



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CRIMINAL APPLICATION 185 OF 2012**

**SAMUEL MURITHI WATATUA .....APPLICANT**

**SHEM KARANJA WAIGWA.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. This Notice of Motion is dated 10<sup>th</sup> June 2012 and is brought under **Article 40, 50(1), Article 165** of the **Constitution** of Kenya, **schedule 16 paragraph 19** of the **Constitution** of Kenya, Constitution of Kenya Protection of Fundamental Right and (freedoms of individual) Practice and Procedure Rules 2001 and all other enabling provisions of the law. The applicants, **Samuel Muriithi Watatua** and **Shem Karanja Waigwa**, came to court through a Notice of Motion dated 10<sup>th</sup> April 2012 in **Misc Criminal application 185 of 2012**, asking the court to exercise its powers of revision and quash the orders of the chief magistrate issued in **Misc. Criminal Application No. 241 of 2012** on 28<sup>th</sup> February 2012.

2. On 28<sup>th</sup> February 2012 the chief magistrate’s court had issued orders in **Misc. Criminal Application 241 of 2012** pursuant to an *ex parte* application brought by the respondent herein, which orders froze the accounts belonging to the applicants named above, in the banks listed hereunder:

**Bank**

**Account No.**

- |                                    |                         |
|------------------------------------|-------------------------|
| 1. <b>Co-operative Bank Ltd</b>    | <b>011091171573600</b>  |
| 2. <b>Equity Bank Ltd</b>          | <b>0170190676294</b>    |
| 3. <b>First Community Bank Ltd</b> | <b>21202-111521-000</b> |
| 4. <b>Fina Bank Ltd</b>            | <b>1120402045</b>       |
| 5. <b>Bank of Africa Ltd</b>       | <b>07513402045</b>      |

6. **CFC Stanbic Ltd** **0100002217923**

**MM120030003**

7. **Family Bank Ltd** **MM1200500020**  
**035000018759**

8. **Diamond Bank Ltd** **5112648506** in **Misc. Criminal Application 185**

**of 2012**, the applicants herein therefore, by application dated 10<sup>th</sup> April 2012 sought orders unfreezing the

said accounts, and allowing them to access the funds therein.

3. That application was canvassed *inter partes* on 10<sup>th</sup> May 2012 and set for ruling, on 28<sup>th</sup> June 2012. The Intended Interested parties Esther Njeri Ngigi and Espol Agencies Kenya Ltd, have now brought this application dated 25<sup>th</sup> June 2012 seeking to be joined in the suit, **Misc. Criminal Application No. 185 of 2012.**

4. Learned counsel Mr. Ojiambo urged, on behalf of the Intended Interested parties, that there be a stay of the delivery of the ruling in **Misc. Application 185 of 2012** pending the hearing and determination of this application, and pending the hearing of the Intended Interested parties in the said suit. Further, that leave be granted to the interested parties to file a replying affidavit to the notice of motion dated 10<sup>th</sup> April 2012.

5. The grounds of this application are that the intended interested parties are the complainants in **Cr. Case No. 307 of 2012 Republic vs Samuel Muriithi Watatua and others,** in which the applicants herein are charged, *inter alia*, with obtaining Kshs.250 million by false pretences from the Intended Interested Parties.

6. That the Intended Interested parties are the rightful owners of the money held in the applicants' bank accounts, and stand to lose those monies should they not be heard in the notice of motion dated 10<sup>th</sup> April 2012, and, or should the said application be allowed. That it is fair and just that the intended interested parties be heard in the said Notice of Motion.

7. The applicants' have countered the Intended Interest parties' application in their replying affidavit sworn by Samuel Muriithi Watatua on 2<sup>nd</sup> July 2012. In the said replying affidavit it is deponed that the allegations in paragraphs 2, 3 and 7 of the Intended Interested parties' affidavit are untrue, presumptuous and in bad taste in so far as they brand the applicants as fraudsters.

8. The deponent avers that he is a stranger to the claims in paragraphs 4 and 8 of the Interested parties' affidavit and that, the allegations in paragraph 5 are frivolous. Further that the applicants are presumed innocent.

9. Learned counsel Mr. Wandugi urged the above grounds on behalf of the appellants and added that the Notice of Motion dated 10<sup>th</sup> April 2012 had already been fully heard before Hon. Lady Justice Achode, in the presence of all parties and that, therefore the Intended Interested Parties' plea is too late, and has been overtaken by events.

10. That in any case, the Interests of the Intended Interested parties were fully canvassed by the state counsel, and through the affidavit of one IP James Manyuru. That the application should have been filed timeously and to allow it now is only meant to delay the cause of justice,

11. Finally, that the provisions cited do not provide for stay of delivery of ruling, nor confer upon the court, jurisdiction to do so and that there are no lawful procedures for the court to hear for a second time, a matter already heard.

12. Learned counsel Mr. Ojiambo submitted in reply that nothing in the applicants' affidavit objects to the joinder except that the application has been heard in full. He asked the court to invoke **Order 1 Rule 1** of the **Civil Procedure Rules**, which provides that a court may at any time of proceedings join any person who ought to have been joined, or whose presence may enable the court to effectively adjudicate and decide the matter properly.

13. Learned counsel Mr. Wandugi conceded that the Intended Interested parties' wish to be enjoined in the suit is fair and just, and for that reason he had not submitted on the issue but had left it to court to decide. His only worry was that the court had no power to cancel the proceedings already on record, which had been conducted in the presence of all the parties but in the absence of the Intended Interested

Party.

**14.** At this juncture the only question that begs an answer is whether, the ends of justice would be better served by joining the Intended Interested parties to the suit, allowing them to ventilate their side of the story, or by shutting them out altogether because the applicants' have already been heard in their absence. The backdrop to this question is the reality that the intended interested parties were the victims of a fraud, and that there is a real likelihood of their money, the subject matter of the fraud, being held in the accounts listed above and whose funds the applicants seek to access.

**15.** Although the applicant's notice of motion was silent on the amount of money involved, and which they seek to access, the respondent's replying affidavit stated the sum to be Kshs.250 million. If there is a chance that these monies did come from the Intended Interested Parties and that they stand to dissipate upon this court making its decision in the application dated 10<sup>th</sup> April 2012, it is only fair and just that the Intended Interested parties be heard before this court makes a decision which may affect them adversely.

**16.** The rules of natural justice demand that the Intended Interested parties be heard. The proceedings before the court are quasi civil and quasi criminal in nature. As a matter of fact, they are commercial in nature. Although the application is filed in the Criminal Division, the Intended Interested parties have come under the provisions of the Constitution as did the applicants in the original application. The Constitution of Kenya is the Supreme law of the land and all other laws in the land flow from it. **Article 159(3)(d)** of the **Constitution**, which cuts across all court proceedings, be they civil or criminal in nature, provides that

***“justice shall be administered without undue regard to procedural technicalities.”***

**17.** I see nothing in the application of the Indented Interested parties which requires this court to a null or retract its proceedings conducted on 10<sup>th</sup> May 2012. All that is under consideration before this court at this stage is whether the court should stay the ruling in the application dated 10<sup>th</sup> April 2012 and allow the Intended Interested parties to be heard on that application, before the court renders its decision thereon. They cannot be faulted for not coming to court timeously because there is no evidence that they were served or made aware of the application of 10<sup>th</sup> April 2012. Nor was there a requirement that they should have been served. They moved to court as soon as they became aware of it. It has not been demonstrated that the applicant stands to suffer any prejudice, should the court be minded to grant the prayers sought.

**18.** I am therefore convinced that, in the circumstances of this case, the interests of justice will be better served by joining and hearing the Intended Interested parties in the application dated 10<sup>th</sup> April 2012 before the ruling thereon is rendered.

For the foregoing Reasons therefore the application is granted.

**DATED and DELIVERED** in open court this **18<sup>th</sup>** day of **July 2012**.

**L. A. ACHODE**

**JUDGE**