



IN THE MATTER OF THE SUPERVISORY JURISDICTION OF THE HIGH COURT

AND

IN THE MATTER OF THE FREEZING OF THE BANK ACCOUNTS OF THE APPLICANT

AND

IN THE MATTER OF AN APPLICATION UNDER S.65 OF THE CONSTITUTION OF KENYA

BETWEEN

FRANKLIN KAMAU KAMATHI.....APPLICANT

VERSUS

THE HON. THE ATTORNEY GENERAL.....RESPONDENT

R U L I N G

This ruling relates to the application that has been brought through an originating notice of motion under sec. 65(2) of the Constitution of Kenya and Rules 2, 3, 4 and 5 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006).

The same seeks the following orders:

- (a) **THAT the Honourable Court be pleased to revise, lift or set aside the order of the Chief Magistrate's Court, Kibera, granted on the 12th August 2009 in Kibera CMC Misc. Appl. Nos. 271, 272, 273, 274, 275, 276, 277 and 278 of 2009 which froze the applicant's various bank accounts.**
- (b) **THAT the Honourable Court be pleased to defreeze the following accounts numbers, that is:**
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- (i) **Account No. 5009468007 held at Chase Bank Ltd., Prudential Building in the name of Franklin Kamau Kamathi.**
- (ii) **Account No. 0170200092586 held with Equity Bank Ltd. Community Branch, in the name of Mancraft Construction.**
- (iii) **Account No. 0101718263600 held with the Standard Chartered Bank Ltd., Koinange Street, in the name of Franklin Kamau Kamathi.**
- (iv) **Account No. 1108443389 held with Kenya Commercial Bank Ltd., Gateway Branch in the name of Mancraft Construction.**

(v) **Account No. 50095219 held with Chase Bank, City square in the name of Juliet Dorcas Ngetich.**

(vi) **Account No. 0210101507422 held with Equity Bank Ltd., Kitengela branch, in the name of John Micheni Musa.**

(vii) **Account No. 3004464 CDI held with Giro Bank Ltd., Kimathi Street in the name of Shelter Credit Ltd.**

During the hearing of the application, the applicant's counsel, namely Mr. Nyang'au submitted that the application is supported by the affidavit of Franklin Kamau Kamathi and the annexures marked as "FKK1", "FKK2" and "FKK3". In addition, the application is also supported by the affidavit of Justus Wainaina Njuguna who is a co-director to the applicant in Ariithi Highway. Mr. Nyang'au further explained that the applicant and Justus Wainaina Njuguna later differed and the latter together with Onesmus Kimani Ngunjiri reported the matter to the police. Following investigations the police charged the applicant in Kibera, Criminal Case No. 3514 of 2009. Consequently, on 6th August, 2009, it was discovered in a director's meeting that the complaint about the theft was erroneous. Thereafter, it was decided that the complainant would withdraw count No. 3 that dealt with theft so that the applicant's accounts could be defrozed. However, the learned Chief Magistrate stated that she did not want the charges to be withdrawn piecemeal. The complainant has sworn an affidavit that there was no theft and that he would not give any evidence on that count. According to Mr. Nyang'au, the case against the accused cannot stand without the evidence of the complainant. Further to the above, he also submitted that the applicant is suffering hardships since all his accounts have been frozen and the criminal trial is likely to take a long time. He urged me to exercise my jurisdiction under sec. 65(2) and (3) of the Constitution and Rules 3, 4, 5 and 6. He further pointed out that the applicant and complainant had reconciled. Apart from the above, Mr. Nyang'au also submitted that the replying affidavit concedes that the applicant and complaint had reconciled.

On the other hand, the State has opposed the application through Mr. Obiri, State Counsel. The State has relied on the affidavit of Joseph Kiragu. The learned State Counsel is of the view that the various amounts in the different accounts were frozen and used as an exhibit in Criminal Case No. 3514 of 2009 and if they are defrozed, they are likely to defeat the above criminal case. He further submitted that an order of refusal should have attracted an appeal but not attract the supervisory power of the court. Among the accounts mentioned in the application, only accounts in paragraph 3(i) and (iii) belong to the applicant. The learned State Counsel is of the considered opinion that the applicant has not demonstrated his interest in the other accounts and hence the court cannot be asked to freeze those accounts.

This court has carefully considered the application together with the submissions by the learned counsels. Sec. 204 of the Criminal Procedure code, Cap 75 states as follows:

"If a complainant, at any time before a final order is passed in a case under this Part [i.e. Part VI – Procedure in Trials Before Subordinate Courts), satisfies the court that there are sufficient grounds for permitting him to withdraw the complaint the court may permit him to withdraw it and shall thereupon acquit the accused."

In the case of AVRIL ATIENO ADONCIA vs. REPUBLIC [2008] eKLR page 7, Ojwang, J. stated as follows:

"As the directory term "may" is used in the foregoing passage, it logically follows that the Subordinate Court has a discretion in allowing withdrawal of a case, and acquitting the accused summarily.

It has to be stated, however, that the directory terms aforesaid are by no means consistent with unreasoned, or churlish exercise of decision by a Subordinate Court. The decision arrived at must, firstly, be in the interests of justice; must uphold the efficacy of judicial decision-making; must be objective and fair, must be exercised according to law."

In conclusion of the above trial, the learned Judge directed the trial magistrate to see to the withdrawal of the proceedings in Criminal Case No. 4778 of 2007, in line with the request already made by the complainant, namely, Kenya Airways. Apart from the above, in the case of MEDARDO vs. REPUBLIC 2 (KLR) 2004 page 434 and 435, Ouko, J. held as follows:

“Generally, under sec. 176 of the Criminal Procedure Code, the courts are expected to encourage and facilitate amicable settlement by way of reconciliation of parties in certain criminal cases, such as in the case of common assault or in any case of a personal or private nature. However, courts will not facilitate reconciliation where the offence, although of a personal or private nature, is aggravated in degree or where the offence amounts to a felony.”

Given the above explicit position of the law, the Chief Magistrate, Kibera is hereby directed to allow the complainant to withdraw the counts that do not amount to a felony. There is no law which bars any litigant to withdraw a portion of charges so long as the complainant gives a reasonable explanation. The learned trial magistrate is at liberty to proceed with any offence that amounts to a felony. In this case, the complainant has deponed that he will not testify against the applicant. I hereby leave the issue to the learned magistrate to deal with at an appropriate time. Besides the above, the applicant has prayed that several accounts be defrozen. However, most of the accounts do not belong to the applicant. The only accounts that bear his names are:

- (a) Account No. 5009468007 held at Chase bank Limited, Prudential Building.
- (b) Account No. 0101718263600 held at the Standard Chartered Bank Limited, Koinange Street.

Unfortunately, the applicant did not give any indication whatsoever of the amounts held in those two accounts. Given the total circumstances of this case, the court hereby defreezes the two accounts on condition;

- (a) That the two Banks will confirm the total amounts held in each Account within the next 7 days.**
- (b) That they will guarantee to provide a similar amount during the trial at the subordinate court. That is, in the event that the money will be required as exhibit.**
- (c) That guarantee must be in writing and be directed to the investigating officer.**

Those are the orders of this court.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open court in the presence of : Nyang’au Applicant’s Counsel

Obiri - State Counsel

MUGA APONDI

JUDGE

22ND OCTOBER, 2009