



WARIDI CREATIONS LIMITED.....1ST PETITIONER/APPLICANT

GODINO MWASAMU MWAGHANIA.....2ND PETITIONER/APPLICANT

JENIFER MUMO MUNUTI.....3RD PETITIONER/APPLICANT

NELSON OCHIENG OWARE.....4TH PETITIONER/APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

(sued as the legal adviser of the Kenya Government)

THE POLICE COMMISSIONER.....2ND RESPONDENT

AND

PAUL LAMBERT.....1ST INTERESTED PARTY

VERMONT FLOWERS EPZ LTD.....2ND INTERESTED PARTY

R U L I N G

1. This matter ought to have been concluded on 15th April 2011 when Ochieng, J. delivered a judgment and stated as follows in granting Orders; in favour of the Petitioners/Applicants;

“The Respondents in this case have not demonstrated that, even if they believed that there was need for the police to raid the 1st Petitioner’s premises without search warrants, they complied with the foregoing procedure.

In any event, as already alluded to earlier herein, the Court was not persuaded that there was any justifiable sense of urgency to warrant the police carrying out the raid without search warrants.

It therefore follows that the police acted contrary to the due process of the Law and, that their actions are unlawful.

I direct the Respondents to return forthwith any items which they obtained from the 1st Petitioner's premises in the course of the said unlawful raid.

If the police wish to carry out investigations into any complaint of a criminal nature, which may have been made against the Petitioners, they must ensure that they comply with the letter and spirit of the Law.

Finally, I order the Respondents and the Interested Parties to pay to the Petitioners the costs of this Petition.

2. The dispute between the parties did not end with the issuance of the above Orders because on 27th March 2012, the Petitioners filed an Amended Chamber Summons premised on **Articles 19, 20, 21, 22, 23, 24, 25 and 73** of the **Constitution** of Kenya 2010 *inter-alia* and a number of Prayers are sought viz;

“(1) That the Application be certified as urgent and that the same be heard ex parte in the first instance.

(2) That pending the hearing and determination of this Application, this Court be pleased to order that the Kenya Police and/or the Criminal Investigation Department or other related agencies be restrained from providing or disclosing to the 3rd and/or 4th Interested parties or to any other third parties any documentation, material or information of whatsoever nature obtained from the Applicant's premises in their investigative mandate or otherwise.

(3) That pending the hearing and determination of this Application, this Court be pleased to order that the 3rd and/or 4th Interested Parties by themselves or through any agents or otherwise be restrained from contacting, approaching or soliciting from the Criminal Investigation Department or the Kenya Police or any other related security agency any information, material or documentation obtained from the 1st Applicants premises or interfering with due process of the Law.

(4) That pending the hearing and determination of this Application the Kenya Police and/or the Criminal Investigation Department do forthwith secure any information, material and/or documentation obtained from the Applicants premises from any unlawful access by the 3rd or 4th Interested Parties and/or their agents or otherwise, with a written undertaking filed in Court confirming the same.

(5) That pending the hearing and determination of this Application, the Kenya Police and/or the Criminal Investigations Department be restrained from paralyzing the 1st Applicant's operations in the course of any investigations which should be conducted fairly and reasonably and that they should return all or at least some of the computers seized to enable the Applicants continue their day to day operations.

(6) That the Kenya Police, and/or the Criminal Investigation Department or other related agencies be restrained from providing or disclosing to the 3rd and/or 4th Interested Parties the nature of evidence obtained from the Applicant's premises in their investigative mandate or otherwise.

(7) That the 3rd and/or 4th Interested Parties by themselves or through any agents or otherwise be restrained from contacting, approaching or soliciting from the Criminal Investigation Department or the Kenya Police or any other related security agency or individual to access, or obtain any information, material or documentation obtained from the Applicants premises or interfering with due process of the Law.

(8) That the Kenya Police and/or the Criminal Investigations Department be restrained from

paralyzing the Applicants operations in the course of any investigations or prosecution regarding and/or relating to the Interested Parties complaints.

(9) That the 3rd and/or 4th Interested Parties by themselves or through any agents or otherwise be restrained from contacting, approaching or soliciting from the Criminal Investigation Department or the Kenya Police or any other related security agency or individual to access, or obtain any information, material or documentation obtained from the Applicants premises or interfering with due process of the Law.

(10) That any and all copies of documentation, material or information obtained by the 3rd and 4th Interested Parties or any of their agents from the Kenya Police and/or the Criminal Investigation Department or any of their agents or otherwise relating to the Interested Parties complains was unlawfully and-or fraudulently obtained and cannot be used in any criminal or other proceedings or any arbitration against the Applicants or any third parties.

(10A) That any and all copies of documentation, material or information obtained by the Kenya Police and/or the Criminal Investigation Department or any of their agents of otherwise from the Applicants premises was unlawfully and/or fraudulently obtained and cannot be used in any criminal or other proceedings or any arbitration against the Applicants herein or any third parties.

(11) That the Kenya Police and/or the Criminal Investigation Department or any of their agents and/or the 3rd and 4th Interested Parties and/or their agents be ordered to forthwith return to the Applicants any and all copies of documentation, correspondence and/or material in their possession relating to the Applicants obtained by the Kenya Police and/or the Criminal Investigation Department from the Applicants premises ad to confirm on oath that the same have all been returned.

(12) That the Search Warrant obtained by the Criminal Investigation Department on 6th May 2011 was obtained through material non disclosure and in contravention of the letter and spirit of the law and the Order of the Court on 15th April 2011.

(13) That the seizure of the Applicants documents and property by Criminal Investigations Department Officers on 6th June 2011 and 25th January 2012 was unlawful and in violation and contempt of the orders of the Court made on 15th April 2011 and 9th June 2011, the Applicants Constitutional rights to a reasonable and fair investigation.

(14) That the arresting, holding, detaining, charging and/or otherwise restricting the activities of the Applicant's by the Kenya Police and/or the Criminal Investigations officers on 25th and 26th January 2012 was unlawful and in violation and contempt of the Orders of the Court made on 15th April 2011 and 9th June 2011.

(15) That the Police should forthwith return any and all documentation, equipment and/or material seized from the Applicants premises on 6th April 2010, 9th June 2011 and 25th January 2012.

(16) That the actions of the Kenya Police and/or the Criminal Investigations Department have been oppressive, vexatious and amount to an abuse of Court process and a breach of the Applicant's fundamental rights and freedoms.

(17) That the Kenya Police, the Criminal Investigations Department and/or any related government or state agencies be restrained from investigating, arresting, holding, detaining, charging and/or otherwise prosecuting the Applicants herein on the basis of the Interested parties complaint.

(18) That the Court do issue any other appropriate Orders to preserve and protect the sanctity of the Court process and the Petitioner's Constitutional Rights."

3. The gist of the case for the Applicants is captured in the elaborate grounds on the face of the Application which are the following;

(a) *The Application raises issues of profound constitutional importance and it is vital that that the same is heard forthwith so as to protect and preserve the Petitioners'/Applicants' fundamental rights.*

(b) *On 15th April 2011 the Hon. Mr. Justice Ochieng held inter alia that the police had acted unlawfully and ordered that they should forthwith return any items obtained from the 1st Applicant's premises in the course of an unlawful raid. He ordered that if the police wished to carry out investigation of a criminal nature, they had to ensure compliance with the letter and spirit of the Law.*

(c) *Since the Order was issued, the police did not return the items as ordered. Instead, on 2nd June 2011, one PC Musau called the 3rd Applicant to inform her that he wanted to return the items. They agreed he would do so on 6th June 2011. When PC Musau entered the 1st Applicant's premises on the said date (with 3 other persons generally introduced as his colleagues), he insisted that the Applicants should quickly sign an inventory acknowledging receipt of the items. The Applicants noted that not all the documentation was returned and that they were not able to verify that the chemicals were the one initially seized and indicated that they required time to do so. In addition, some of the items did not belong to the Applicants as the items bore the name of Vermont Flowers Limited. On PC Musai's insistence they acknowledged receipt of part of the items.*

(d) *Upon acknowledging receipt, PC Musau then took back all the items he had presented to the Applicants' and produced a Search warrant dated 6th May 2011 with an Affidavit sworn by himself. He indicated that the Court had now sanctioned his action and then proceeded with his colleagues to take pictures of every part of the Applicant's offices and equipment. They then took all the computers on the premises including all the hard drives and personal lap tops.*

(e) *The seizure of all the computers in the premises effectively paralyses the Applicants' operations and the continued seizure thereof will cause substantial and irreparable loss to the Applicant. The Applicants will not be able to serve their customers' orders and they could be liable for breach of contract claims. The police have acted unfairly and unlawfully without any regard for the continued operations of the Applicants. They have also seized property outside the scope of the Search Warrant as the documentation and items seized did not relate to Vermont Flowers.*

(f) *The Search Warrant was obtained without the police having complied with the order of the Court on the return of the Applicants' items unlawfully seized and without having disclosed this material fact to the resident magistrate court at Kiambu. The police have acted contemptuously of the letter and spirit of the Law and the Order of the Court made on 15th April 2011. They continue to infringe on the Applicants constitutional rights to the benefit of a competitor.*

(g) *Further, in the pleadings filed by the Interested Parties and in the proceedings before the Hon. Justice Ochieng, it was apparent that the police had disclosed and furnished to the Interested parties documentation and information relating to investigations. As part of the documentation is confidential relating to investigations. As part of the documentation is confidential relating to the Applicant's secret processing formula and chemicals, the Applicants are apprehensive that the police will leak further information to the Interested Parties to their detriment and in violation of their privacy and right to protection of property. Their client contacts could also be disclosed.*

(h) *The Interested Parties intends to pursue the Applicants and other 3rd Parties for breach of an alleged patent which is disputed and appears to be using the police to obtain confidential information for this purpose through deceit and violation of the Law. This amounts to economic sabotage of the Applicant's business using illegal means. The Applicants are entitled to equal protection of their business and fundamental rights even as the police conduct any investigations.*

(i) *It is just and equitable in the circumstances of this matter that the application filed herein be heard as*

a matter of urgency.

(j) The Criminal Investigation and police officers continue to disregard the orders of the Court and have demonstrated that they have no regard to the law. Unless restrained by the court they intend to ensure that the Applicant's business is destroyed by their competitor at all costs. The Court should determine the matter with finality to preserve the integrity of the Courts and to protect the public at large. The police are not above the Law. They are subject to it.

(k) The Prayers sought will enable this Court to achieve the overriding objective and ensure an expeditious and just determination of the issues raised herein.

4. The above facts are repeated in the Supporting Affidavits of Godino Mwagaru Mwaghania, Jennifer Munguti and Nelson Ochieng Oware and I see no need to repeat them.

5. The response by the Interested Parties is contained in Affidavits sworn by Paul Lambert, Alexander Wanganju Kariuki and John Mbako Mutua and their argument is straight forward; the dispute between the parties cannot be settled if the 1st and 2nd Respondents are stopped from investigating a complaint lodged by the 1st Interested Party, Paul Lambert. According to the latter, he genuinely lodged a complaint that an armed robbery was committed against his family and himself; that threats were made to his life on telephone and yet the complaints have remained unattended to. Further, that nowhere in Ochieng J.'s judgment were the Kenya police stopped from investigating or prosecuting any suspect to alleged criminal acts and there was no Order that the Applicants and/or any other suspects to such acts should be treated differently. Many other matters raised in the Affidavits on record are not germane to the issue before me and I have decided to let them rest as they are.

6. On behalf of the 1st and 2nd Respondents concise grounds of objection were filed on 6th February 2012 and they are as follows;

(1) The Application is misconceived, frivolous, vexatious, incompetent, improperly before the Court and an open abuse of the Court process and should thus be dismissed with costs.

(2) The Orders sought are meant to stall the operations of the Respondents in the execution of their legal mandate under the relevant establishing legislation. By virtue of the operation of the principle of separation of powers, the High Court cannot issue the Orders sought as to do so would be tantamount to abusing the said principle.

(3) Investigation agencies cannot be restrained from disclosing information obtained in the course of their investigations because that exercise is meant to ascertain whether or not the investigations reveal or establish a cause of action giving rise to criminal liability. To make an informed decision whether to prosecute or not, it is imperative to have communications and interviews between complainants and investigating agencies.

(4) The Orders sought are in vain as they amount to prohibiting the investigation agencies in the execution of their legal mandate.

(5) The Application is full of falsehoods meant to mislead the Court with a view to obtaining the Orders sought.

(6) The Warrants of Search obtained and utilized on 6th May 2011 was legally and properly obtained.

7. **What is my understanding of the issues before me?** I gather that the 2nd, 3rd and 4th Applicants were former employees of the 2nd Interested Party, Vermont Flowers Ltd. whose chairman is Paul Lambert, the 1st Interested Party. The three established Waridi Creations Ltd, the 1st Applicant, which then begun a parallel and competing business with the 2nd Interested Party. It is obvious to me that the bad blood exhibited can be traced to that fact. Nonetheless at some point in 2008, 2009 and 2010 after the

incorporation of Waridi Creations Ltd, the Interested Parties lodged a complaint with the Police and alleged that;

(i) *There was an intentional infringement and diversion of the 2nd Interested Party's initial patent and other specific technologies.*

(ii) *There was massive theft of industrial chemicals, diesel and intellectual property from the Interested Party's business premises.*

(iii) *There was theft of the 1st Interested Party's motor-vehicle KAU 0795 Nissan double cabin.*

(iv) *There was an armed robbery at the 1st Interested Party's residence in Karen by about six armed gangsters.*

8. Upon a report being made, the police begun investigations which led them to the Applicants and then the present proceedings were instituted leading to the judgment of Ochieng, J. I agree with the advocate for the 1st and 2nd Interested parties who summarized the present Application as seeking Orders that can be reduced into two viz;

(a) *Orders that the Police be stopped from conducting any investigations that would amount to an infringement of the Applicant's constitutional rights.*

(b) *Orders barring the Police from disclosing to the Interested Party and any other personal information obtained in the cause of investigations conducted upon the complaints set out above.*

9. It is agreed by all parties that Ochieng, J. in his judgment, declared certain actions by the Kenyan police and particularly one PC Musau as being unlawful. The learned judge however allowed investigations to go on but within the parameters known to the Law. I am now being asked to stop any further investigations and although when I was first seized of this matter, I had the impression that the Applicants were being harassed unnecessarily, on reflection and with a fuller picture of the situation, the rights of all parties must be considered in totality. The Interested Parties are saying that their complaint on alleged criminal activities have not been acted upon and I agree with them that this Court cannot now take over the investigations and declare the Applicants innocent. I have read the decision of Majanja, J. in Kenya Commercial Bank Ltd & Others vs. The Commissioner of Police & Others Petition No.218/2011 and I am satisfied that it is distinguishable from this case. In that case, the Respondents were using the criminal process to “*get back at*” the Applicants having failed to get favourable orders in the civil process and where a number of judges had declared the issues in dispute to be barred by the doctrine of *res judicata*. The judge state partly as follows;

“The opening of a criminal inquiry which would result in impugning lawful Court decisions no doubt diminishes the Standing of the Court”.

10. I agree entirely and in a recent decision this Court also found that where the criminal process was used to settle scores arising from a civil dispute but which may have an element of fraud and/or forgery and which was the subject of civil litigation, the Court could stop the investigations until the matter was determined by the hearing of the Constitutional Petition filed by the offended party.

In this case, the converse is true; the Petition has been heard and determined; the parameters of the intended investigation have been set by the Court and the re-opening of litigation amounts to little more than the desire for the Court to baby-sit and micro-manage the investigations by the Police which is not its lawful duty.

11. I am therefore of the same mind as Warsame, J. in Michael Monari & anor vs. Commissioner of Police and DPP H.C. Misc. Application No.68 of 2011 when he invoked **Articles 157(4) and (10)** of the **Constitution** to find that “*the Police have a duty to investigate once a complaint is made*” because the

office of the Director of Public Prosecutions is an independent one and when ordering the Police to investigate an alleged criminal complaint, it must act independently of any person or authority.

12. I am also persuaded by the reasoning in Cargo Distributors Ltd vs. DPP, H.C. Misc. Application No.39/2006 where the issue of Police investigations and the powers of the Court was well addressed. It was held as follows;

“... What I must consider is whether the need to preserve the status quo is on a prima facie basis matched with the public interest either in allowing the investigations or preventing the investigations ...Crime detection is also a constitutional ideal or value which the Court must consider in the circumstances of this case ... the demand that the Police must give all the details in their possession to the magistrate instead of giving only those details which demonstrate a reasonable suspicion that crime has been committed would be against the public interest and would inhibit and complicate unreasonable the work of the Police ... In this case I consider that the work of the Police and crime detection could be hampered seriously if every time an investigation became necessary and the Police wanted to made a move they would be required to initiate formal proceedings first and also gave (sic) details to the Court beyond those demonstrating a reasonable suspicion of the commission of a crime before obtaining a warrant to investigate.”

13. Having found as I have above it is obvious to me that on the two issues summarized as requiring this Court’s intervention, I am not inclined to agree with the Applicants that they are deserving of the same.

To re-open the matter as they have and introduce wholly new evidence as opposed to filing contempt proceedings as they have clearly intimated is an abuse of Court process.

14. Before dismissing the Application as I shall shortly do, I reiterate that in the conduct of investigations the Police must be guided by the Principles set out in **Article 244** of the **Constitution** which includes striving to achieve the highest levels of Professionalism, Compliance with Constitutional Standards of Human Rights and Fundamental Freedoms and Fostering of Relationships with the broader society. If those principles are upheld, suspicion over the conduct of the Police will be history.

15. In any event, the Amended Chamber Summons dated 27th March 2012 is dismissed with no orders as to costs.

16. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2nd DAY OF AUGUST, 2012

ISAAC LENAOLA
JUDGE

In the presence of:

Irene – court clerk

Mrs. Wetende for Applicants

No appearance for Respondets

Order
Ruling duly read.

ISAAC LENAOLA
JUDGE

Mrs. Wetende

We seek an order stopping the police from taking an action pending a formal Application.

Order

I will exercise discretion and issue orders stopping any action by the police against the Applicants for 14 days pending the filing of a formal Application by the Applicants.

Leave to appeal is also granted.

**ISAAC LENAOLA
JUDGE
2/8/2012**