



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 293 OF 2013**

**BETWEEN**

**MANFRED WALTER SCHMITT ..... 1<sup>ST</sup> PETITIONER**

**SPARKYBEN LIMITED ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC**

**PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**BANKING FRAUD AND**

**INVESTIGATIONS..... 3<sup>RD</sup> RESPONDENT**

**DIAMOND TRUST**

**BANK KENYA LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The main issue in this matter is whether the petitioners are entitled to relief for violation of their right to privacy protected under **Article 31** of the Constitution.
2. Before I traverse the main issues in the petition, I will outline the facts giving rise to this petition as extracted from the depositions filed by the parties. All the parties have filed written submissions which were augmented by oral submissions.
3. The petitioners filed an amended petition dated 8<sup>th</sup> October 2013 supported by the 1<sup>st</sup> petitioner's affidavit sworn on the same date. The petitioners' claim is opposed by the respondents. Chief Inspector Ali Ibrahim, an investigating officer with the Banking Fraud Investigation Department ("BFID") of the Criminal Investigation Department has sworn an affidavit on behalf of the 1<sup>st</sup> and

3<sup>rd</sup> respondent. The 2<sup>nd</sup> respondent, the Director of Public Prosecution (“the DPP”) opposes the petition through the affidavit of Edwin Okello, Senior Prosecution Counsel in the Office of the DPP. Hilda Gituro, the head of compliance of Diamond Trust Bank Kenya Limited (“Diamond Trust”), the 4<sup>th</sup> respondent has sworn an affidavit to oppose the petition.

### **Background and Facts**

4. The 1<sup>st</sup> petitioner is the principal director of the 2<sup>nd</sup> petitioner, a limited liability company incorporated in Kenya. In 2010 he opened four accounts with the Diamond Trust, a duly licenced bank, in the names of “*Manfred Walter Schmitt*” and four additional accounts in the name of “*Sparkyben Limited*”. He used these accounts to carry out transactions in several currencies; Euro, US Dollars, Swiss Francs and Kenya Shillings. Between the year 2010 and 2012, the 1<sup>st</sup> petitioner transferred a total of Kshs. 635 million into the accounts through 45 different transactions to facilitate his business operations in Kenya.
5. Diamond Trust forwarded to the Central Bank of Kenya (“Central Bank”) a letter dated 12<sup>th</sup> July 2012 in which is detailed facts that led it to believe that the petitioners’ accounts were being operated in manner that entitled it to report to the Central Bank. It concluded that the transactions could be classified as “Suspicious Transactions”.
6. On the 20<sup>th</sup> of July 2012, BFID received a report from the Central Bank on suspicious transactions concerning the petitioners’ bank accounts. BFID commenced investigations with a view to establishing the legality of the transactions. As part of its investigation, BFID made an application to the Chief Magistrate’s Court being ***Miscellaneous Criminal Application No. 2326 of 2012 Banking Fraud Investigations Unit v Manfred Schmitt, Sparkyben Limited and Diamond Trust Bank*** to obtain warrants to investigate and seize the petitioner’s accounts at Diamond Trust. On 24<sup>th</sup> October 2012 the court issued an order restraining the petitioners from accessing the bank accounts or carrying out any transactions.
7. At the material time, the 1<sup>st</sup> petitioner was out of the country and was not notified of the court action. When he returned that he was informed that his accounts were frozen to facilitate investigations. He instructed his advocates to file an application for revision to determine the correctness, legality or propriety of the search and seizure warrants. I heard the application ***Nairobi High Court Criminal Revision Application No. 569 of 2012 Manfred Schmitt and Sparkyben Limited v Republic and Chief Magistrate, Nairobi*** and concluded that there was no factual basis established upon which the learned magistrate could issue the warrants. On 7<sup>th</sup> January 2013, I issued the following order, ***“THAT the Notice of Motion dated 22<sup>nd</sup> November 2012 is allowed to the extent that the order made and issued on 24<sup>th</sup> October 2012 in Nairobi Chief Magistrate Miscellaneous Criminal Application No. 2326 of 2012 Banking Fraud investigations Unit v Manfred Schmitt, Sparkyben Limited and Diamond Trust Bank be and is hereby set aside and discharged.”***
8. In the meantime, the DPP, by a letter dated the 31<sup>st</sup> December 2012, directed the BFID to undertake further investigations into the petitioners’ accounts by contacting the banks that wired monies into the petitioners’ accounts so as to authenticate the source of these monies. The DPP also directed that bank statements showing various transactions between the Diamond Trust and other banks associated with the petitioners’ accounts be scrutinised and officials in the said banks and Central Bank record statements. He also directed that companies that had transacted with the petitioners be investigated.

### **Issues for Determination**

9. The petitioners are aggrieved by the respondents’ actions. They seek the following orders in their amended petition:

- a. A declaration that the Petitioners fundamental rights to privacy has been violated, transgressed and trampled upon jointly and severally by the Respondents contrary to Article 31( c) of the Constitution of Kenya
- b. A declaration that the Respondents acts of restraining the Petitioners' accounts amounts to unconstitutional interference with their right to ownership of property contrary to Article 40 of the Constitution of Kenya
- c. A declaration that the institution of criminal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners without reasonable or probable cause amounted to malicious prosecution on the part of the Respondents
- d. An order for general damages, exemplary and aggravated damages for the contravention and gross violation of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners fundamental rights and freedoms under Article 31 and Article 40 of the Constitution of Kenya and for malicious reporting
- e. An order for special damages amounting to Kshs. 59,507,813.83
- f. Interest on (d) above at the court rates from the time of filing the suit until payment in full
- g. Any further order as the honourable court may deem appropriate
- h. Costs of this Petition.

10. From the prayers in the amended petition, four issues fall for determination.

- i. Whether the respondents are liable for malicious prosecution.
- ii. Whether the petitioner's rights under **Articles 31** and **40** of the Constitution were violated.
- iii. Whether the petitioner is entitled to relief.

11. I shall consider these issues in light of the submissions by the parties.

### **Determination**

#### ***Malicious Prosecution***

12. The petitioner submitted that it has made out a case for malicious prosecution. Counsel for the petitioner, Mr Ligunya, submitted that the tort of malicious protection was established where civil or criminal proceedings were instituted for an improper purpose and without probable cause. He submitted that on the basis of the facts the petitioners had the elements of the tort of malicious prosecution as follows; the criminal proceedings must have been instituted by the defendant or that the defendant was instrumental in setting the law in motion, that the defendant acted without reasonable or probable cause, that the defendant acted with an improper or wrongful motive and that the criminal proceedings terminated in the applicants favour. Counsel cited several cases; ***Mbowa v East Mengo District Administration [1972] EA 352***, ***Kagane v Attorney General [1969] EA 643*** and ***Leonard Ataro v Attorney General [2009]eKLR***.
13. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents on their part, rebuffed the petitioners claim on the basis that the investigation and the commencement of the proceedings against the petitioner was based on facts that emerged out of an investigation which the DPP and the BFID were entitled to investigate. They contend that there was reasonable and probable cause to institute the proceedings and as such they cannot be found liable for malicious prosecution.
14. Diamond Trust denied liability on the ground that its action in writing to the Central Bank was grounded in law and in particular the need to comply with the ***Prudential Guidelines on Proceeds of Crime and Money Laundering (Prevention) (CBK/PG/08)*** and ***Proceeds of Crime and Money Laundering Act, 2009*** which requires all licenced institutions under the ***Banking Act*** to provide information about suspicious activity in customers' accounts. It submitted that its communication with the Central Bank was confidential and privileged and the contents were restricted to the regulator and was subject to immunity as prescribed by **section 31 (5)** of the ***Banking Act***.
15. I hold that the case for malicious prosecution must fail. The petition before the court is brought under **Article 22** of the Constitution to enforce fundamental rights and freedoms. Therefore the

claim for malicious prosecution is misplaced in these proceedings. It is not in dispute that malicious prosecution is a tort and consequently, the procedure for agitating such a cause of action is not through a petition to enforce fundamental rights and freedoms.

16. Even if I were to deal with the matter as a tortious claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, I would still dismiss the claim. The claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent is time barred by virtue of **section 13A** of the **Government Proceedings Act** and **section 3** of the **Public Authorities Limitation Act** and I find and hold that this petition is an attempt to evade these legal provisions and not one intended to enforce fundamental rights and freedoms in this respect.

### ***Case against Diamond Trust***

17. Before I proceed to deal with the violation of the substantive fundamental rights and freedoms, I turn to the claim against Diamond Trust. Diamond Trust was not a party to the application for the search and seizure warrant or the revision proceedings in the High Court. It was however sued by the petitioners for the letter it wrote to Central Bank. In the suit, **Nairobi HCCC No. 123 of 2013 (Manfred Walter Schmitt and Sparkyben Limited v Diamond Trust Bank Kenya Limited)**, the petitioners seek, inter alia, “A declaration that the Defendant’s act of wilfully and knowingly publishing a false and malicious letter and report amount to malicious reporting contrary to section 10 and section 44(2) of the Proceeds of Crime and Anti-Money Laundering Act.”
18. The petitioners’ claim against Diamond Trust in this petition is in effect an agitation of the same cause of action based on the same facts as the existing suit. Such a claim is not permitted as it is *sub-judice* and an abuse of the court process. The claim against Diamond Trust must be struck out.

### ***Violation of rights and fundamental freedoms***

19. The facts in this case arise from the fact the petitioners’ accounts were seized on the basis of an application by BFID. As I stated earlier in the judgment, the key issue for consideration is whether the petitioner’s right to privacy under **Article 31** was violated. I dealt with this issue extensively in **Nairobi High Court Criminal Revision Application No. 569 of 2012** where I stated as follows;

*[18] The subject of these proceedings is an order issued by the court to permit the BFIU to conduct an investigation and restrain dealing with the applicants’ accounts. The authority given to State agencies to conduct searches and seizures is a limitation of the fundamental right to privacy protected under the provisions of **Article 31** which provides as follows;*

*Every person has the right to privacy, which includes the right not to have—*

- (a) their person, home or property searched;*
- (b) their possessions seized;*
- (c) information relating to their family or private affairs unnecessarily required or revealed; or*
- (d) the privacy of their communications infringed.*

*[19] Since searches infringe the right to privacy and the right against arbitrary deprivation of property protected under **Article 40**, searches must be conducted in terms of legislation which must comply with the provisions of **Article 24**. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains, which include obtaining information from third parties like banks, of ordinary citizens is one of the features that distinguish a democracy from a police state. (See **Samura Engineering Limited and Others v Kenya Revenue Authority Nairobi Petition No. 54 of 2011 [2012]eKLR** and **Mistry v Interim National Medical and Dental Council & Others CCT 13/1997 [1998] ZACC 10** at para. 25 per Sachs J.).*

20. After reviewing the evidence before the subordinate court, I concluded that, “[26] [I]n my view an objective assessment of the application and the deposition before the learned magistrate lacks substance as there is no evidence upon which the learned magistrate could have concluded that there was a basis for issuing a warrant or ordering a restraint on the applicants’ bank accounts.” I proceeded to discharge the warrants issued. The result of those proceedings and decision is that issue whether there was a violation of the petitioner’s right to privacy was conclusively determined in that case and cannot be re-opened or re-litigated in these proceedings as it is barred by the doctrine of issue estoppel. In **Trade Bank Ltd v LZ Engineering Construction Ltd [2001] EA 266, 272**, the Court of Appeal, adopting the definition of issue estoppel in **Halsbury’s Laws of England (4th Ed.) at p. 861**, stated that, ‘An Estoppel which has come to be known as an Issue Estoppel may arise where a plea of res-judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law.’ The decision on review is therefore conclusive on the validity of the warrants issued by the subordinate court. It is now beyond contest, at least in the circumstances of this case (see also **Daniel Toroitich arap Moi v Mwangi Stephen Muriithi and Another CA Civil Appeal No. 240 of 2011 [2014]eKLR**).
21. The purpose of a warrant of search and seizure is authority to perform an act which would otherwise be unlawful and once it is set aside anything upon which it is predicated becomes unlawful and the holder of the warrant becomes liable for violation of the right. In **Ivanov v North West Gambling Board [2012] ZASCA 97**, the South Africa Court of Appeal summarised the principle thus, “[15] [T]he lawfulness of the search and seizure is dependent on the legality of the search warrant. This must necessarily be so as the warrant provides justification for the search and seizure. If the warrant is declared null and void, it means that there was no basis in law for the search and seizure, which were therefore invalid ex tunc. In this case, the police had no authority to seize the appellant’s goods, albeit that they acted in good faith and that they believed that they had the power to search in terms of the warrant. Once the order of invalidity was issued, the necessary consequence is that the police acted unlawfully.” The result of the finding in **Nairobi High Court Criminal Revision Application No. 569 of 2012** is that BFID’s action was unlawful and a violation of the petitioners’ right to privacy.
22. The violation of the right of privacy under **Article 31** of Constitution attracts several remedies. First, the petitioner is entitled to apply to the court which issued the warrant or the High Court to set aside the warrant. In this case, the petitioners invoked the High Court jurisdiction under **section 364** of the **Criminal Procedure Act (Chapter 75 of the Laws of Kenya)** to set aside the order of the subordinate court. Under those provisions the High Court has no jurisdiction to award damages. The Court only determines that legality of the action.
23. Second, in the event the petitioners were to face a criminal trial, they entitled to rely on the exclusionary rule under **Article 50(2)(4)** of the Constitution to exclude evidence obtained as a result of violation of his right to privacy. The third remedy for a party aggrieved, is to seek damages for the illegal warrants of search and seizure.
24. The pursuit of the remedy by way a petition made under **Article 22** of the Constitution is without prejudice to any of the remedies that the petitioner is entitled to pursue. **Article 22** is broad in its scope and intended to avail an aggrieved person the full protection and enjoyment of his or her fundamental rights and freedoms hence the filing the petition against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to seek damages cannot be construed as an abuse of process in the circumstances.

### **Whether the petitioner is entitled to damages**

25. Under **Article 23** of the Constitution, the Court is empowered to grant appropriate relief including damages. The petitioners seek special damages. Their claim comprises expenses incurred in defending **High Court Criminal Revision Application No. 569 of 2012** which includes the cost of accommodation and airfare presumably for the 1<sup>st</sup> petitioner for the time he was in Nairobi to instruct his advocate and to attend the hearing the case. The amount claimed is Kshs 491,104.26. The petitioners claim legal fees paid to their advocates *Rachier and Amollo Advocates* to defend them, set aside and discharge the restraint orders issued by the subordinate court amounting to Kshs. 12,913,350.00.
26. The petitioners also claim loss of interest on the sums of monies held on account of the warrants issued in favour of BFID from 15<sup>th</sup> January 2013 to 12<sup>th</sup> February 2014. In the petition, the 1<sup>st</sup> petitioner avers that his attempt to establish new bank accounts failed as BFID has blacklisted him on account of suspicious banking transactions. He claims interest at the rate of 13.5% on the sum of Kshs 635,000,000 and amounting to Kshs 5,789.373.28.
27. The petitioners claim to have suffered economic loss in the form of lost business opportunities and the stalling of potential investment due to the freezing of their accounts from 13<sup>th</sup> February 2013 to 12<sup>th</sup> February 2014. They seek interest at 5.5 % per annum on Kshs 635,000,000 less 15% withholding tax which amounts to Kshs 29,686,250.
28. It has been said time and again special damages must be pleaded with particularity and proved (see *Ratcliffe v Evans* [1892] 2QB S24; *Kampala City Council v Nakaye* [1972] EA 446, *Siree Limited v Lake Turkana El Molo Lodges* [2002] 2 EA 521 and *Hahn v Singh* [1985] KLR 716.) This duty is in no way lessened by the fact that the matter before the court is a petition for the enforcement of fundamental rights and freedoms as the respondent is entitled to have notice of the kind of claim to be defended. I have considered each head of special damages and I make the following findings.
29. The petitioners seek expenses incurred in defending themselves in **Criminal Revision No. 569 of 2012**. It is not in doubt that certain costs and expenses were incurred in defending that matter. However, the issue is whether they are recoverable under a separate cause. The final order that case was that, “**there shall be no order as to costs.**” This implies that each party was to shoulder the burden of its own costs and expenses. As the order was not challenged on appeal, it cannot be re-opened in these proceedings. Even if I were to take a different view, I do not think the 1<sup>st</sup> petitioner would be entitled to such expenses. He has deponed that he is a businessman with interests within and outside Kenya. His travel and accommodation could not be attributed solely to the court case. I also note that there were no receipts annexed to the affidavit showing that the firm of *Rachier and Amollo Advocates* had been paid the sums claimed as legal fees.
30. As regards the item for loss of interest on monies held in the account, I find that whereas the petition has pleaded the amount, the affidavit does not set out the factual basis of the calculations. There no evidence of the actual amount in the account by way of bank statement or certificate from the bank to show the actual amount held and the interest rate applicable on those accounts. In my view the amount is not supported by anything that would assist the court make such a determination. Likewise the claim for economic loss is a bland statement bereft of substance. The 1<sup>st</sup> petitioner has given evidence of the nature of his business, identified the specific opportunities lost and the real and tangible loss of money as a result.
31. I therefore find and hold that he petitioner proved that loss of Kshs. 59,507,813.83 claimed in the petition.
32. The dismissal of the claim for special damages is not the end of the matter. As I stated earlier, the duty of the court is to provide appropriate relief and our courts have awarded general damages in case where the right to privacy has been violated. In **Standard Newspapers Limited and Another v Attorney General and Others Nairobi Petition No. 113 of 2006 [2013]eKLR**, the court

awarded general damages amounting to Kshs. 5,000,000.00 for unlawful search and seizure without a search warrant. In that case the action was accompanied by unidentified police officers who used force. In ***Samura Engineering Limited and Others v Kenya Revenue Authority Nairobi Petition No. 54 of 2011 (Unreported)*** the court awarded between Kshs. 600,000.00 and Kshs. 1,200,000.00 where person belongings were seized without a warrant from the court. In ***Abubakar Shariff Abubakar v Attorney General and Another Mombasa Petition No. 82 of 2012 [2014]eKLR***, Kshs 400,000 was awarded while in ***Joseph Musomba v Attorney General Kisumu Petition No. 4 of 2011 [2012]eKLR***, the petitioner was awarded Kshs. 500,000.00.

33. In this case, the BFID filed an application for warrants but they failed to provide sufficient basis for the grant of the orders. In the circumstances, I do not think the action by the respondents was motivated by actual malice or bad faith. On the other hand, the 1<sup>st</sup> petitioner suffered the humiliation and indignity of his accounts being frozen without lawful cause. Taking these factors into account and the authorities I have cited above, a global sum of Kshs. 500,000 for each of the petitioners would go some way in vindicating the petitioners' rights.

34. As regards costs, I see no reason why the normal rule on costs should not apply. However, I shall direct the 1<sup>st</sup> and 3<sup>rd</sup> respondents to bear ½ the costs of the claim as they lost the claim for malicious prosecution which was a substantial claim. The petitioners shall however bear the 4<sup>th</sup> respondent's costs as a result of the finding that the case against the bank is an abuse of the court process.

### **Disposition**

35. The final orders are therefore as follows;

- a. **I declare that the petitioners' rights to privacy under Article 31 of the Constitution were violated by the 1<sup>st</sup> and 3<sup>rd</sup> respondents.**
- b. **The 1<sup>st</sup> and 3<sup>rd</sup> respondent shall pay each of the petitioners Kshs, 500,000.00 as general damages to each petitioner and the said sum shall accrue interest at court rates from the date of this judgment.**
- c. **The case against the 4<sup>th</sup> respondent is dismissed with costs to be borne by the petitioners.**
- d. **The 1<sup>st</sup> and 3<sup>rd</sup> respondents shall bear ½ of the petitioners' costs.**

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> May 2014.**

**D.S. MAJANJA**

### **JUDGE**

Mr Ligunya, instructed by Rachier and Amollo Advocates for the petitioners.

Mr Ojwang', Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

Mr Okello, Senior Principal Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the 2<sup>nd</sup> respondent.

Mr Oraro, instructed by Oraro and Company Advocates for the 4<sup>th</sup> respondent.