



*(From Misc. cr. Application No.217 of 2009 Chief Magistrate's court Kibera)*

**ABC METALLURGIACS LIMITED .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

In Misc. Criminal Application No.217 of 2009 made under Section 180 of the Evidence Act, Kenya Anti-corruption Commission made an application where the respondents were **Giro Commercial Bank of Kenya Limited and Commercial Bank of Africa Limited** seeking;

**“That the Honourable Court be pleased to issue a warrant to investigate account in order for the applicant’s investigator Mrs. Umazi Runya, a forensic investigator or any other investigator duly appointed by the applicant, to investigate, inspect and lift copies of statements and bankers books and original cheques in respect of account numbers 3006082001 Giro Bank Limited, Kimathi Street Branch, Nairobi and 0102472004 Commercial Bank of Africa Limited, Upperhill Branch, Nairobi held in the names of ABC Metallugiacs Limited and Kenya Pipeline Company Limited respectively and specifically obtain the following documents:**

- o **Account opening documents.**
- o **Bank statements**
- o **Original cheque number 258419**

The said application was supported by an affidavit sworn by Mrs. Umazi Runya a forensic investigator with Kenya Anti-Corruption Commission and the grounds were that the commission was investigating an allegation of corruption committed by Kenya Pipeline Company Limited together with ABC **Metallugiacs** Limited. It was alleged that the applicant herein had allegedly received a sum of Kshs.45 million being payment for the supply of non-existent goods and products to Kenya Pipeline Company Ltd. It was also alleged that the said money was paid through two accounts held at Commercial Bank of Africa Limited and Giro Commercial Bank Limited.

The purpose of seeking investigation was to establish or verify the veracity of the said allegation and for Kenya Anti-Corruption commission to establish whether the two accounts specified had monies received from Kenya Pipeline Company. The purposes of investigations was for the said banks to avail certified copies of account opening documents, statements and bank books kept in respect of the two accounts in question by the applicant herein. The orders were then granted by a magistrate based at Kibera Law Courts and Kenya Anti-Corruption Commission proceeded with investigations having obtained an order under section 180 of the Evidence Act.

The applicant herein was then informed about the action by Kenya anti-corruption Commission in respect of the two accounts and felt aggrieved by the decision of the lower court to give an order investigating the two accounts behind their back and without their knowledge. In a letter dated 7<sup>th</sup> July 2009 the applicant

herein urged this court to reverse the decision made by the trial court concerning the investigations to be carried out by Kenya Anti-corruption Commission in respect of the two accounts.

It is the case of the applicant that the information upon which the subordinate court granted warrants to investigate their accounts at Giro Commercial Bank Kimathi branch was false since it had been contracted by Kenya Pipeline Company Limited to supply main line pipes when they had been actually contracted to supply various seals. And secondly that the warrants were based on false allegations that no goods were supplied to Kenya Pipeline Company Limited. The applicant attached delivery notes showing goods were supplied to Kenya Pipeline Company Limited. As a result the applicant has urged this court;

**“to exercise its jurisdiction to review the correctness propriety, regularity or legality of the proceedings in Misc. Criminal application No.217 of 2009 so as to stop the continued abuse of the warrant issued by the lower court to Kenya Anti-corruption Commission.”**

It is the position of Kenya Anti-Corruption Commission that under section 7 and section 23 of the Anti-Corruption & Economic Crimes Act 2003, it is bound to conduct investigations into complaints received with a view to recommend the necessary action to the relevant authorities concerned with their investigations. And that the commission received allegations of corruption to the effect that Kenya Pipeline Company Limited paid a sum of Kshs.45 million to ABC **Metallugiacs** Limited allegedly for non-existent goods and services. It is on the strength of that information that they sought for and obtained a warrant to investigate the accounts of ABC **Metallugiacs** Limited and Kenya Pipeline Company in order to establish the truth or otherwise of such allegations. And in obtaining warrants from the lower court, the Commission was seeking to verify or establish the veracity of whether the information or allegations received had any basis. It is contended that the Commission has executed the warrants to investigate the accounts as issued by the court and no attempt whatsoever has been made to obtain any document/s that has not been authorized by the said warrants.

In short it is the position of the Commission that the warrants were obtained legally, lawfully, and regularly and that there is no error apparent on the face of the record to warrant a review of the matter as decided by the subordinate court. It is also the position of the Commission that warrants to investigate is just investigative tool provided by the law. And there are no criminal proceedings of any nature against the applicant to say that it is aggrieved by the decision of the lower court. What that means is that nobody is facing criminal sanctions and an investigation as conducted by the Commission and with the permission of the court could very well prove the allegations against the applicant and Kenya Pipeline Company as false and with no basis.

The question for my determination is very simple and it is whether the lower court had jurisdiction to grant the orders sought by Kenya Anti-Corruption Commission. My short and very simple answer is that the lower court had jurisdiction to issue the orders sought by Kenya Anti-Corruption Commission. The wordings of section 180 of the Evidence Act and section 118 of the Criminal Procedure Code is very clear that a court can issue orders as the one that were granted by the lower court upon being satisfied that an offence had been committed or is about to be committed by any party. And that it is in the interest of justice and for the detection of crime to give such orders. The overriding principle as captured under section 180 of the Evidence Act and section 118 of Criminal Procedure Code is to ensure that no party compromises or interferes or destroys evidence that would be necessary for the interest of public good and for the general principle of detection, investigation and conclusion of criminal offences. In my understanding the purpose of criminal law is for the good of the public interest and that the rights of an individual cannot supersede that of public good. I therefore see nothing wrong in the way the trial court granted the orders sought by Kenya Anti-Corruption Commission. In my understanding it is the duty of the court to ensure that its process are fairly used by the State and citizens alike and where there is an apparent erosion of public confidence by reason of concern that the court process would lead to oppression and injustice, the court would stand up to do the right thing.

The point I am making is that if at the end of the day it is discovered that the evidence or investigations carried out by the commission is unfair, the court would come to the aid of the applicant. However, at this stage there is no evidence before me that the Commission has used or is about to use oppressive or

unfair tactics against the applicant. The predominant element in an investigation is to obtain evidence and information that would lead to a proper conviction. In cases where it is shown that the information obtained was without proper foundation or that it was oppressive or that it was obtained through unfair investigation or that it would compromise the fairness of a trial, then the court's duty is to uphold fairness and justice between the parties. We have not reached that stage for me to determine that certain information or evidence was obtained oppressively and unfairly. And in my humble view, an information or evidence obtained from a bank account of an individual who is reasonably suspected to have committed or is about to commit an offence, can only be determined when and at the stage, where that evidence is being used or is about to be used against the aggrieved party. The fairness of the contest as a result of the information obtained *ex parte* and to the exclusion of aggrieved party can only be determined when the issue is placed before court for determination. In essence this court cannot act on assumptions and speculations simply because an order of investigation of an account has been obtained by Kenya Anti-Corruption Commission. The requirement of conducting a fair trial in my understanding ensures that evidence to be tendered are not obtained in a manner prejudicial to the interest of the opposite parties. But in this case the law offers the Commission collateral advantage under section 180 of the Evidence Act, section 118 of the Criminal Procedure Code and section 3 and 7 of the Anticorruption & Economic Crimes Act therefore as was rightly pointed out by Ms Gateru learned counsel for the State there is no error on the record and there is nothing to be reversed by this court.

In conclusion it has not been shown that the learned trial magistrate in granting the orders did not exercise his discretion judiciously. There was a proper basis for the trial court to grant the orders that were sought by the Commission. The truth or otherwise of the allegations are matters of evidence which cannot be canvassed or contested by way of revision. I make a finding that Kenya Anti-Corruption Commission had legitimate authority or powers to seek from court the orders that were granted by the subordinate court. I agree section 180 of Evidence Act grants an investigator powers to appear before a magistrate or a judge and upon showing that he has reasonable suspicion in respect of any banker's books for purposes of detection of a crime, the court upon being satisfied grants permission to the investigator to look into any specified account. Further section 7 of Act No.3 of 2003 gives Kenya Anti-Corruption Commission the authority or powers to investigate any matter that in its opinion raises suspicion that any of the issues mentioned have occurred or are about to occur. I am therefore satisfied that the complaints raised by the applicant is misplaced and without merit.

Lastly it has been confirmed that the orders have been executed, therefore the investigations are complete. However, it has come to the attention of this court that there are other proceedings involving the same parties and which occurred as this matter was pending for determination. In order to ensure fairness and justice, I direct that the Kenya Anti-Corruption Commission not to prejudice the rights of the applicant by engaging in matters which may be prejudicial to the interest of the applicant. The point I am making is that the Commission shall not use the orders that were granted by the lower court in their application dated 18<sup>th</sup> June 2009 in a manner to abuse the court process and/or in a manner to prejudice the interest of the applicant. I am not in any way saying that the commission cannot conduct further investigations on the same subject matter but it has to observe fairness and ensure that the process of the court is not used in a manner likely to prejudice the interest of the applicant.

In conclusion, I make a finding that there is nothing for me to revise and orders issued by the subordinate court were legitimate and lawful. The application for revision is hereby dismissed.

Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of October 2009.

**M. WARSAME**

**JUDGE**