



REPUBLIC.....APPLICANT

VERSUS

KENYA ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

CHIEF MAGISTRATE’S COURT..... 2ND RESPONDENT

THE HON. ATTORNEY-GENERAL. 3RD RESPONDENT

AND

GIRO COMMERCIAL BANK OF KENYA LTD. INTERESTED PARTY

EX PARTE:

ABC METALLURGIACS LIMITED

R U L I N G

The application before the court is the Notice of Motion dated 10th August, 2009. It seeks the following reliefs:-

- 1) That an Order of Certiorari to remove into this Honourable court for the purpose of being quashed and quash the order and warrant to investigate account given on 30th July, 2009 in Misc. Application Number 251 of 2009 in the Chief Magistrate’s Court at Kibera Nairobi in respect of account number 3006082/CD/1 in Giro Commercial Bank, Kimathi St. Branch, Nairobi held in the name of ABC Metallurgiacs Limited do issue.
- 2) That an Order of Prohibition directed at the 1st Respondent prohibiting it from further investigating account number 3006082/CD/1 Giro Commercial Bank, Kimathi Street Branch, Nairobi held in the name of ABC Metallurgiacs Limited do issue.
- 3) Costs.

The facts in support of the application are in the statutory statement. They can be summarized as follows:

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The Respondents, to properly prosecute some possible criminal offences against the ex parte applicant, applied to the Chief Magistrate’s Court at Kibera in Miscellaneous Application Number 217 of 2009 for a warrant to enable them inspect the applicant’s Bank Account Number 3006082/CD/1, Giro Commercial Bank, Kimathi Street, Nairobi. The Chief Magistrate’s Court granted the application and issued a warrant for inspection of the account. The ex parte applicant being dissatisfied and aggrieved about and in the manner the said warrant for search and inspection was issued decided to challenge the warrant and the issuance thereof. This he did under High Court Criminal Revision Case Number 29 of 2009.

It is in common acceptance that the application for revision was argued inter partes before Warsame J. who then reserved the ruling to the 1st October, 2009. It was part of applicant's case before me that in Revision Application Number 29 of 2009 he had challenged that the first warrant's legality and regularity as concerned the applicant's bank account intended to be inspected under the warrant.

The applicant further stated that as the parties who included the 1st Respondent, waited for the courts ruling, the 1st Respondent returned to the Chief's Magistrate's court under a fresh application, Miscellaneous Application Number 251 of 2009 to seek another similar warrant to access and inspect the same applicant's bank account number 3006082/CD/1/. That the Respondents this time wanted the same information sought and already obtained under Miscellaneous Application number 217 of 2009 in the same court that had issued the first warrant.

The ex parte applicant stated further that he came to court under this application seeking the judicial Review orders of Certiorari, to recall the Chief Magistrate's decision to quash it and to issue a prohibitory order to prevent it in future from issuing a similar warrant in respect of the ex parte applicant's said bank account.

In reply to the averments by the applicant above, the 1st Respondent, by a replying affidavit sworn by one Soita Wasike, a Forensic Investigator of the first Respondent, admitted that the respondent indeed applied and obtained a second warrant for access and inspection of the applicant's bank account abovementioned. His reason, he stated, was that the bank had not on the first occasion supplied them with the full information they had sought to enable them satisfactorily prosecute the applicant with a relevant criminal offence. He denied that the second application for the 2nd warrant from the Chief Magistrate, was in bad faith or an abuse of court process, or an abuse of the Commission's powers under the relevant Act or that its conduct was unreasonable or out of proportion or malicious or an act contrary to the applicant's expectation as a citizen.

The 2nd and 3rd Respondents who are the Attorney-General and the Kibera Chief Magistrate also responded through Mr. Obiri, Senior State Counsel. While replying upon the Replying affidavit deposed by one Victor Mule, Principal State Counsel, dated 21st August, 2009, Mr. Obiri first felt that the applicant was not entitled to the orders of certiorari and/or prohibition on the basis that this court should not interfere with the functions of the 1st Respondent in relation to the exercise of powers given to it under a statute. He thought such interference would be improper especially since the 1st Respondent's power to fight or prevent corruption is wide and its purpose to assist the Government to fight corruption, proper.

However having learnt in court concerning the manner the 1st Respondent went about obtaining the 2nd warrant, Mr. Obiri became cautious in his approach. He rightly, in my opinion, expressed the view that the 1st Respondent should have first waited for the delivery of the ruling pending before the High court since the ruling touched on the propriety and/or legality of the first warrant. He further said that he had indeed perused the affidavit upon which the 1st Respondent had applied for the 2nd warrant and was satisfied that the contents thereof were similar to those of the affidavit upon which the 1st warrant was based. Mr. Obiri also conceded that the 1st Respondent may not have disclosed to the lower court all the relevant information, including the fact that there was a pending revisional suit ruling touching on the first warrant. Otherwise, he felt, the lower court would not have easily granted the 2nd warrant.

Mr. Obiri concluded his submission by categorically stating that he would not support any conduct on the part of the 1st Respondent that tended to abuse court process and/or other process. The court understood the 3rd Respondent to be stating that 1st Respondent's application for the second warrant while a ruling on the legality of the 1st warrant pending in court, was improper and indeed absurd.

With the above in mind I will now turn to the facts and arguments from both sides for analysis and findings. Clearly the main issue is whether or not the 1st Respondent who exercised its power and

discretion to obtain the 2nd warrant for the inspection of the earlier mentioned applicant's bank account, acted fairly and in accordance with the governing principles of law.

It was impressed upon this court that the 1st Respondent who is the Kenya Anti-corruption Commission has been given mandate by parliament to prevent, stamp out and/or reduce corruption in this country. It was the Commission's position accordingly, that the court before which a revision was sought, under the High Court Criminal Revision Number 29 of 2009 had not made any order to stop the Commission from applying for the 2nd warrant which it did within its statutory mandate.

The issue before this court however, is not whether or not the Commission has the power to apply, obtain and use such warrant to obtain the information it requires within its mandate. The issue is how such power and discretion exercisable by the Commission under the Anti-corruption and Economic Crimes Act should be lawfully invoked and whether in this case it was lawfully exercised.

The facts presented in this application show that the method applied to obtain the first warrant to inspect the applicant's bank account by the First Respondent was challenged by the applicant in the High Court Criminal Revision Number 29 of 2009. It is not indeed denied by the Respondents that the warrant's regularity, correctness and legality was fully challenged by the applicant before the said court while being fully and properly defended by the Respondents. Nor is it denied that at the end of the two sides' arguments, the court reserved its ruling to 1st October, 2009.

Common sense and logic would in my view thereafter dictate that either party would wait until the 1st October, 2009 to know from the court whether or not the method used by the 1st Respondent to obtain the first warrant from the 2nd Respondent was were proper, regular, and lawful. If the court found the method improper or unlawful, it might nullify the warrant and/or make corrective orders. That indeed is the purpose of the revision powers of the High Court.

Upon what basis then would the 1st Respondent who was one of the parties clearly to be bound by the expected ruling of the court, proceed to apply for a second similar warrant in the same court that issued the 1st warrant

The 1st Respondent in paragraph 10 of an affidavit sworn by One Soita Wasike on 23rd August, 2009 explains that the Commission applied for the 2nd warrant because the 1st one failed to yield all the information or evidence the commission required. That may be so, but that does not explain or justify the commission's failure to wait for the ruling of the application which had challenged the method the Commission had used to obtain the 1st warrant. Furthermore, there is credible evidence on this record that the Ex Parte applicant had sought for an undertaking from the Counsel representing the 1st Respondent, not to take any further adverse action against the applicant until the ruling is delivered on 1st October, 2009. Although no order was made by the court for status quo, the applicant has sworn in support of this application that the Commission's counsel assured the court that it would do nothing adverse while awaiting the ruling. Since I accept the applicants averments that the Commission's counsel gave the court such assurance, then the conclusion I come to is that its conduct thereafter in going straight for a 2nd warrant was baffling and absurd.

Be it what it may, the impression created in the court's mind is that the 2nd Respondent proceeded to apply for the 2nd warrant for inspection of the applicant's bank account in open disregard and in contempt of whatever ruling the court would deliver on 1st October, 2009. That is to say that even if the court in its revisory powers found that the 1st warrant was irregular or illegal and cancelled it, the Commission would have obtained any information or evidence it wanted under the second warrant and withstanding any orders the court might make.

The court's finding and/or order would accordingly have been made by the court in vain as it would at that point not affect the 1st Respondent either way. The 1st Respondent's action would that way have

overtaken the ruling.

It is my understanding and my view that a party in a matter reserved for judgment or ruling, who proceeds to act unilaterally and notwithstanding the nature of the final decision of the court, acts in contempt of the court. In acting as the 1st Respondent acted herein, the 1st Respondent's conduct clearly undermined the dignity and integrity of the court before which the relevant ruling pended. Furthermore, the 1st Respondent who had vigorously defended the challenge to the first warrant's issuance, stole or tried to steal a match against the applicant whose case for revision of the lower court orders, had been canvassed, before being reserved for the ruling.

It was further argued by the applicant that the 1st Respondent failed to disclose to the lower court during the application for the 2nd warrant, material information which would have enabled the lower court to properly consider whether or not to issue the second warrant. I have examined the response by the Commission which however, states that it disclosed all such information. However, the Commission's affidavit does not assert or show that the lower court was informed that the 1st warrant's legality, had been challenged, and particularly, that a ruling over the challenge was pending. It is, in my view, most unlikely, that the lower court could have disregarded the pending ruling and proceed to issue the 2nd warrant, had the 1st Respondent disclosed the pendency of the ruling. The said conduct of the Commission, in my opinion, lacked honesty, integrity and candour. Instead it was carried out in contempt of the court before which the ruling pended. The conduct at the same time, was clearly *mala fides* since it was intended to steal a match against the Ex Parte applicant while it at the same time, it disregarded the assurance it had given to the court, that no prejudicial action would, in the meantime, be taken, pending the ruling.

This court has no misgivings concerning the wide power and discretion given to the Kenya Anti-corruption Commission to effectively investigate corruption crimes. In my understanding, however the commission, like any other authority or person granted such power, has to exercise such power wisely, discretely and reasonably. It has to do so in good faith and for the purpose for which the power was reposed in it and for no other ulterior purposes. As stated in the Australian case of Spants V Williams (1992) 66 ALJR, 585: -

“The proceedings complained of were instituted and/or maintained for a purpose other than that for which they were properly designed to exist or to achieve for the person instituting them some collateral advantage beyond that which the law offers or to exert pressure to effect an object not within the scope of the process. The focus in such suit is on the purpose for which the proceedings exist, and in the dominant purpose of the person charged with abuse of the process in instituting them.”

It appears to me then that while the wide powers given to the Commission is intended to enable it collect the necessary and relevant evidence to assure it a successful prosecution, nevertheless the exercise of the power has to be for that purpose only apart from it being in good faith. In this case before me, however, the counsel representing the Commission was acting in breach of his assurance to the court that he would not in the meantime act to undermine the status quo position. Also in applying for the 2nd warrant, without full disclosure to the lower court, the Commission acted dishonestly. The two acts can be said to have been done with an intention to defeat the expected ruling of the court that had reserved the revision ruling, in the event it went against the Commission's interest or intentions. I do therefore find that the Commission's main purpose in lounging the application for the 2nd warrant, was not basically to collect the required evidence but first and foremost to be one step ahead of the applicant and the court. This in the process, created a different purpose other than the honest collection of evidence to prosecute the applicant. The conduct of the Commission accordingly amounted to an abuse of the process as laid down in the Act under which the officer or officers acted.

The summary findings of the court from the conclusions reached above are as follows: -

- a) That the commission through its counsel or officers acted in open disregard to and contempt of the court in which the revision ruling pending.
- b) That the Commission, through its officers, acted dishonestly and failed to fully disclose to the lower court the fact that it had undertaken before the court to maintain a status quo and that a ruling concerning the propriety and legality of the first warrant earlier issued by the same court, was pending.
- c) The Commission's conduct in trying to act a step ahead of the pending ruling was intended to steal a match against the applicant and the court and not basically to collect the relevant information or evidence as authorized by the statute under which the Commission functions.
- d) That the Commission in the circumstances revealed above, acted in bad faith as it also failed to act candidly.

In the English Court of Appeal case of Associated Provisional Picture Houses Ltd V Wednesbury Corporation, (1948) 1 K.B. 223, Lord Green, M.R. stated at page 229 as follows: -

“Bad faith, dishonesty – those of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to..... as being matters which are relevant to the question..... if they cannot be all confined under one head, they at any rate, I think, overlap at a very great extent.....”

Thereafter the judge also stated: -

“It is true the discretion must be exercised reasonably.”

The judge was saying that where bodies or tribunals such as the Kenya Anti-corruption Commission who had been given power and/or discretion to exercise in the functioning of their duties, they are expected to be under legal obligation to exercise such power or discretion reasonably. He further stated: -

“For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.”

In this case before me the officers of the 1st Respondent committed the acts and conduct already described above. That it to say, they acted in open contempt of court; they acted dishonestly; they failed to act candour and/or disclosure and they acted also with a clear view to steal a match against the applicant and the court. Finally in deliberately failing to show respect to the court's ruling, they acted so absurdly, that no sensible person could ever dream that such a conduct could be within the realm of 1st Respondent's power or discretion.

In respect to a conduct as the one committed above, Lord Greene. M.R. in the cited case above stated at page 233: -

“The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into

account. Once that question has been answered in favour of the local authority, it may be still possible to say that, although the local authority has kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere.”

In this case before me, the Kenya Anti-corruption Commission is in the class of the tribunal or local authority the exercise of whose power the court is inquiring. Since I have already concluded that the Commission’s conduct was **“unreasonable”** as hereinabove described, I find that this court can and will indeed interfere in this case.

The power of this court to interfere with the exercise of the Commission’s power or discretion under the statute that created, it is not as by an appellate court, to override the decision and manner it exercised the authority. Rather, this court is a judicial authority which is concerned and concerned only with making sure that the Commission does not contravene the law by acting in excess of the powers confided in it by Parliament. This court makes sure that individual citizens investigated by the Commission in its noble and necessary duty to fight corruption, are fairly treated. Put differently, the Commission’s functions have to be carried out without exceeding the authority and power given to it and thus without abuse of such authority and power.

The courts sometimes face criticism concerning the manner they exercise their arbitral judicial or supervisory function, especially in the way they support or fail to support government’s or public policy. Such criticism comes from politicians, civil society and sometimes interested institutions such as Kenya Anti-corruption Commission. The function of the Judges and magistrate’s, however, is to interpret the law as intended and promulgated by parliament. Even where the legislated law is silent the courts can only arrive at what in the circumstances can be called the **“best decision”** leaving the rest to Parliament to step in and legislate in the way it thinks best. The court’s function is therefore not to legislate, and where change is required in any statute, it is the legislature, probably prodded by the Executive, to legislate.

Reverting to the matter before me, I am satisfied that the ex parte applicant has proved on the balance of probability that he is entitled to the orders of certiorari to recall to this court, the decision of the Chief Magistrate’s Court at Kibera in Miscellaneous Application Number 251 of 2009 to quash the 2nd warrant aforesaid. That will effectively nullify the said warrant to access and inspect the ex parte applicant’s bank account Number 3006082/CD/1 Giro Commercial Bank Ltd, Kimathi Street.

As concerns the prayer for prohibition to prevent the 1st Respondent to apply for a similar warrant, the same raises some anxiety. First, there is a ruling before another court which will decide whether the 1st warrant obtained by the 1st Respondent was properly obtained. That ruling will therefore decide whether the 1st warrant was lawful or not. In the event that the said warrant was valid then as confirmed by the Commission, the 1st Respondent actually did obtain the information specified in it. Indeed the 1st Respondent deposed in its replying affidavit that it actually accessed the bank account and obtained the information specified to be obtained under the warrant. Furthermore the warrant still exists and still authorises access to the bank account, of course, limited to the information specified in the warrant. Would it be reasonable to allow another similar warrant on the same grounds seeking similar information to be sought in the future?

The view I hold is that that would be an abuse of process on the part of the 1st Respondent. The commission, in proper exercise of its discretion, should have decided what exact information it requires for the purpose of prosecuting the given case before seeking it in the lower court. It should then have sought a warrant for the specific information from the ex parte applicant’s bank account, taking into account the fact that a citizen’s bank account has privacy and privilege which must be respected as part of his individual rights. The commission, in my view, should always keep in mind and particularly to this case, the fact that the access given to it to the citizen’s bank account, is out of necessity to get information

to fight corruption and is simply a slow-back on individual privacy and rights. It is authorized only by virtue of the power given under the Act of Parliament against the jealously guarded rights of the citizen. That is why the Commission's right to access private privileges aforementioned, must be exercised reasonably and within the legal principles now refined and settled under our judicial system.

In this case, the Commission had such access through the first warrant. It will alone be to blame if it did not properly use the access under the warrant to obtain all the information it originally set out to obtain. In the circumstances it would be an abuse of process to grant another warrant. Prohibition sought will accordingly be granted to the ex parte applicant.

ORDERS

1. The order of Certiorari removing the order and warrant issued by the Kibera Chief Magistrate's Court in Kibera Chief Magistrate's Court in Miscellaneous application Number 251 of 2009 dated 30th July, 2009, into this court for the purpose of being quashed and quashing the said order and warrant to investigate bank account number 3006082/CD/1, Giro Commercial Bank, Kimathi Street in the name of ABC Metallurgiacs Limited, HEREBY ISSUES.
2. An Order of Prohibition directed at the Kenya Anti-corruption Commission prohibiting it from further investigating the said bank account for the purpose and intention indicated in the 1st warrant dated 19th June, 2009 or any other related and/or connected purposes, HEREBY ISSUES.
3. Costs of this application are to the ex parte applicant to be agreed upon or taxed.

Dated and delivered at Nairobi this 16th day of October, 2009.

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D A ONYANCHA

JUDGE