



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)

MISCELLANEOUS APPLICATION 18 OF 2012

BERYL AKINYI MUGANDA.....APPLICANT

VERSUS

ETHICS & ANTI CORRUPTION COMMISSION.....RESPONDENT

AND

BARCLAYS BANK OF KENYA.....INTERESTED PARTY

RULING ON REVISION

On 3rd August 2011 the Kenya Anti-Corruption Commission filed an application before the Chief Magistrate's Court, Kibera. The said application was filed pursuant to **sections 118 and 121 (1) of the Criminal Procedure Code**, as read together with **section 23 (3) of the Anti-Corruption and Economic Crimes Act**.

Through the said application, the Kenya Anti-Corruption Commission sought orders for the seizure and preservation of all the money held in the bank account No. 073-427557, at Barclays Bank of Kenya Limited, Westlands Branch.

The application was supported by the affidavit of Kipsang Sambai, a Forensic Investigator with the Kenya Anti-Corruption Commission. He deponed that he was investigating allegations that the Ministry of Health had paid huge amounts of money to some of its employees under unexplainable circumstances, which the Commission suspected to be fraudulent.

One of the said employees is RUTH ATIENO MUGANDA, the Principal Accounts Controller at the Ministry of Health.

The account which the Commission was investigating was in the names of the said Ruth Atieno Muganda together with BERYL AKINYI MUGANDA, who is believed to be her daughter.

It was the contention of the Commission that the account in issue had about KShs.19,000,000/-.

As the account holders are believed to have been to the bank on several occasions, to withdraw money from the account in issue, the Commission feared that if the account was not frozen, the Commission's investigations would be jeopardized.

The application was heard by Hon. A. Mwangi, Resident Magistrate. Having given due consideration to the application, the learned magistrate granted orders to seize and preserve all the money in the bank account in issue. The said orders were granted on 3rd August 2011.

After the orders were extracted and served upon Barclays Bank of Kenya Limited, the account was effectively “frozen.”

On 20th February 2012, Mr. Paul Muite and Mr. Koonal appeared before Hon. A. Mwangi, on the instructions of the account holder.

Mr. Muite advocate urged the trial court to vacate the orders which had been made on 3rd August 2011. His application was based on the grounds that the court had acted without jurisdiction.

Secondly, Mr. Muite argued that any orders for the preservation of suspect property could only remain effective for a maximum of six months. Therefore, the orders made on 3rd August, 2011, would have expired, by operation of the law, on 2nd February, 2012.

After giving due consideration to the submissions of the account holders, the learned trial magistrate stated that he had not ever had jurisdiction to entertain matters brought under the Anti-Corruption and Economic Crimes Act. The said learned magistrate was persuaded that it was only the High Court that had the jurisdiction to make orders preserving suspect property.

Consequently, the court referred the matter to Hon. T. Matheka, Senior Principal Magistrate.

On the next day, (21st February 2012), the matter was placed before Hon. Matheka SPM.

In a brief ruling, the learned magistrate stated that because the matter concerns the Anti-Corruption and Economic Crimes Act, the Resident Magistrate lacked jurisdiction to handle it. Therefore, the court directed that the file be placed before the High Court, to enable the said court deal with the matter accordingly.

It is on the strength of those orders that the case was placed before me, for Revision.

When the matter was first placed before me on 5th of March 2012, I directed that all the parties directly affected should be served, so that they would thereafter have an opportunity to address the court.

On 14th March 2012, Mr. Muite advocate, appearing for the account holder, urged me to order that the orders freezing his clients’ account be reversed.

He submitted that **section 23 of the Anti-corruption and Economic Crimes Act** did not confer any jurisdiction on the Resident Magistrate. As far as he was concerned, that section simply states that officers of the Kenya Anti-Corruption Commission have similar powers to those of police officers.

Secondly, Mr. Muite advocate submitted that pursuant to **section 56 of the Anti-Corruption and Economic Crimes Act**, it is only the High Court that was vested with jurisdiction to make orders to preserve the subject-matter of investigations.

In any event, submitted Mr. Muite, any orders for the preservation of the subject-matter had to be served.

And the said orders could only be valid for upto six (6) months, unless they were specifically extended.

In the understanding of Mr. Muite advocate, section 56 deals with all manner of scenarios, including those in which investigations were being undertaken.

As the orders issued by the Resident Magistrate had now been in place for over 7 months, the court was

told that that was yet another reason to warrant the orders sought.

In answer to the application for revision, Mr. Rinkanya, learned advocate for the Kenya Anti-Corruption Commission, submitted that as soon as the Resident Magistrate's Court had granted the original orders, it became *functus officio*. Therefore, the attempts by the applicant, to re-open the matter before that same court were said to be irregular.

Secondly, it was submitted that the application for Revision could not be sustained in the absence of an appeal lodged by the account holder.

Meanwhile, as regards the issue of jurisdiction, it was submitted that the Resident Magistrate had the requisite jurisdiction. Her role was, at that stage, to assist in the process of investigations.

It was further submitted that section **56 of the Anti-Corruption and Economic Crimes Act** only came into force when the High Court was dealing with the civil recovery of property. The said section was said to have no application in situations such as the one before me, where the Commission was conducting investigations in matters of a criminal nature.

On his part, Mr. Ochieng, learned advocate for Barclays Bank of Kenya Limited, said that his client would abide by whatever orders this court made. In other words, the bank was not seeking to influence the court in any particular way.

When called upon to reply to the submissions, Mr. Muite said that although the investigations were into allegations of economic crime and corruption, the statute only gave jurisdiction to the High Court, to freeze accounts.

Commenting on the decision in the case of **ABC METALLURGIACS LIMITED Vs REPUBLIC, CRIMINAL REVISION NO. 29 of 2009**, Mr. Muite advocate submitted that that case dealt with a scenario in which the Commission wanted to access information about a bank account, but did not seek orders to freeze the account.

Section 118 of the Criminal Procedure Code provides as follows;

“Where it is proved on oath to a court, a magistrate or a justice of the peace 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 any offence, is, or reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court, a magistrate or a justice of the peace may by written warrant (called a search warrant) authorize a police officer or any 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 said warrant) for any such thing and, if any such thing be found, to seize it and take it before any court having jurisdiction to be dealt with according to law.”

Clearly, therefore, a court, a magistrate or a justice of the peace has authority to issue search warrants, authorizing a police officer or any other person named in the search warrant, to conduct a search, and if the search yielded fruits, to seize the thing found.

Pursuant to section 121 (1) of the Criminal Procedure Code;

“Where any such thing is seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.”

To my mind, **section 121 (1)** is complimentary to **section 118 of the Criminal Procedure Code**, because the latter section already states that the thing that is found during the search should be seized and taken before any court having jurisdiction.

It is significant that the law stipulates that when something is found and seized during a search, it shall be

taken before any court having jurisdiction, to be dealt with according to the law.

I believe that the issue of jurisdiction is brought in at that stage because by the time the police or any officer is asking the court to issue a search warrant, he would not know whether or not he will find the thing being sought, and even if he were expecting to find something, he would not know the value of what he will find.

I believe that that is why he is told that when he has found something and seized it, he must then take it before any court having jurisdiction.

By necessary implication, therefore, the court issuing a search warrant need not inquire into the issue of jurisdiction because at that stage the said court is not yet being called upon to exercise its authority and power to try any case.

When a search warrant is issued it is for use in the conduct of the investigation into an offence. The investigations may thereafter be either successful or otherwise. The law is saying that when the investigations are successful, then and then only must the investigator take the thing that was seized to the court which has jurisdiction.

Pursuant to **section 23 (3) of the Anti-corruption and Economic Crimes Act;**

“For the purposes of an investigator, the Director and an investigator shall have powers, privileges and immunities of a police officer in addition to any other powers the Director or investigator has under this Part.”

As the account holder submitted, that section does not confer jurisdiction. However, I do not think that anybody had asserted that the said section conferred jurisdiction.

Under **section 118 of the Criminal Procedure Code**, a search warrant may be issued to a police officer or to any other person named in the search warrant.

To my mind, that provision is already wide enough to include investigators working under the Kenya Anti-Corruption Commission.

Therefore, **section 23 (3) of the Anti-Corruption and Economic Crimes Act** only serves as a matter of abundant caution, to make it crystal clear that when an investigator under the Commission was carrying out investigations, he would enjoy the powers, privileges and immunities of a police officer.

When an investigator in this case sought a search warrant from the court, he had powers to do so.

Under **section 23 (4) of the Anti-corruption and Economic Crimes Act;**

“The provisions of the Criminal Procedure Code, the Evidence Act, the Police Act and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Director and an investigator as if reference in the provisions to a police officer included reference to the Director or an investigator.”

It is for that reason that when the investigator cited **sections 118 and 121 of the Criminal Procedure Code**, he did the right thing even though those sections do not specifically mention an investigator working with the Kenya Anti-corruption Commission.

As the Commission submitted, correctly, in my humble opinion, **Section 23 of the Anti-Corruption and Economic Crimes Act** falls under Part 4 of the Act, which is headed;

“INVESTIGATIONS”.

Therefore, because the Commission was carrying out investigations into a suspected criminal offence, **section 23 of the Act** was directly applicable.

In contrast, **section 56** falls under **Part 6 of the Act**, which is headed;

“COMPENSATION AND RECOVERY OF IMPROPER BENEFITS.”

Therefore, **section 56** comes into play when the Commission is seeking an order prohibiting the transfer or disposal of, or any dealing with property that was acquired as a result of corrupt conduct. The intention is, obviously, to preserve the said property, so that it may ultimately be available as compensation to the person or persons who had suffered a loss due to corruption or economic crime.

In so far as the Commission was not seeking to prohibit the transfer or disposal of the money from the bank account in issue, for later use as compensation, it did not need to move the High Court.

However, I must emphasize that pursuant to **section 118 of the Criminal Procedure Code**, the Commission was obliged to place before the court which has jurisdiction, the bank account that had been seized.

The court that the said account should have been placed before is the special magistrate’s Court, duly authorized to hear and determine cases of persons charged with corruption or economic crimes, if the account holder was charged with a criminal offence. The account would then have been an exhibit before the trial court.

Alternatively, if the Commission wished to have the contents of the account preserved, with a view to using the same to compensate any particular person, the Commission should have sought orders from the High Court.

However, the Commission has not placed the account before either the Anti-Corruption court or the High Court. Yet the account in issue continues to remain frozen, more than 7 months after the Commission commenced its investigations.

I find and hold that although the Commission had power to seek the orders enabling it to investigate the account; and notwithstanding the fact that the Resident Magistrate had jurisdiction to issue the search warrant, it is not right for the investigations to have been put in limbo after the search warrant was executed.

If the investigations revealed that the account holder or anybody else had committed a criminal offence, then charges ought to have been preferred. Thereafter, the account would have been presented to the trial court, as an exhibit.

The Commission could also have sought the orders from the high Court to preserve the account, for use to compensate the person or persons who had suffered losses attributable to corruption or economic crime.

In either scenario, it is not right that the matter remains in limbo indefinitely. I therefore direct the Kenya Anti-Corruption Commission to take steps within the next 30 days, to either have the seized account presented to a trial court as an exhibit, or to seek orders from the High Court to preserve the funds in the account, for use as compensation.

If no steps are taken within the next 30 days, the orders for the seizure of the account will automatically lapse. It is so ordered.

Dated, Signed and Delivered at Nairobi, this 19th day of April, 2012.

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FRED A. OCHIENG
JUDGE