



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISC. APPLICATION NO. 293 OF 2015**

EASTLEIGH MALL LIMITED.....1<sup>ST</sup> APPLICANT  
 ABDI ALI RAGE.....2<sup>ND</sup> APPLICANT  
 ABDIKARIM HASAN ABDI.....3<sup>RD</sup> APPLICANT  
 ABDULAHY YUSUF.....4<sup>TH</sup> APPLICANT  
 MOHAMED SHAKUL.....5<sup>TH</sup> APPLICANT  
 NOOR AHMED NOOR.....6<sup>TH</sup> APPLICANT  
 ABDI KARIM HASSAN.....7<sup>TH</sup> APPLICANT  
 OSMAN ALI SALAT.....8<sup>TH</sup> APPLICANT  
 REHMA SHURIYE SIYAAD.....9<sup>TH</sup> APPLICANT

**VERSUS**

REPUBLIC.....RESPONDENT

**RULING**

By Notice of Motion dated 21<sup>st</sup> August, 2015, the Applicants pray for the main relief that this court orders for stay of proceedings in **Makadara Criminal Case No. 5027 of 2015**. The application is brought under **Articles 27(1), 47,165 (6) & (7) of the Constitution, Section 362 of the Criminal Procedure Code** and all other enabling provisions of the Law. The application is premised on the grounds that the Respondent has unprocedurally and maliciously instituted criminal proceedings against the Applicants by failing to adhere to the necessary procedure to be taken after the tax assessment report issued to the Applicants. That there is a petition pending before the High Court in the Constitutional and Human Rights Division over the same subject matter in which the Applicants opposed the institution of the criminal proceedings vide Makadara Criminal Case no. 5027 of 2015. As such, it is prayed that the said proceedings be stayed because they have breached the fundamental rule of natural justice and violated the Applicants’ rights to an opportunity to be heard and make their defence.

The application is supported by an affidavit of Noor Ahmed Noor, the 6<sup>th</sup> Applicant on behalf of all the Applicants sworn on 21<sup>st</sup> August, 2015. The gist of the Supporting Affidavit is that the Criminal proceedings were instituted unfairly and maliciously against the Applicants when, infact, the Applicants bank accounts had been frozen vide Makadara Misc. Criminal Case No. 395 of 2015.

This court is seized of the original file of the trial court Criminal Case being Makadara Criminal Case No. 5027 of 2015. The criminal proceedings were infact instituted by the Kenya Revenue Authority on behalf of the Republic. That explains why the Replying Affidavit is sworn by one Justus Kiuvyu, an investigator with Kenya Revenue Authority sworn on 31<sup>st</sup> August, 2015. The deponent avers that the criminal proceedings were legally instituted owing to the problems that Kenya Revenue Authority was experiencing in effectively assessing, collecting and accounting for all tax revenues owing from the Applicants. That Kenya Revenue Authority had conducted investigations and come up with preliminary findings that the Applicants were evading tax by virtue of material non-disclosure of the tax remitted to the government. The acts of such evasion are particularized under paragraph four of the Replying Affidavit being;

- i. Traders keeping various and/or parallel set of accounts records which are deliberately excluded from tax declarations to the Kenya Revenue Authority.
- ii. Manipulation of records for purposes of under-declaration of taxes due.
- iii. Poor record keeping amongst small, medium sized and large businesses, which directly resulted in incorrect tax declarations.
- iv. Deliberate failure by the traders to remit Value Added Tax and other taxes collected.

The case for Kenya Revenue Authority is that this application is incompetent and an abuse of the court process as the Applicants moved this court after failing to obtain similar orders before the Constitutional and Judicial Review Division in **Petition No. 318 of 2015** in which the prayer for conservatory orders to stay the Criminal proceedings was declined. In any case, the mere fact of the existence of a civil matter/proceedings does not preclude the state from instituting criminal proceedings against any party. Both the Applicants and the Respondent filed written submissions. Those of the Applicants are dated 12<sup>th</sup> November, 2015 whilst those of the Respondent (KRA) are dated 4<sup>th</sup> November, 2014. In addition, brief oral submissions were made before the court on 12<sup>th</sup> November, 2015. Learned counsel Mr. Omollo represented the Applicants while learned counsel Mr. Okello was for Kenya Revenue Authority. Mr. Omollo submitted that the Respondent vide Misc. Cr. App. No. 395 of 2015 at Makadara Law Courts obtained orders freezing bank accounts associated with the Applicants. On several occasions in court, the Respondent was heard without the benefit of service of the application and order to the Applicants. That precipitated the Applicants to file the Constitutional Petition No. 318 of 2015 in which they wanted the court to make a determination on whether the Applicants' constitutional rights had been infringed against by virtue of the orders issued ex-parte in Makadara Misc. Criminal Application No. 395 of 2015. The case for the Applicants therefore, is that since Kenya Revenue Authority had conducted an audit and the Applicants were paying the tax arrears, the taking of plea in Makadara Criminal Case no. 5027 of 2015 as well as the proceedings in Misc. Criminal Application No. 395 of 2015 should be stayed.

In opposing the application, learned counsel for Kenya Revenue Authority Mr. Okello submitted that the matters subject of the Constitutional Petition No. 318 of 2015 are directly related in fact and issue to this application. He told the court that the Applicants in the petition prayed for conservatory orders to stay the criminal proceedings as well as to unfreeze their bank accounts. The conservatory order was not granted as a result of which the Applicants filed this application. That of itself, amounts to an abuse of the court process. Furthermore, the Respondent in the application for freezing the Applicants' accounts disclosed the parties who were being investigated. Kenya Revenue Authority had come up with an audit report which indicated the tax arrears owing from the Applicants. The amount in the frozen accounts is thus intended to recover the evaded tax. Therefore, if the accounts were unfrozen the entire exercise of the recovery of the evaded tax would be an exercise in futility.

In rejoinder, Mr. Omollo submitted that as at 19<sup>th</sup> August, 2015 the Applicants' prayer for conservatory orders had not been determined. In the intervening period pending the determination of that prayer, the

Respondent charged the Applicants vide the Criminal Case No. 5027 of 2015. That has precipitated the application herein. He further submitted that the Applicants who own a mall in Eastleigh Estate in Nairobi have been occasioned injustice by the closure of their bank accounts as their creditors and tenants cannot pay rent. The action taken by the Respondent is unfair and is intended to force the Applicants to accede to its demands. He pleaded with this court to allow the application.

I have considered the application and the respective submissions made before me. I note that the application was brought under Section 362 and 364 of the Criminal Procedure Code. Those provisions deal with revision of orders made by a subordinate court. To be precise, under Section 362, the High Court is donated the power to call for and examine the record of criminal proceedings before a subordinate court so as to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such subordinate court. Section 364 on the other hand provides for the reliefs that the High Court can give upon such revision. A look at the main prayer sought in the application has no relation with Section 362. The court is also moved under the Constitution. Article 27 provides for equality and freedom from discrimination under the Bill of Rights. That, to me implies that the prayer for a relief for recognition of the right to equality and freedom from discrimination would be best dealt with in the pending Constitutional Petition. That leaves this court to address itself on whether it can stay the criminal proceedings by virtue of its supervisory jurisdiction over the subordinate court as provided under Article 165 (6) & (7).

The Applicants were charged with six counts of making an incorrect statement affecting liability to tax contrary to Section 110 (a) as read with Sections 107 & 72A of the Income Tax Act. The charge sheet was presented in court on 31<sup>st</sup> July, 2015. The Court issued summons for the Applicants to appear for plea on 10<sup>th</sup> August, 2015. On this date, learned counsel Mr. Hassan who was in attendance for the Applicants informed the court that the Applicants were out of the country. The court gave the counsel 14 days to avail the Applicants. The matter was placed for mention for 28<sup>th</sup> August, 2015. On this date, the Applicants were in court but the plea was deferred owing to the discrepancies in their names. On the 8<sup>th</sup> September, 2015, again the plea was not taken as the Applicants had obtained an order staying the criminal proceedings. That position obtains as at now as the stay orders were obtained in this file on 24<sup>th</sup> August, 2015. The original file was also forwarded to this court for purposes of this application.

A copy of the petition in High Court Constitutional Judicial Revision Division, Petition No. 318 of 2015 is annexed to the Supporting Affidavit in the application. Although the date of filing is not clear, it is dated 28<sup>th</sup> July, 2015. A copy of the Replying Affidavit is also annexed to the Supporting Affidavit and it bears a filing stamp of 11<sup>th</sup> August, 2015. The application herein was filed on 21<sup>st</sup> August, 2015. It is therefore clear that the Judicial Review Petition commenced before the application herein. Amongst the reliefs sought in the petition were; a declaration that the searches and seizure of the Petitioners' properties as well as the freezing of their bank accounts on 3<sup>rd</sup> July, 2015 was unconstitutional and a violation of their rights to privacy and fundamental freedoms. The Petitioners who are the Applicants herein did also move the court for an order of certiorari to quash the order of search and seizure of the Applicants' property. On 13<sup>th</sup> April, 2014, in Kibera Misc. App. No. 578 of 2015, a similar order was sought for quashing an order freezing the Applicants' account on 3<sup>rd</sup> July 2015 in Makadara Misc. Criminal App. No. 395 of 2015. In the petition, the Applicants also moved the court for an order of mandamus to compel the Respondent in the petition to return the Applicants' properties seized on 13<sup>th</sup> April, 2015. The Applicants also wanted the Respondents be prohibited from arbitrarily searching and seizing the Applicants' properties. The Respondents in the petition were; Commissioner of Investigation Compliance and Enforcement (KRA), Commissioner of Income Tax and Kenya Revenue Authority.

Filed alongside the Petition was a Notice of Motion dated 28<sup>th</sup> July, 2015 in which amongst other prayers sought was for a conservatory order staying the orders and proceedings issued in both Makadara Misc. Cr. App. No. 578 and 395 of 2015. A conservatory order was also sought restraining the Respondents from further conducting a search or entry into the Petitioners' property. Although it is not clear from the annexures to the Supporting Affidavit whether a conservatory order was issued as prayed, it came out clearly during the hearing of this application that no conservatory orders were issued. That meant that

KRA, based on any audit it carried out against the Applicants herein was at liberty to take any legal action against them as it deemed fit and appropriate. According to counsel for KRA, the investigations done by KRA culminated into the filing of the criminal charges in Makadara Criminal Case No. 5027 of 2015.

It is clear that the order sought herein is for stay of the criminal proceedings based on the grounds that they were a violation of the Applicants' Constitutional right to natural justice. On the part of this court, I emphasize that the mere fact that the Constitutional Petition is pending is not, of itself, a bar to the Applicants being charged with criminal offences. Again, it is clear that the reliefs sought in the Constitutional Petition are directly related to the issues in this application. Although the court called for the original files in the various miscellaneous criminal applications that were filed at Makadara Law Courts, the Applicants have sought orders of prohibition of the proceedings in the Constitutional Petition. I am therefore, barred by the rule of *sub judice* to find that any of those proceedings should discontinue.

It is important to note that the Applicants have conceded that the Constitutional Petition is still pending before the High Court, Constitutional and Judicial Review Division. They should await the outcome of the Petition before they seek any other redress relating to the orders given in those Miscellaneous Criminal applications. Suffice it to say, KRA under Section 5(1) of the Kenya Revenue Authority Act Cap 469, Laws of Kenya, as a government agency, is mandated to collect and receive all revenue of the government. Under the Income Tax Act, tax payers are required to submit returns of their tax payments and those who do not comply are charged under the Act. The alleged failure by the Applicants to comply with the Income Tax Act culminated into their being charged in court in the Criminal Case no. 5027 of 2015. Therefore, it is proper to conclude that the Applicants were legally charged with the various counts of financial improprieties and tax evasion. As to the proof of the offences, is a matter of evidence to be adduced in court. I do not see any valid reason why the said proceedings should be stayed and as properly submitted by counsel for KRA, the Applicants ought to have awaited the disposal of the Constitutional Petition which shall determine the issues directly giving rise to the criminal proceedings before they filed this application. I therefore, find that this application has no merit and the same is hereby dismissed with no orders of cost. The miscellaneous criminal application files being No. 395 of 2015 and No.578 of 2015 shall be remitted back to the Lower Court. As for the file in the Criminal Case No. 5027 of 2015, the same shall also be remitted back to the Lower Court for mention on 10<sup>th</sup> December, 2015 for purposes of the Chief Magistrate issuing summons to the Applicants to take plea.

**DATED and DELIVERED this 4<sup>th</sup> day of December, 2015.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *No appearance for the Applicants*
2. *Mr. Okello for the Kenya Revenue Authority*
3. *M/s Wario for Respondent.*