



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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.218 OF 2015**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT**

**BETTY NJOKI MUREITHI T/A**

**BLUE STAR ENTERPRISES..... RESPONDENT**

**RULING**

By Notice of Motion dated 18<sup>th</sup> November, 2015 brought under Section 346, 118 and 121 of the Criminal Procedure Act, Section 180 of the Evidence Act, Section 3 of the Judicature Act and all the enabling provisions of the law, the Applicant prays for the following orders:

1. That the Honourable court be pleased to certify the application as extremely urgent and in the first instance stay the execution of the honourable court's order made on 12<sup>th</sup> November, 2015 lifting the freezing order of the Kiambu Chief Magistrates Court in Misc. Application No. 328 of 2015 pending the determination of the application substantively and/or further court orders.
2. That the Honourable court be pleased to review and vary the orders of the High Court dated 12<sup>th</sup> November, 2015.
3. That the Honourable Court be pleased to make any other order that it deems fit in the interest of justice.

The application is supported by the affidavit of Alloys Kemo, Senior Assistant Director of Public Prosecutions sworn on 18<sup>th</sup> November, 2015. The gist of the Supporting Affidavit is that on the 12<sup>th</sup> November, 2015, this court issued orders revising the order by the Chief Magistrate's Court at Kiambu Criminal Case No.328 of 2015 freezing the Respondent's account No. [particulars withheld] held by the Respondent at Paramount Bank Limited. The effect of this order was to lift the freezing order issued at Kiambu Law Courts in the aforesaid miscellaneous criminal application. According to the Applicant, although the account was lifted based on information given to the then counsel for the Applicant, Ms. Atina that police had completed investigations against the Respondent and were not intending to charge her, there were parallel investigations being conducted by Ethics and Anti-Corruption Commission (EACC) and the same were not complete. It was therefore, desirable that the Respondent's account be frozen again until the investigations by EACC were completed.

Prayer 1 in the application was disposed of on 18<sup>th</sup> November, 2015 by the granting of interim orders pending hearing inter-partes. The application was vehemently opposed by the Respondent. Her counsel, Mr. Wandugi filed Grounds of Objection on 30<sup>th</sup> November, 2015 in which he stated that the application was incompetent and bad in law, that this court lacked jurisdiction to review orders of a court of concurrent jurisdiction, that the orders were sought in bad faith, that the Applicant acted mischievously

and dishonestly by failing to disclose vital information to the court and that it was only fair and just that the orders issued on 28<sup>th</sup> November, 2015 be discharged.

Suffice it to say, the orders of 18<sup>th</sup> November, 2015 were issued by Hon. Lady Justice J. Lesiit when the application was heard Ex-Parte. She froze the Respondent's Account on interim basis pending hearing of the application inter-partes.

In addition to the Grounds of Objection, the Applicant filed a Replying Affidavit sworn by his counsel, Wandugi K. Kiraithe on 30<sup>th</sup> November, 2015. The crux of the Replying Affidavit is that this court has no jurisdiction to review orders issued pursuant to Sections 362 and 364 of the Criminal Procedure Code. In addition, it is argued that the Applicant came to court without clean hands in that, in the first instance, the orders freezing the Respondent's account at Kiambu Law Courts were issued Ex-Parte. Even after the issuance of those orders, the Applicant did not labour to serve the Respondent both with the application in that court and the order issued thereof. Moreover, it was in bad faith to seek the freezing of the Respondent's account in that the Banking Fraud Investigation Department (BFID) who were investigating the account had confirmed both to the then state counsel handling the matter and the court that they had closed their investigations and had not found any evidence that would necessitate charging the Respondent in court. Therefore, the court had unfrozen the account based on facts and not mere speculations. It was then apparent that the EACC was conducting investigations with *mala fide* and the Applicant should not be influenced by intimation that further investigations are ongoing. The investigations by EACC in any case, were not necessary as they were likely to give directions that were contemptuous of the court orders issued on 12<sup>th</sup> November, 2015. It was also important to note that the Applicant was fully involved in the proceedings giving rise to the order of 12<sup>th</sup> November, 2015 and could not backtrack against his full knowledge that BFID had finalized investigations against the Respondent.

Learned counsel for the Respondent further deposed that the investigations by BFID found the Respondent not culpable based on the fact that the Respondent was awarded a tender through a transparent process to supply goods to National Youth Service (NYS), a department in the Ministry of Devolution and Planning. She did supply the goods which were received by NYS after which she was paid the amounts for the goods tendered and supplied. It was therefore, unfair, extremely oppressive and punitive that the Respondent could not access the monies paid for a job well done and through a transparent process. In lieu thereof, it is deposed that the office of the DPP was working in collusion with EACC with a view to ensuring that the Respondent does not receive the fruits of her labour. This has exposed her to loss, prejudice and at the risk of being auctioned by her creditors some of who have threaten to lodge criminal complaints against her. It is urged that the application be dismissed.

The application was canvassed before be on 3<sup>rd</sup> December, 2015. Learned state counsel Mr. Kemo was in attendance for the Applicant whereas learned counsel Mr. Wandugi represented the Respondent. Each made respective submissions which reiterated the averments contained in the Supporting Affidavit to the application and the Replying Affidavits in opposition thereof. This court does not wish to belabour repeating the submissions comprehensively. But it is important that I highlight a few pertinent issues raised. On the question of jurisdiction, Mr. Kemo submitted that Section 346 of the Criminal Procedure Code allows a court to amend an order or a warrant issued by it at any time. In addition, Section 118 of the Criminal Procedure Code should be read together with Section 180 of the Evidence Act which gives the court the power to issue a warrant for purposes of investigations of a bank account. In the present case, he argued that the court has jurisdiction to vary or review its own orders depending on any varying circumstances that it may deem fit and just to do so. He submitted that the application was necessitated by the fact that after BFID completed investigations, they were required under Article 157(10) of the Constitution to forward the file to the DPP for perusal after which the DPP would advise on what action would be taken against the Respondent. In essence, he would have recommended that either the file be closed, further investigations be carried out or that the Respondent be charged. In not doing so, BFID had usurped the powers of DPP. In this regard, Mr. Kemo submitted that the Respondents' bank account was lifted based on the wrong information given to the then prosecuting state counsel, Miss Atina that investigations against the Respondent had closed. Unknown to her, unfortunately, EACC was also

conducting parallel investigations and had also directed the bank not to allow any transactions on the account. He urged the court to note the much publicized financial scandal in the Ministry of Devolution and Planning against which several investigations were being conducted by the Police and the EACC. Owing to the intensity and the gravity of the scandal, the investigation was likely to take longer than expected and at the least, between two to three months. In the respect of the Respondent, he submitted that EACC is pursuing information on whether the goods supplied to the Ministry of Devolution and Planning, Department of National Youth Service (NYS) were worth the amount of the tender and the amounts paid into the Respondent's bank account. The EACC could also be investigating to find out whether the tendering process was flawed. According to Mr. Kemo, had these matters been brought to the attention of the court, the court would not have unfrozen the account.

On the part of Mr. Wandugi, he submitted that the application was in court as an abuse of its process. He pointed out that the court has no jurisdiction under Section 346 of the Criminal Procedure Code to review its own orders. In support thereof, he referred the court to the case of **Muya vs Republic (2004) (1) KLR 515** in which the Court of Appeal held that the High Court in exercise of its revisionary jurisdiction shall be deemed to have made its own decision in its Appellate jurisdiction. In that case, its decision was only appealable to the Court of Appeal.

On matters of fact, Mr. Wandugi submitted that the Respondent did not have any objection to the EACC carrying out investigations against her. However, the investigations cannot be carried out arbitrarily to the disregard of the law. It was factual that the Respondent supplied goods to NYS which were inspected and paid for. It was further clear that the amounts in the bank that were being frozen were those paid after delivery of the goods. She tendered for goods through an open, competitive and transparent process and it was unfair and oppressive to deny her access to the money for which she was not holding the goods tendered for. She annexed to the Replying Affidavit the documents relating to the tendering process up to the point the goods, comprising farm machinery were received by NYS.

Further, according to Mr. Wandugi, the Applicant was relying on extraneous information to mislead the court. The submission by the Applicant was that he had received information from EACC that it was conducting investigation on the matter yet, there was no tangible evidence in that regard. As such the DPP was only required to rely on the conclusive report by BFID that there were no further investigations going on against the Respondent.

He further submitted that the initial application not having been heard by the judge who refroze the Respondent's account on 18<sup>th</sup> November, 2015, the Applicant in the instant application was shopping for a forum that would give orders favourable to him. He urged the court to dismiss the application.

In very brief rejoinder, Mr. Kemo stated that the Applicant was not seeking for a favourable forum as at the time the interim orders were issued, this court was attending an official workshop and the matter had to be placed before the Judge in charge of Criminal Division. He also urged the court to look at the documents relating to the tender and supply of the goods by the Respondent to NYS holistically. If done, the court will note material discrepancies particularly respecting the worth of the goods supplied against the amount of the tender. That, of itself, demonstrates that there is the need for further investigations. He insisted that this court had jurisdiction under Section 361 of Criminal Procedure Code to review its own orders.

I have accordingly considered the rival submissions. First, I would wish to put it clearly on record that when the interim orders were issued by Hon. Lady Justice J. Lesiit, this court (myself) was attending a workshop at Judiciary Training Institute on Leadership and Management for Judges. As a matter of course, in my absence the file had to be placed before the judge in charge of the criminal division Hon. Lady Justice J. Lesiit. There was therefore no forum shopping by the Applicant.

On the issue of the jurisdiction of this court, it is important to note that the prayers sought herein are for a stay of execution or review or variation of the orders issued on 12<sup>th</sup> November, 2015 whose effect was to refreeze the Respondent's account. My understanding of Sections 118 and 121 of the Criminal Procedure Code as read with Section 180 of the Evidence Act is that those provisions should be invoked when a

party is coming to court in the first instance to seek a search warrant or a warrant to investigate a bank account or seek the detention of any seized properties pursuant to issuance of any such search warrant or warrant to investigate. In the instant case though, the warrants to investigate and the subsequent seizure of the Respondent's bank account was facilitated by the magistrate's court at Kiambu. Subsequently, the Respondent came to this court seeking a review of those orders upon which the court issued the orders of 12<sup>th</sup> November, 2015.

Section 361 of the Criminal Procedure Code again cannot apply because it deals with second appeals which are appeals before the Court of Appeal after a party fails to get appropriate redress in the High Court.

I am also of the view that Section 346 of the Criminal Procedure Code cannot also aid the Applicant. The provision can only be invoked for purposes of correcting minor errors and defects which do not substantially affect the main order or judgment of the court. The same provides that;

***“The court may at any time amend a defect in substance or in form in an order or warrant, and no omission or error as to the time and place, and no defect in form in an order or warrant given under this code shall be held to render void or unlawful an act done or intended to be done by virtue of that warrant or order, provided that it is therein mentioned, or may be inferred therefrom that it is founded on a conviction or judgment, and there is a valid conviction or judgment to sustain it.”***

I then hold the view that reviewing its own order, the court would invoke the inherent powers donated to it under the Constitution for purposes of doing substantive justice. Under **Article 165(3)(a)** the High Court is conferred unlimited original jurisdiction in a criminal matter. This should be read together with Sub-Article (7) which provides that, in making any order, the court should ensure the fair administration of justice. Furthermore, under Article 159 (2)(d) the court should administer justice without due regard to procedural technicalities. That is to say that, the overall objective in granting any order, is to do justice. I have not seen any provision under the Criminal Procedure Code by which this court can review its own orders. But it is also trite to note that a court can vary or review its own orders if new matters are brought to its attention that were not within the knowledge of an Applicant when the order sought to be varied was granted. What this court cannot do is to review or vary an order of a superior court to it. That is why, in doing substantive justice, this court would only invoke the inherent powers conferred to it by the Constitution. The instant application is based on the fact that at the time the order of 12<sup>th</sup> November, 2015 was made, the Applicant was unaware that EACC was conducting parallel investigations on how the Applicant was paid Ksh. 47 Million deposited in her account with Paramount Bank. In my view that was new material information that necessitated the Applicant to file the instant application.

Let me also comment on the case of **Muya Vs Republic (Supra)** in which the Court of Appeal held thus:

***“An order made by the High court in the exercise of its revisionary jurisdiction is deemed to be a decision of the High Court in its appellate jurisdiction and accordingly the decision in this case was appealable to the Court of Appeal on a matter of Law.”***

In that case, the Appellant had moved to the High Court to revise an order of forfeiture issued by the Subordinate court. The High Court noted that there was no illegality, impropriety or irregularity in the proceedings as would justify its intervention under Section 364 of the Criminal Procedure Code. The Appellant was dissatisfied with the holding of the High Court and he appealed to the Court of Appeal. In so finding, the latter Court was procrastinating on whether it had jurisdiction to entertain an appeal from a revisionary order of the High Court. It found it had under Section 361 of the Criminal Procedure Code.

The facts of that case can be distinguished with the present case. In the former, the High Court declined to revise the orders of the subordinate court by granting a refusal order with finality. In the present case, this court revised the order of the subordinate court but owing to other material disclosures it is urged to vary by reviewing its own orders issued pursuant to Section 362 and 364 of the Criminal Procedure Code. The Applicant again, has not come to this court on appeal but with a request that the court reconsiders its

decision based on new matters that has arisen matters. In that regard, I hold that this court is seized with jurisdiction to entertain the application.

In the instant case, the contention of the Applicant is that notwithstanding that BFID had exonerated the Respondent, parallel investigations by EACC were ongoing which at the time the order was made that information had not been brought to the attention of the applicant. Of concern to the court and factually what is in issue is the investigation of the Applicant's account. Whether or not she supplied goods worth the amount of the tender that was paid to the bank account is a matter to be determined by the investigations. It would negate justice for this court to hold that no further investigations should be carried out merely because BFID had exonerated the Respondent. In any case, it is in the public domain of the existence of the ongoing investigations of financial impropriety and fraud in the Ministry of Devolution and Planning from which the Respondent tendered for the supply of goods to NYS. The court would be insensitive to the mandate conferred to various investigative bodies that can conduct parallel investigations on one particular issue. Of importance in the matter is singly to get to the bottom of the entire case. I would be usurping the powers of the investigative bodies if I were to conclude that, based on the documents presented by the Respondents there was no case against her and that therefore, EACC was acting *mala fide*. It is not the duty of the court to determine how the tender was done, and whether the process was flawed. That is purely the preserve of the investigators. Be that as it may, prima facie, based on the documents presented by the Respondent, it is clear that she was entitled to her payment. But again, given the inter twined investigations ongoing in the Ministry of Devolution and Planning which impact on the economy of this country, EACC through the office of the DPP must be accorded sufficient time to complete investigations against the Respondent. I am aware that the Respondent is anxious to get her payments and that she is economically inconvenienced, as she has demonstrated that all the money she purchased the goods with is owing from creditors. However, the balance of justice demands that thorough investigations be done. And if she is found clean, she would be vindicated.

In view of the above, it is important to note that learned counsel Mr. Kemo informed the court that owing to the intensity of the investigations and the amounts involved not only in this case but in the Ministry of Devolution and Planning, investigations will not take less than between 2 and 3 months. The Applicant should however note that investigations cannot go on endlessly merely because there is a scandal in the Ministry. Respectively, EACC would only be given a particular period of time and as requested by Mr. Kemo, to ensure that investigations are complete. Such investigations will come up with a recommendation of whether or not the Respondent would be charged with a criminal offence. I note that the account was frozen on 29<sup>th</sup> September, 2015. It is now close to three months since this date. It would be expected, given the submission by Mr. Kemo that the police ought to have completed investigations. But in the interest of justice, I am aligned to the interest the investigations in the Ministry of Planning and Devolution has aroused. For that, I would still give EACC sufficient time to conclude investigations. Accordingly, the application is allowed with the follow orders:

- a. I set aside the order of this court issued on 12<sup>th</sup> November, 2015 lifting the freezing of the Respondent's bank account No. 030002061501 held with Paramount Bank Limited.
- b. Effectively, the aforestated account is hereby frozen pending completion of investigations on it by EACC.
- c. The matter will be mentioned on 11<sup>th</sup> February, 2016 to confirm if EACC had completed investigations.

**DATED and DELIVERED** this 17<sup>th</sup> day of November, 2015.

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Miss Kahoro for the Applicant*
2. *Karoki holding brief for Wandugi for the Respondent.*