



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. APPL. NO. 292 OF 2013

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE CHIEF MAGISTRATE, KIBERA.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

EXPARTE

MARYANNE NJERI NJOROGE

AND

GEOFFREY NDUNGU GATHII.....INTERESTED PARTY

RULING

1. This decision concerns whether the leave granted should operate as a stay of the orders issued by the subordinate court freezing the ex-parte applicant's client account.
2. Leave in this matter was granted on 15th August 2013 by Korir J., for the *ex-parte* applicant to apply for the following orders which are set out in the Notice of Motion dated 19th August 2013 as follows;
 - i. *An Order of Certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent or officers subordinate to him and or the Kenya Police, from freezing the Applicant's Account Number [particulars withheld] at Consolidated Bank Limited on Harambee Avenue Branch in Nairobi.*

- ii. *An Order of Prohibition directed at the 1st Respondent in person or through officers subordinate to him be prohibited from interfering in any way whatsoever with the Applicant's Account Number [Particulars withheld] at Consolidated Bank Limited, Harambee Avenue Branch, Nairobi.*
 - iii. *That, the grant of leave herein do operate as a stay of the Order freezing the Applicant's Account Number [particulars withheld] at Consolidated Bank Ltd, Harambee Avenue Branch, Nairobi.*
 - iv. *That costs of this application be in the cause.*
3. The *ex parte* applicant is a partner in the firm of advocates trading in the name and style of **Njoroge Nyagah and Company Advocates** ("the firm"). According to the Verifying Affidavit of Maryanne Njeri Njoroge sworn on 8th August 2013, the firm's client account was frozen pursuant to an order issued in **Kibera Criminal Case No. 209 of 2013** issued on 24th July 2013. As such, she contends that the firm has been unable to operate the account which holds client's funds. The applicant also claims that neither she nor her partner is a party to the criminal case.
 4. The first respondent through the replying affidavit of Corporal Peter Kireri sworn on 19th August 2013 opposes the application on account of the fact that the matter concerns an ongoing investigation ensuing from a complaint lodged by one Florence Soila Nyossor against Geoffrey Ndungu Gathii in respect of some property in Kajiado which was sold to Johari Investments Limited in which the *ex parte* applicant is a director. It is alleged that Johari Investments Ltd sold part of the subject property to another company DCF Engineering Ltd. Pursuant to the sale agreement, a payment of Kshs. 22,500,000.00 paid into the firm's client account by the purchaser's advocates, Muttisya and Company Advocates.
 5. It is the first respondents' contention that the freezing of the account was to facilitate investigation and safeguard the funds received from Muttisya and Company Advocates. Furthermore, despite the orders, the Manager of Consolidated Bank has declined to release the documents sought in the court order. The first respondent also argued that the freeze was only temporary to enable the police complete investigations.
 6. I have considered the arguments by the parties and I take the following view of the matter. The grant of leave to operate as a stay is discretionary and is intended to secure the subject matter pending the determination of the application. It is also intended to avoid hardship that may ensue following the decision that is contested in the judicial review proceedings.
 7. In this case, the issue is whether the stay should be granted that would result in unfreezing the firm's client account. The order issued by the Kibera Chief Magistrates Court was a warrant to investigate an account and it related to investigation of documents namely the account opening documents and the account statements from the date of opening the account. These documents would be available whether or not the funds are frozen and the order may be enforced against a recalcitrant bank manager if he fails to comply with the warrant. The freezing of the client account was unnecessary and unreasonable in the circumstances. A client account holds funds due to third parties who would be affected adversely unless such an order targets the specific funds subject of the complaint.
 8. I have considered the statement written by the *ex-parte* applicant in the course of the investigation and which is attached to the Corporal Kireri's affidavit and it is clear that the balance of purchase price of Kshs. 20,250,000.00 was released to the company's shareholders in February 2013. By the time the warrant was executed on 24th July 2013, the firm no longer had the money and it would be unreasonable to freeze the client account in the circumstances.
 9. I am aware that the grant of this order effectively determines the motion but based on the facts I have outlined the *ex-parte* applicants case has a very high degree of success. My decision is fortified by the fact that the counsel for the first respondent conceded that the freezing of the account was temporary to facilitate investigations. Quite apart from the fact that the order has

been in force for almost a month, it is clear as I have demonstrated, the warrant may still be enforced against the bank to finalise investigations.

10. For the reasons I set out above, the leave so granted shall operate as a stay in terms of prayer 3 of the Notice of Motion dated 19th August 2013 that is to say;

- a. **That the grant of leave herein do operate as a stay of the Order issued by the Chief Magistrates Court Kibera in Criminal Case No. 209 of 2013 freezing the Applicant's Account Number [particulars withheld] at Consolidated Bank Ltd, Harambee Avenue Branch, Nairobi.**
- b. **Cost of the application shall be in the cause.**

DATED and DELIVERED at NAIROBI this 23rd day of August 2013.

D.S. MAJANJA

JUDGE

FURTHER ORDER: In view of the ruling I have issued, it is no longer necessary to determine the Notice of Motion and in the circumstances and *suo moto*, I grant the Notice of Motion dated 19th August 2013 in terms of prayer 1. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 23rd day of August 2013.

D.S. MAJANJA

JUDGE

Ms Owino instructed by N.A. Owino and Company Advocates for the ex-parte applicant.

Ms Kirimi, Litigation Counsel, instructed by the Directorate of Public Prosecutions for the 1st respondent.

Ms Chege, Litigation Counsel, instructed by the State Law Office for the 2nd and 3rd respondent.