



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION 11 OF 2016

RUTH WENDY WAMBUI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The Applicant’s Notice of Motion filed on 20th May, 2016 essentially invokes this court’s revision jurisdiction under Section 362 of the Criminal Procedure Code. Also invoked are Articles 24 and 31 of the Constitution.

2. Prayer 2 of the Notice of Motion seeks:-

“2 THAT during the interparties hearing of this application, the Honourable Court be pleased to call for and examined the record of criminal proceedings in Criminal Case number 752 of 2016 Republic -Vs- Ruth Wendy Wambui before the Chief Magistrate’s Court at Naivasha Law Courts to satisfy itself as to the correctness, legality and propriety of the findings and orders recorded and passed by the trial court, and the regularity of proceedings with a view to vacate and set aside or reverse and alter the orders given on 20th May 2016 and lift the restraint orders effected pursuant to the same on accounts number 053000004657 held at Family Bank Naivasha in the names of the Applicant AND 01116118741200 and 01105117196600 held at Co-operative Bank Naivasha in the names of the Applicant and the Applicant’s son respectively.

3. The subject of the Notice of Motion is the order made in the lower court Criminal proceedings in **Criminal Case number 752 of 2016 Republic -Vs- Ruth Wendy Wambui Karanja** on 20th May 2016. To the effect that, the Applicant’s bank accounts number 01116118741200 and 0110511796600 both at Co-operative Bank, and Account number 053000004657 at Family Bank **“remain frozen until further orders of this court.”**

4. Apparently, prior to the charges of Stealing by servant contrary to section 281 of the Penal Code being laid against the Applicant, a warrant to investigate the said accounts had been issued by the court on 26th April 2016, to **CPL Daniel Chepkwony** of Criminal Investigations, Department Naivasha.

5. The Applicant’s complaint through her affidavit and oral arguments is that the ‘freezing order’, brought after the charges, was a violation of the Constitutional rights of the Applicant as Section 180 of the Evidence Act only allows for the inspection of bank books. And further, that an application for such a ‘freezing order’ ought to be made formally in order to accord a hearing to the subjects, who in this case include the minor son of the Applicant and herein described as a third party.

6. In support of the above propositions the case of **Erastus Kibiti Stephen –Vs- Euro Bank Ltd [2003] eKLR** was cited. The Applicant’s view is that the proper body to make an application for a “freezing order” is the one created for this purpose under the Proceeds of Crime and Anti-money Laundering Act – the Assets Recovery Agency. Moreover, that no connection was made between the sums in the frozen accounts and the charges facing the Applicant.

7. The Director of Public Prosecutions, through an affidavit sworn by **CPL Daniel Chepkwony** and oral submissions, took the following position in opposition to the Notice of Motion. That the impugned order was made pursuant to an application made in the presence of the Applicant and her advocate and that they raised no objection.

8. Contending that the total sums in the three stated accounts are in excess of Shs 1.5 million, the Director of Public Prosecutions highlighted through annexed bank statements the contrasting regular income of the Applicant being her salary of Shs 13,500/= per month. In the Director of Public Prosecutions’ view, the present application should have been made in the lower court as its order was not final.

9. It was argued that one of the accounts in the minor’s name was effectively being operated by the Applicant, thus the minor is not a 3rd Party as alleged. The Director of Public Prosecutions distinguished this case, based on the resultant orders, from that of **Erastus Kibiti Stephen**. Mr. Gichuki, appearing for the Complainant in the lower court case supported the stand taken by the Director of Public Prosecutions.

10. Pursuant to jurisdiction conferred on this court under Section 362 of the Criminal Procedure Code, I have called for and perused the proceedings in the lower court case, the subject of the instant application. I have also reviewed the respective arguments and affidavit evidence in respect of the application.

11. In my considered view, two issues arise for determination. The first relates to the merits of the impugned orders, while the 2nd relates to the propriety of the procedure adopted by the court and by extension the police in the lower court case.

12. I will deal first with the second issue. Arguments raised to the effect that only agents of the Assets Recovery Agency can apply to court to “freeze” accounts appear persuasive. A perusal of the Proceeds of Crime and Anti Money Laundering Act, appears to support such a proposition. Proceedings brought by the agency for a restraint or seizure order under Sections 68, 69, 70 and 71 relate to realizable property.

13. Realizable property is defined in Section 2 of the Act as:-

“(a) property laundered;

(b) proceeds from or instrumentalities used in, or intended to be used in money laundering or predicate offences;

(c) property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offence; and

(d) property of corresponding value”

14. In this case, the sticking point was not whether Section 180 of the Evidence Act, allows the investigation of accounts by a police officer but on the question of ‘freezing’ of accounts, which, as **Waki J** as he then was, declared in the **Kibiti Case**, as not covered by Section 180 of the Evidence Act.

15. In my view, the dilemma expressed by **Waki J.** regarding the lack of a provision enabling the preservation of monies held in such accounts was resolved by the passing of the Proceeds of Crime and Anti-Money Laundering Act in 2010. The Act provides for a procedure, civil in nature, for moving the court in seeking orders of restraint and seizure of realizable property, in this case, monies suspected to be proceeds of crime.

16. I am also aware of the Court of Appeal decision in **Samuel Watatua & Another –Vs- Republic Court of Appeal Nai. Criminal Appeal No. 2 of 2013** (unreported) where the court stated that:-

“A reading of Section 180 of the Evidence Act together with Section 118 and 121 of the Criminal Procedure Code leaves no doubt in anybody’s mind that the court, upon, application has the power, not only to authorize access by police to bank accounts of suspected criminals but also to freeze these accounts for the purpose of preserving evidence and the subject matter of the alleged crime.....

In this case we find that the limitations in Section 180 of the Evidence Act together with Section 118 and 121 of the Criminal Procedure Code are in consonance with Article 24 of the Constitution.”

17. It is a matter of public notice that the commencement date of the Proceeds of Crime and Anti-Money Laundering Act was the year 2010. The Act has been subject to several amendments in 2009, 2010, 2012 and 2015. Only recently, has an acting Director of the Assets Recovery Agency been appointed. The Act does not stipulate what was to happen during the transition period. However Section 131 states as follows:-

“Where there is a conflict between the provisions of this Act and the provisions of any written law with regard to any matter, the provisions of this Act shall prevail.”

18. Thus in my considered view we now have in our laws, two sets of provisions dealing with issuance of warrants to police officers to search accounts, retrieve documents etc, namely Section 180 of the Evidence Act on the one hand, and Sections 103, 105, 106, 107 of the Proceeds of Crime and Anti-Money Laundering Act, on the other.

19. It seems to me however, that while the Provisions of Section 180 of the Evidence Act, and Sections 118 and 121 of the Criminal Procedure Code do not conflict, regarding the fundamental objects with corresponding provisions of the Proceeds of Crime and Anti-Money Laundering Act, as far as restraint and seizure orders are concerned, the provisions of the Proceeds of Crime and Anti-Money Laundering Act, must prevail. The latter Act assigns the role of making relevant applications for restraint and seizure to the Assets Recovery Agency. Secondly the law prescribes the application of the Civil Procedure to such applications.

20. Equally, while police officers may apply for warrants to investigate accounts under Section 180 of the Evidence Act, they may also, depending on the circumstances of the matter under investigation, apply to the court under Sections 103 – 107 of the Proceeds of Crime and Anti-Money Laundering Act with regard to documentary material. Regarding the matter before us, it seems that Section 180 of the Evidence Act was considered more appropriate.

21. In the **Watatua Case** the Court of Appeal stated that:-

“In certain cases, as stated in the Kibiti Case (Supra) where properties or monies in bank accounts may be dissipated before the matter is heard interpartes, exparte orders may be granted but only for a short period. Thereafter the application (for seizure/freezing) should be served upon all persons likely to be affected by any ensuing orders and no final order should be made until the matter is heard inter parties with all parties, pursuant to Article 50 of the Constitution, accorded an opportunity to be heard.”

22. Similarly Sections 68 and 69 of Proceeds of Crime and Anti-Money Laundering Act provide for a notice to the affected party, who may apply to vary or to rescind the restraint/seizure order. This means that such a party is accorded a hearing with regard to the orders in question. In light of the foregoing, it is my view that the procedure adopted in this case regarding the **“freezing”** of the Applicant’s bank accounts did not take into account the provisions of Proceeds of Crime and Anti-Money Laundering Act, particularly Sections 68 – 71. It is true that the Assets Recovery Agency may not have officers

everywhere in the Republic, but exigency cannot defeat the prescribed procedure under of the law.

23. As regards the substantive question on the threshold of proof required for the issuance of a “**freezing**” order, I think the law applicable is very clear on the matter. And in view of the orders I am about to make, I do not find it appropriate to delve into the merits of the impugned ‘freezing’ order itself. Be that as it may, the said order resulted from irregular proceedings.

24. In conclusion, it is my finding that the application for the ‘freezing’ order, being equivalent to a restraint and/or seizure order under Sections 68 – 71 ought to have been brought under the said provisions of Proceeds of Crime and Anti-Money Laundering Act, and, by the director of the Assets Recovery Agency or his/her appointed agent.

25. In the circumstances, I do set aside the ‘freezing’ order issue on 20th May 2016 and direct that, a fresh application to the said effect be lodged in compliance with Proceeds of Crime and Anti-Money Laundering Act. This will no doubt give an opportunity to the Applicant to respond to the material to be relied on in support of the application. Secondly, and for the avoidance of doubt, I direct that pending such application by the relevant party, the court’s and decision thereon, the funds held in the stated bank accounts should not be interfered with by any party, including the present Applicant, the Investigating Officers or any other third parties acting on their behalf. The lower court file is returned herewith.

Delivered and signed at Naivasha, this 25th day of **July, 2016**.

In the presence of:-

For the DPP : Miss Kavindu

For the Applicant : Mr. Wairegi

C/C : Lilian

Applicant : N/A

C. MEOLI

JUDGE