REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Revision 569 & 2326 of 2012

IN THE MATTER OF AN APPLICATION BY:

MANFRED WALTER SCHMITT ..... 1ST APPLICANT

SPARKYBEN LIMITED ..... 2ND APPLICANT

VERSUS

REPUBLIC ..... 1ST RESPONDENT

CHIEF MAGISTRATE'S COURT ..... 2ND RESPONDENT

AND IN THE MATTER OF

BANKING FRAUD INVESTIGATIONS UNIT ..... APPLICANT

VERSUS

MANFRED WALTER SCHMITT …..... 1ST RESPONDENT

SPARKYBEN LIMITED …….... 2ND RESPONDENT

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

RULING

Introduction

1. The 1st applicant is a resident of Germany and a director of the 2nd applicant company. This application arises of out certain monetary transaction concerning the company accounts at the Diamond Trust Bank Limited ("the bank") which are now the subject of investigation by the 1st respondent and the issue for determination is whether the learned magistrate was entitled to issue an order permitting the investigation of the applicants' accounts and restraining any transactions on the said accounts.

The Application and proceedings in the Subordinate Court

2. The Notice of Motion before the Court is dated 22nd November 2012 and is brought under the provisions of **section 362** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which provides that, ***"the High Court may call for and examine the record of any criminal proceedings before***

any subordinate court for purposes of satisfying 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 any such subordinate court."

3. The applicants have moved the court for the following principal order;

[3] That the inter-partes hearing of this application, the Honourable Court be pleased to call for and examine the record of criminal proceedings in ***Miscellaneous Criminal Application 2326 of 2012 BANKING FRAUD INVESTIGATIONS UNIT vs MANFRED SCHMITT, SPARKYBEN LIMITED AND DIAMOND TRUST BANK*** *before the Chief Magistrate's Court at Milimani Law Courts to satisfy itself as to the correctness, legality and or propriety of the findings and orders recorded and passed by the subordinate court, and the regularity of proceedings with a view to vacate and set aside or reverse and alter the orders given on 24th October 2012 and lift the restraint orders effected pursuant to the same on accounts number 020215235 and 020215219 both held at Diamond Trust Bank Diani Branch in the names of the 1st and 2nd Applicants respectively.*

4. The genesis of the proceedings is an application dated 24th October 2012 filed on behalf of the Banking Fraud Investigations Unit ("BFIU"). The Ex-parte Notice of Motion was made under **Section 118** and **121(1)** of the ***Criminal Procedure Code*** and **section 180** of the ***Evidence Act (Chapter 180 of the Laws of Kenya)***. The application sought the following prayers.

(i) That this application be deemed fit for admission for hearing on a priority basis.

(ii) That the Honourable Court be pleased to issue a warrant to investigate and restraint account to the applicant to enable No. 65854 CPL GERALD KANYITHIA, an investigator with Banking Fraud Investigation Unit of Criminal Investigation Department, have access and obtain information and carry away documents relating to the transactions for the period in respect of Diamond Trust Bank Kenya Limited, A/C No. 020215235 in the names of Manfred Walter Schmitt and Sparky Limited A/C No. 020215219.

(iii) That the orders of this Honourable Court be served upon the Manager Diamond Trust Bank Kenya Limited.

(iv) That there be no order as to costs of this application.

5. The grounds as set out in the motion were that the applicant was undertaking investigations of suspicious transactions in the applicants accounts being operated in the bank and the accounts received funds which aroused suspicion and that on the 18th October 2012 this BFIU received a report from the Central Bank of Kenya ("CBK") requested it to investigate the matter.

6. The application was supported by the affidavit of Corporal Gerald Kanyithia, an investigating officer within the BFIU and sworn on 24th October 2012 where he stated as follows;

(i) That I am an investigator attached to Banking Fraud Investigation Unit of Criminal Investigation Department and I am competent and have been authorised to swear this affidavit.

(ii) That the Banking Fraud Investigation Unit is involved in investigations in a case of theft of Treasury Bonds which were fraudulently sold.

(iii) That the information in the bank account will go a long way in assisting the investigation being undertaken by the applicant.

(iv) That I swear this affidavit in support of the application for an order to investigate and restraint the accounts to enable me access information and documents relating to the respondents account here in above held at Diamond Trust Bank.

(v) That the facts deponed to herein are true and within my knowledge, belief and ability.

(vi) That the investigations have so far revealed that the suspected transactions are held at the said Bank Diani branch.

(vii) That I pray to this Honourable court to issue me with an order to investigate and restraint account numbers 020215235 and account No. 020215219 domiciled at Diamond Trust Bank Diani Branch.

7. On 24th October 2012 the Magistrate heard the application and made the following order, ***"I have considered the Notice of Motion Application dated October 24, 2012 and the affidavit of Cpl. Gerald Kanyithia of the same date in support of the application. I find the application meritorious and hereby grant the orders as sought therein."***

8. Pursuant to the Magistrate's order, the following order was extracted.

The Managers,

Diamond Trust Bank Kenya Limited

WHEREAS it has been proved to me on oath that for the purpose of an investigation into the commission of an offence it is necessary or desirable to inspect the book or books of Diamond Trust Bank Kenya Ltd which relates to account No. 020215235 and account No. 020215219 in the names of MANFRED WALTER SCHMIT and SPARKYBEN LIMITED respectively which are held with the said bank.

NOW THEREFORE I authorise No. 65854 CPL GERALD KATHITHIA an investigator with Banking Fraud Investigation Unit of Criminal Investigation Department by this order to investigate and restraint the said accounts and require the production and taking of certified copies (except where expressly indicated).

(i) Account opening documents/signing mandate (original)

(ii) Account Statement for the period when the accounts were opened to date.

(iii)All the Real Time Gross Settlement forms transacted for the period.

(iv) Any other related documents in relation to the accounts.

And upon hearing the application Exparte, supported by an affidavit by No. 65854 CPL GERALD KANYITHIA it is hereby ordered that an order do and is hereby issued directing the Diamond Trust Bank Kenya Ltd to restraint account No. 020215235 and 020215219 in the names of MANFRED WALTER SCHMIT and SPARKYBEN LIMITED respectively till the investigations are completed or until further ordered by this Court.

Given under my hand and seal of the court this 24th day of October 2012

Applicant's Case

9. The applicants only came to learn of the order on 24th October 2012 once the accounts were frozen and are aggrieved by the order on several grounds which were articulated by their advocate, Mr Ligunya. They complain that the court granted final orders *ex parte* against parties without so much as granting them audience or the opportunity for redress at a later time. That there was not direction issued that the affected parties be served or that even notice be issued to the affected persons. Further that the orders did not require the BFIU to report back to the Court on its findings or the result of the investigations whatsoever and indeed no report has been rendered at all to date.

10. The applicants also contend that there has been no adverse finding against their accounts and that they were not of any allegations against them. They contend that they were only contacted for questioning and or interrogation about a month after the orders were issued.

11. Mr Ligunya contended that the application before the subordinate court was incompetent as the provisions of the law cited in the ***Criminal Procedure Code*** and ***Evidence Act*** did not in any event allow for the restraint/freezing of the accounts. Counsel submitted that the provisions of the ***Proceeds of Crime and Anti-Money Laundering Act (Act No. 9 of 2009)*** which areapplicable to this case were not followed.

12. According to the applicants, the application upon which the orders were sought and granted was vague and lacked substance in the several regards. That the BFIU referred to a report from the CBK directing investigation without so much as indicating what the report required it to do or how the report related to the applicants. Further that the BFIU did not annex the CBK report or at least its recommendation in order to inform the Court in its determination. Mr Ligunya submitted that the facts upon which the application was based were threadbare as there was nothing to demonstrate the alleged suspicious transactions.

13. It is on this basis of the matters outlined above that the applicants seek revision of the orders issued by the subordinate court.

Respondent's Case

14. The application was opposed by counsel for the respondents, Mr Okello, who appeared with Mr Warui. According to the respondents the learned magistrate acted within the law and no basis has been made out for the Court to interfere with the orders issued. Counsel contended that the deposition by Corporal Gerald Kanyithia constituted sufficient and reasonable ground for the magistrate to issue the orders.

15. The respondents' position is that the subject of this case was a criminal investigation which was governed by the provisions of the ***Criminal Procedure Code*** and the ***Evidence Act*** and therefore the ***Proceeds of Crime and Anti-Money Laundering Act*** was not applicable to this case. Counsel further contended that the subordinate court has jurisdiction to issue a restraint order where the subject of the investigation was money as money can only be preserved by restricting its use. Mr Okello further submitted that in accordance with **sections 118** and **121** of the ***Criminal Procedure Code***the orders of the court were not final and the investigating officer had go back to the court to inform the court of the proceeds of the search and seizure and there was indeed an opportunity for the applicants to go back and move the subordinate court for appropriate orders.

Determination

16. This is an application for revision of the order of the subordinate court and the duty of the Court is to satisfy itself of the propriety of the order made by the subordinate court on 24th October 2012. I have considered the arguments made by the parties and I think for purposes of this case I shall limit my observations to the provisions of the ***Evidence Act*** and the ***Criminal Procedure Code*** as are necessary to dispose of the matter. I will not consider the applicability of the ***Proceeds of Crime and Anti-Money Laundering Act (Act No. 9 of 2009)*** as the application in the subordinate court was not made under the provisions of the said Act.

17. The promulgation of the Constitution heralded a values based approach to application and determination of fundamental rights and freedoms. **Articles 18, 19** and **20** as read with **Article 10** demand that the Bill of Rights and national values and principles of governance must now permeate every decision made by every person exercising authority under any law and the Constitution and it falls upon this Court to consider this case in that shadow of the Bill of Rights and the values of the Constitution.

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 (Unreported)** and ***Mistry v Interim National Medical and Dental Council & Others*** **CCT 13/1997 [1998] ZACC 10** at para. 25 per Sachs J.).

20. Thus the limit to the right to privacy to the extent of providing for the procedure of conducting searches and seizures is set out in **sections 118, 119, 120** and **121** of the ***Criminal Procedure Code***. **Section 118** of the ***Criminal Procedure Code*** which empowers the court to issue search warrants stipulates 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 mine]

21. In interpreting this provision the court Honourable Justice Osiemo in ***Vitu Limited v The Chief Magistrate Nairobi & Two Others***, ***H.C. Misc. Criminal Application No. 475 of 2004*** (Unreported) held, ***"It is therefore expected that when a police officer or any other investigator approaches the Court for a warrant, there must be reasonable suspicion of an offence being about to be committed or having been committed …"*** [Emphasis mine]Similarly in ***Cargo Distributors Limited v Director of Criminal Investigations Department***, **H.C. Misc. Application No. 39 of 2006** (Unreported) Honourable Justice Nyamu ruled,"***On a prima facie view although these are proceedings concerning the alleged theft of containers a warrant under s. 180 of the Evidence Act does not have to be issued following proceedings and all the police officer is required [to do] to satisfy the Judge or Magistrate is that his inquiry is based on reasonable suspicion."*** [Emphasis mine]

22. **Section 180 (1)** of the ***Evidence Act*** is to the same effect and it provides;

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 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 mine]

23. As an *ex-parte* order for search and seizure cannot be challenged before it is conducted, the party affected is entitled to challenge the action afterwards and the court is entitled to declare the warrant invalid. In my view, the affected party may make an application before the court that issued the warrant or in a case such as this apply for revision of the order. The Court's duty in such a case is to assess independently and objectively the evidence present at the time the warrant was issued and determine whether there were reasonable grounds placed before the court to establish the applicant's entitlement to an order of search and seizure. This inquiry is to be conducted on the basis of the facts as presented before the court at the time the application was made. It is for this reason that I have not considered nor commented on the facts set out in the Further Affidavit of Stephen Ligunya sworn on 10th December 2012 which purports to introduce new evidence.

24. As regards the jurisdiction to grant the orders, I am satisfied that under **section 180** of the ***Evidence Act*** the BFIU had the right to apply for and the court was entitled to grant the request for a warrant to investigate the applicants accounts, which are subsumed under the rubric of *"banker's book."* I am also satisfied that the BFIU is entitled to apply to the court *ex-parte* should circumstance permit and the court is entitled to consider the case on that basis.

25. The issue then for consideration is whether there were reasonable grounds for suspicion that the applicants had committed any offence to warrant the issuing of orders to investigate the applicant's accounts. The substance of the application is to be found in the deposition of Corporal Gerald Kanyithia, which I have set out at paragraph 6 above. Paragraph 2 and 3 of the affidavit are merely general allegations that do not point to any wrongdoing by the applicants. The allegation that there theft of Treasury Bonds which requires investigation is inadequate in the absence of some facts linking the applicants and their account and the theft of these bonds. Paragraphs 4 and 6 merely point to the accounts and allege suspicious activity. No facts are placed before the court for the court to objectively conclude that the indeed there is criminal activity involving the applicants in relation to their accounts at the bank which would entitle the BFIU proceed with investigations suggested. Even the CBK report dated 18th October 2012 alluded to in the face of the motion was not placed before the Court for consideration. These facts set out in the deposition are woefully inadequate to found a case for the grant of a warrant under the provisions of **section 118** of the ***Criminal Procedure Code*** of **section 180** of the ***Evidence Act***. I would hasten to add, that the standard of evidence required is that of reasonable evidence to connect the subject to the crime and each case must be judged on its merits.

26. The decision of the learned magistrate dated 24th October 2012 and which I have set out at paragraph 7 above, is also perfunctory in its nature. The learned magistrate did not set out the ground upon which she founds that the grounds proffered by the BFIU were meritorious. In 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.

27. Having found that there was no reasonable basis to grant the order, it is not necessary for me to determine whether the learned magistrate had the jurisdiction to grant orders restraining the account although, I note, contrary to the applicants' arguments the said order was sought in the motion. I also observe that where an order has been issued restraining or freezing accounts, the order should not be open ended and should be given for a strict period of time so that the subject of the order is given an opportunity to contest the same.

28. I would be remiss if I did not comment on the nature of the proceedings before the subordinate court. The duty imposed on the judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual. The Court is not a conveyor belt for issuing warrants when an application is made nor must the court issue warrants of search and seizure as a matter of course. When an application is made, the Court is required to address itself to the facts of the case and determine, in accordance with the statutory provisions, whether a reasonable case has been made to limit a person's rights and fundamental freedoms. On the other hand, the duty of the State and its agencies, in investigating and prosecuting crime, is to furnish the Court with facts upon which the court can conclude that there is reasonable evidence of commission of a crime by the person it

seeks to implicate by the application for search and seizure.

29. In conclusion therefore I make the following order;

(a) The Notice of Motion dated 22nd November 2012 is allowed to the extent that the order made issued on 24th October 2012 in *Nairobi Chief Magistrate Miscellaneous Criminal Application 2326 of 2012, Banking Fraud Investigations Unit V Manfred Schmitt, Sparkyben Limited And Diamond Trust Bank* be and is hereby set aside and discharged.

(b) There shall be no order as to costs.

DATED and **DELIVERED at NAIROBI** this 7th day of January 2013

D.S. MAJANJA
JUDGE

Mr S. Ligunya instructed by Rachier and Amollo Advocates for the applicants.

Mr Okello with him Mr Warui, instructed by the Director of Public Prosecution for the respondents.