24(e) and 51(j) of the National Police Service Act (Cap 84) which also place the 1st and 2nd Respondents under the compulsion to investigate any allegations of criminal conduct or activity if a complaint is lodged. The position was reaffirmed by Warsame J (as he then was) in the case of **R -vs- Commissioner of Police and Another Ex P Michael Monari & Another [2012]eKLR** where the learned judge stated as follows:-

“The police have a duty to investigate any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime[if they do not investigate].”

38. The power to investigate is to be independently exercised. The Inspector General of the Police under whose command the National Police Service falls is independent. By extension, the police service in

exercising such constitutional and statutory compulsions as investigating crime must also be independent. The Service ought to and must not operate on or under the directions or control of any person save the Director of Public Prosecutions as expressly mandated under Article 157(4) of the Constitution. Not even the court is expected to interfere with such exercise of power.

39. The rationale with regard to independent investigation of crime ought to be simple and easily understood. Persons who are criminally culpable ought to be so held after independent investigations are carried out and all evidence point to culpability. External influence and control may lead to twisted and infirm investigation and this may lead to many culpable persons not being held responsible. Conversely interference may also lead to some innocent persons being victimized.

40. As has been severally pointed out the principle in law is that the court ought to exercise all the necessary caution before interfering with the constitutional mandate or functions of other constitutional organs: see for example **Diana Kethi Kilonzo & Others vs. the IEBC & 10 Others [2013]eKLR** as well as **Pauline Cherono Kenes & Another vs. The Chief Magistrate's Court & Another [2013]eKLR**. Interference should be the exception and not the rule. Indeed, in the case of the power to investigate alleged criminal activities or conduct, public interest dictates that the process ought to be left unabated for the simple reason that criminal conduct ought to be attended to and those culpable brought to book.

41. The exercise of constitutional or statutory mandates ought however to be undertaken within the corners of the law to ensure as well that the constitutionally guaranteed rights of an individual are not violated; See **Kenya Commercial Bank Ltd. & 2 Others vs. Commissioner of Police & Another [2013] eKLR**.

42. In the instant case, it is not disputed that the order which led to the subject bank account being frozen was obtained without any notice to the Petitioner. The order was obtained before the Chief Magistrate's court at Nairobi in Miscellaneous Criminal Application No. 2034 of 2015. That was on 6th October 2015. The 1st, 2nd and 5th Respondents contend that the process was perfectly legal and that there was no need to notify the Petitioner. The Petitioner contends that there was a violation of Article 47 of the Constitution.

43. Article 47 of the Constitution on fair and just administrative action provides, inter alia that:-

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

The emphasis in relation to the instant claim should be on the requirement as to lawfulness and procedural fairness as the Petitioner has questioned the lawfulness and fairness of the 1st and 2nd Respondents' action in causing the freezing of the subject bank account. Article 47 rights it must be noted are not absolute and may legally fall victim to the provisions of Article 24 of the Constitution.

44. There is no doubt that the Petitioner was not afforded any notice let alone a hearing prior to the 1st and 2nd Respondents' decision to have the Petitioner's account frozen. The Respondents, save the 5th, however contend that the decision and action was regular and legal.

45. While Section 24(e) and (g) of the National Police Service Act (Cap 84) grants to the 1st and 2nd Respondents the power to investigate, detect and prevent crime, the Respondents are only to conduct such mandate or exercise such powers within the confines of the law generally and of the Constitution in particular. Section 118 of the Criminal Procedure Code (cap 75), donates additional power to the 1st and 2nd Respondents in the exercise of the power to investigate. It allows the Respondents to obtain orders before a court of law to help in the seizure of anything which is necessary for the investigations. Section 118 provides as follows:-

“118. 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.” [emphasis]

46. Additionally, Section 121 of the Criminal Procedure Code also allows for the detention of anything seized pursuant to warrants obtained from the court under Section 118 of the Criminal Procedure Code. Section 121 of the Criminal Procedure Code (Cap 75) provides that:-

121(1). When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation. [emphasis]

47. More specifically and with regard to bank records, Section 180 of the Evidence Act (Cap 80) also provides for the court to grant warrants to the 1st and 2nd Respondents or the Police Service generally to access such bank records for the purposes of any investigations being undertaken. Section 180 of the Evidence Act (Cap 80) provides as follows:-

180(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 or person may take copies of any relevant entry or matter in such banker’s book. [emphasis]

48. A clear and closer reading of the foregoing statutory provisions would lead to the more prudent inference that the law allows the 1st and 2nd Respondents to not only investigate crime but also seize private property for such purposes as may be necessary for the investigation. Secondly, it is also evident that investigators of crime cannot act in any arbitrary manner. There has to be a basis established for the warrants to be issued by a judge or a magistrate if satisfied that the warrants are merited. The satisfaction is for the court, judge or magistrate and is to be established by an affidavit. The judge or magistrate acts as an intervener to cushion any person from any intended whimsical and arbitrary acts which may offend constitutional guarantees, especially the rights to security of person, privacy and property. At the same time the investigator is also assisted to accomplish his ever delicate mission.

49. In the case of **Mape Building & General Engineering vs. The Attorney General & 3 Others HCCP 437 of 2015 [2016]eKLR**, this court stated as follows with regard to the investigatory power under Section 118 of the Criminal Procedure Code and Section 180 of the Evidence Act:.

“[73] The 2nd Respondent moved the court. Statute law under Section 118 of the Criminal Procedure Code and Section 180 of the Evidence Act allowed them to do so. The application could be made ex parte for very obvious reasons. To hold otherwise would not be in the public interest. It would indeed destroy the very fabric of forensic investigations. No suspect or offender, knowing that there existed evidence which if not destroyed or vanquished would lead to his guilt or liability, can be expected to sit back once notified of possible investigations. The suspect would rid the evidence out of sight and reach. Consequently, the investigator must where there is a foundational basis be allowed and be in a position to seize and secure the evidence.

[74] To avoid arbitrary infringement of a citizen’s privacy or property through entries or searches or services, 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. The order or warrant is never to be granted as a matter of course.

[75] It can thus be clearly understood 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.”

50. The court concluded that there was a reasonable justification to the apparent infringement in not affording a party being investigated a hearing at the preliminary stage of investigation. The apparent statutory intervention and limitation was justified. I still find the reasoning in **Mape Building & General Engineering vs. The Attorney General & 3 Other [supra]** to be sound and would adopt the same for purposes of the instant case.

51. I would however add the rider that Section 118 of the Criminal Procedure Code is also clear that such warrants for seizure are to be granted or issued by the court not just where the court is satisfied as to the need to issue them but also in so far as is necessary for the conduct of the investigations. If it is not necessary, the court ought not issue the same. Where also there is an alternative way of investigating and obtaining the necessary evidence, the court ought not to issue the same. Secondly, the resultant seizure ought not be absolute but only for the period of investigation. Certainly, the period of investigation must not be an indefinite period if only to ensure that a person's property is not absolutely appropriated or expropriated through a warrant of seizure.

52. In the instance case, there is no doubt and it is not contested by the parties that there was need for investigations once the complaint as to alleged fraud at the National Youth Service was made. Secondly, it is also not in controversy that preliminary investigations led the 1st and 2nd Respondents to the 4th Respondent and ultimately to the subject bank account. Additionally, I did not hear the Petitioner fault the process followed by the 1st and 2nd Respondents in obtaining the warrants except the complaint that it was unnecessary to seize (by way of a freezing order) the subject bank account. According to the Petitioner the 1st and 2nd Respondent's approach ought to have been limited to only the Kshs.4,720,000/= traceable to the 4th Respondent.

53. I would agree with the 1st, 2nd and 5th Respondents that the investigations were justified and were conducted within the confines of the law. I would also agree with the said Respondents that the seizure on the face of the documents accessed in the preliminary stage was also necessary. The sale Agreement the basis upon which the 4th Respondent purportedly paid the sum of Kshs.4,720,000/= to the Petitioner did not disclose the 4th Respondent as a purchaser. That alone was enough to raise any investigator's eye-brows.

54. However, was it necessary to have the entire account seized? I do not think so. It is clear that the 1st and 2nd Respondents' approach was to investigate a possible case of money laundering. This was traceable to the 4th Respondent. Having only managed to link the Petitioner to the sum of Kshs.4,720,000/= and not otherwise, the warrants ought to have been limited to that sum and to the provision of all the other records as provided for under Section 180 of the Evidence Act. Secondly, I also did not hear the 1st and 2nd Respondents claim any further links, notwithstanding the time that has lapsed since the freezing order was made.

55. It would be unreasonable to have the freezing order continued indefinitely therefore. Investigators, in my view, must only be entitled to what is necessary in the eyes of the court unless they show otherwise. Caution ought to be exercised always by the court granting the warrants to ensure that a blanket permission is not given to investigators which may lead them to going beyond limits and infringing on constitutional rights and freedoms.

Conclusion

56. In conclusion, I find that while the 1st and 2nd Respondents were justified in obtaining the freezing order and causing the Petitioner's account to be frozen, it was unnecessary to obtain a blanket freezing order which had apparently no limits yet the Respondents themselves had focused on only an aspect of the Petitioner's funds. In this regard consequently, there was no violation of Article 47 of the Constitution.

57. I also find that though it may at times be necessary for the court acting under and pursuant to Section 118 and 180 of the Criminal Procedure Code and Evidence Act respectively to issue warrants covering and attaching to an entire bank account, it was not so necessary in the instant case. In so far as the order to attach and freeze the subject bank account continues for an indefinite period of time and in so far as it was not necessary for the entire account for purposes of the investigations, I find that the Petitioner right to property which is not absolute has been violated and continues to be violated.

Reliefs

58. In the circumstances of this case, I find the following orders appropriate:

- a. There shall issue a declaration that the Petitioner right to property has been violated.
- b. The shall also issue a declaration that the freezing order over bank account No. 0006190001 is unconstitutional in so far as it covers the entire of the Petitioner's account.
- c. There shall issue an order that the freezing order over bank account No. 0006190001 domiciled at the 3rd Respondent bank is to be immediately and forthwith lifted save in so far as it relates to the amount of Kshs.4,720,000/= the true subject of the 1st and 2nd Respondent's investigations.
- d. Each party shall bear its own costs of the Petition.

Dated, Delivered and Signed at Nairobi this 31ST day of May 2016

J.L. ONGUTO

JUDGE