



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Revision Case 352 of 2009

DAVID NJANE RUIYI1ST APPLICANT

RACHEL NJANE.....2ND APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

This application has been brought for the revision of Order made on 31st July 2009 by the Honourable Mrs. Kasera (SRM) in Miscellaneous Applications No. 256, 257, 258, 259, 260 and 261 of 2009. The application has been brought under section 362 and 364 of the Criminal Procedure Code, Cap 75 Laws of Kenya.

The application is premised on the following grounds:

- 1. The learned magistrate granted a blanket order for the investigating of all bank accounts in the above Miscellaneous Applications and the subsequent freezing of the same ex-parte and without affording any of the Applicants a chance to be heard.**
- 2. The Applications tabled before the learned Magistrate by the Respondents as enumerated above did not seek the order of freezing the Applicants' bank accounts.**
- 3. The learned Magistrate did not inquire as to which of the accounts enumerated in the above Applications were directly involved in the transactions leading up to the investigations by the prosecution before granting the orders freezing the same.**
- 4. The learned magistrate did not satisfy herself as to the correctness of the allegations in the enumerated Applications before granting the orders to freeze the Applicants' Bank accounts.**

5. The Applicants have and continue to suffer grave prejudice by the manner in which the learned Magistrate issued the orders to freeze their personal and business accounts regardless of the fact that they were not involved in the transactions leading up to the investigations.

6. In light of the above circumstances, the Applicants have no further recourse but to bring this matter to the attention of the High Court for revision of the said orders.

During the hearing of the application, Mr. Regao, for applicants, submitted that there were four applications that had been made by the PCIO, Nairobi that referred to different bank accounts. Further to the above, Mr. Regao also submitted that all the applications bear a prayer seeking that the subordinate court issue a warrant to investigate a bank account. However, he pointed out that neither of those applications asked for supply of account opening documents as directed by the court in its order. Following the freezing of the four accounts on 31st July, 2009, the applicants have been prevented from using those accounts for over one month.

Mr. Regao further added that since the applicants are engaged in business, that has crippled their operations and they continue to suffer irreparable damage. In conclusion, Mr. Regao submitted that the applicants cannot now transact their business which is the source of their income. It is on the basis of the above that he has prayed for an order of revision.

On the other hand, the application has been opposed by Mr. Nyakundi, State Counsel, who has relied on six grounds of opposition. According to the learned counsel, section 118 of the Criminal Procedure Code allows the seizing of things authorized by warrants. Further to the above, he also submitted that the court thought it appropriate that the status quo be maintained pending further orders. Apart from the above, he also submitted that the amount of money frozen will be used as an exhibit. In addition to the above, the learned counsel submitted that section 121 of the Criminal Procedure Code allows preservation of things till the matter is determined. He also reminded the court of its obligation to balance between the rights of an individual and that of society. He was of the view that crime detection is a component of public interest that the court cannot disregard. He concluded his submissions by stating that, if the frozen accounts are defrosted the trial in the subordinate court will be frustrated.

This court has carefully considered the application together with submissions by the two learned counsels. No doubt, the parties have not denied the fact that the applicants have pending criminal cases in Kibera Law Court. Specifically, the following cases are quoted in the Order that was issued by the learned magistrate: Misc. Criminal No. 257, 256, 258, 259, 260, 261 and Misc. 257 in 2009. In support of his submissions, the Learned State Counsel referred the court to Section 118 of the Civil Procedure Code that states as follows:

“S.118. Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may be written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, shop, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.”

In addition to the above, he also quoted the case of **Cargo Distributors Limited vs. Director of CID, Miscellaneous Application No. 39 of 2006** in which Nyamu, J. (as he then was) stated as follows: -

“To my mind in the real world the police must on the other hand be able to move with speed to prevent any destruction of vital evidence in the crime detection. Crime detection is also a constitutional ideal or value which the court must consider in the circumstances of this case. It is also a component of public interest which the court cannot disregard.

On a prima facie basis 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 unreasonably the work of the police. Similarly requiring that an affidavit be sworn before any other person might provide fatal leaks of vital evidence to undeserving persons thereby defeating the objectives of crime detection. Contesting the affidavit would result in a similar outcome. As outlined above this case represents a complex interplay of ideological values on the one hand there is the need to detect, prevent and control crime and other the other hand the growing concern for due process.”

Whereas I concur with the sentiments expressed in the above case, I hereby wish to state that in the present case, the police have had the chance and opportunity to investigate the relevant accounts from 30th July, 2009. It is now incumbent upon them to complete their investigations within the next 30 days so that they may proceed with the cases where any suspected stolen money may have been deposited. In view of the above, I hereby direct that the parties appear before the learned magistrate viz, Mrs. Kasera (SRM) or the Chief Magistrate on 5th January, 2010 to enable the investigating officer to report his findings to the court. In the event that any of the account is not related to commission of any offence, then the said learned magistrate will be at liberty to defreeze the same. Similarly, the said magistrate is also at liberty to sustain the order issued earlier in the event that there is any relationship to any crime. It is on the basis of the above that I decline to defreeze the accounts at this stage.

Those are the orders of the court.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open court in the presence of:

.....Applicant’s Counsel

.....State Counsel

MUGA APONDI

JUDGE

27TH NOVEMBER 2009