



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

MILIMANI LAW COURTS

Miscellaneous Criminal Application 432 of 2008

AURELIAN AJIAMBO AKWARO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

REASONS FOR THE RULING

1. On the 18/08/2008, I allowed the Applicant's application dated 13/08/2008 and reserved the reasons for the same. Thereafter, the file was taken to the Registry for purposes of extracting the order. For nearly a year, the file was not brought to my attention again until I asked for it. This is the reason for the delay in giving these reasons.
2. By her application dated 13/08/2008, the Applicant sought the following orders:-
 1. ***THAT*** this Application be heard forthwith as a matter of urgency.
 2. ***THAT*** the record of the Subordinate Court in Nairobi Chief Magistrate's Criminal Miscellaneous Application No. 71 of 2007 be called forth, examined and reviewed;
 3. ***THAT*** pending full determination of this matter, the Bank Manager, Standard Bank Investment Ltd. I.C.E.A. Building, Kenyatta Avenue do forthwith pay to the Applicant's advocate Mr. Mutavi I. Maseki practicing as Maseki & Company Advocates the credit balance and any other financial value in one of the Applicant's Bank Account Number 01935 held at the said Bank by the Applicant **AURELIAN AJIAMBO OKWARO** pursuant to the Applicant's written authority and Affidavit filed herein.
 4. ***THAT*** the Order of the Subordinate Court in Nairobi Criminal Miscellaneous Application No. 71 of 2007 issued on 4th June 2007 freezing and investigating Bank Account Number 01935 and CDS Account Number 5931070LC-O at Standard Bank Investment Ltd. I.C.E.A. Building, Kenyatta Avenue in the name of the Applicant **AURELIAN AJIAMBO OKWARO** be and is hereby set aside;

5. **THAT** the Bank Manager, Standard Bank Investment Ltd. I.C.E.A. Building, Kenyatta Avenue do forthwith pay to the Applicant's Advocate, Mr. Mutavi I. Maseki practicing as Maseki & Company Advocates the credit balance and any other financial value in **account Number 01935 and CDS Account Number 5931070 LC – 0** held at the said Bank by the Applicant **AURELIAN AJIAMBO OKWARO** pursuant to the Applicant's written authority and Affidavit filed herein.

6. **THAT** costs of this application be provided for.

3. The application was filed under Certificate of Urgency on the following grounds:-

A. The order freezing the Applicant's Accounts did not specifically apply to any particular Bank Account and this Honourable Court is empowered under its revision powers to reverse and have the said order vacated *ex parte* in the first instance under an application of certificate of urgency where the court order of Subordinate Court did not relate to a specific Bank Account. See High Court (Nairobi) Misc. Criminal Case No. 475 of 2004: *Vitu Limited –vs- (1) The Chief Magistrate Nairobi (2) The Attorney General (3) Charterhouse Bank Ltd. (unreported)*.

B. The Applicant is a single parent. The said freezing has deprived the Applicant's children of their constitutional rights to education due to her inability to withdraw funds for fees. Deprivation of education to the said children cannot be compensated fully in monetary terms and they shall suffer irreparable loss and damage unless the applicant is granted unfettered access to the said account to pay for college bills.

C. The Applicant is travelling out of Kenya urgently on 13th August 2008 to South Africa and thereafter to USA to seek indulgence from college officials, on the basis of the financial constraints occasioned by the unlawful actions of the police, to reschedule college fee payments for the said children who are likely to forthwith miss their studies unless the said accounts are opened and funds therein accessed forthwith. See paragraphs 20 and 21 of the Affidavit.

D. If the orders sought are granted, the Respondent cannot suffer any loss or prejudice.

E. This Honourable Court is empowered and has jurisdiction under Sections 60 and 65(2) of the Constitution of Kenya and Sections 362 and 34(1)(b) of the Criminal Procedure Code Cap 75 to revise, reserve and/or cancel the order of the Subordinate Court complained of, even *ex parte* on its own motion.

F. The order of the Subordinate Court made on 4th June 2007 in Nairobi Criminal Miscellaneous Application No. 71 of 1007 (Exhibit "AAO-3") did not specifically state that the said accounts be frozen. The same was ambiguous, equivocal and open to misinterpretation and misapplication.

G. The search and freezing Warrant and order was made pursuant to erroneous provisions of the Law:

section 118 of the Criminal Procedure Code Cap 75 Laws of Kenya under which it was made and obtained does not apply to search and freezing of a bank account but strictly to police search of premises or any place, building, ship, aircraft, vehicle, box or receptacle in respect of which an article used during the commission of an offence may be found.

H. Although the search warrant could be obtained either under section 180(1) of the Evidence Act Cap 80 or Section 19 of the Police Act Cap 84 Laws of Kenya, the Search Warrant could not be applied under the said statutes to freeze bank accounts. There is no power donated to the police under the said statutes to freeze a suspect's bank account without court proceedings.

I. Issuance of the said warrant was un-procedural, misplaced and misconceived and unlawful.

J. The police having failed in the past 1 year and 2 months to report the result of their investigations to the court pursuant to Sections 118 and 121(1) of the Criminal Procedure Code under which the said order was obtained or to charge the Applicant and thereby to commit her to court for trial, the Applicant is entitled under Section 121(3) thereof to have the order reversed forthwith.

K. The supporting affidavit of S/Sgt. Mulatya was inadequate and purposeless in that it did not have any facts or matters corroborating circumstances which were in certainty capable of proving to the learned magistrate the possibility which would have let the deponent to come to a reasonable suspicion that the Applicant herein had committed the alleged offence.

4. At the hearing hereof, learned Counsel for the Applicant, Mr. Maseki contended that the order to search and freeze the Applicant's bank account was made under the wrong provisions of the law, namely Section 118 of the Criminal Procedure Code (CPC). He said that the proper section which should have been invoked by the Respondents was section 180(1) of the Evidence Act, Cap 80, Laws of Kenya. He said that even if the right provisions of the law had been invoked, an order for freezing of accounts should not have been the result of such a search. Learned counsel argued that according to the express terms of the order, the court was moved purposely for investigating the account and that it does not make provision for the freezing of the Applicant's accounts. Further, learned counsel argued that the Magistrate's order was open to abuse, particularly in view of the fact that the affidavit supporting the application in the lower court did not state expressly that the search warrant was also to serve as a freezing order. Learned counsel relied on **High Court (Nairobi) Misc. Criminal Case No. 475 of 2004 – Vitu Ltd. –vs- The Chief Magistrate Nairobi & 2 Others** Learned Judge (Osiero, J) in deciding the above case referred to a number of other authorities, among them:-

- **Misc. Criminal Application No. 71 of 2001 – Crucial Properties Ltd. –vs- Charterhouse Bank of Kenya & Another** in which it was held that a warrant issued by the Chief Magistrate under Section 180(1) of the Evidence Act to investigate and freeze the account of the Applicant was irregular and illegal.

- **Misc. Criminal Application No. 571 of 2002 Sanjay Shah & Another vs Republic**

It was held therein that the issuance of a warrant for the production for scrutiny of the banker's books in respect of a customer at the Charterhouse Bank Ltd. was irregular and unlawful misplaced and misconceived. Mbogholi Msagha J also said the following at pages 5-6 of the ruling:-

"I am yet to come across a case where an affidavit perse can facilitate the issuance of a court order or

where an affidavit is construed as both the application and evidence to support the same. Further to the foregoing, the wording of section 180(1) of the Evidence Act aforesaid requires proof, and in criminal law, proof is beyond any reasonable doubt. That being the case, unless the law provides that a party may move the court *ex parte* for any orders, the other party, should have notice of such a proceeding and accorded an opportunity to be heard. That is the cornerstone of the law of natural justice. There is no law that provides that a warrant such as the one herein can be issued *ex parte*. If the legislature so intended, that would have been expressly provided for.”

· **Misc Criminal Application No. 80 of 2001 at Mombasa – M/c Crescent Forwarders Limited –vs- Middle East Bank Limited & Another**

The court therein (Onyancha J) held that

“The Section [180(1) allows the court to authorize a police officer or other person only to investigate the account of any specified person and to take copies thereof or produce the banker’s book or account document for scrutiny and no further. No power or authority to freeze the bank account is given.”

· **Misc Criminal Application No. 9 of 2003 – Erustus Kibiti Stephen vs Euro Bank Limited & Another**

In the above case, Waki J (as he then was) held, inter alia, that

“Where it is desired that the accounts be frozen, a separate application ought to be filed and contested with parties for the investigator to satisfy the court that there is sufficient basis for the order, Waki J”

· **Misc. Criminal Application No. 229 of 2004 – Sian Enterprises –vs- The Chief Magistrate & 2 Others**

Here the Chief Magistrate issued warrants to investigate bankers books and accounts of Transnational Bank under Section 182(1). Several issues arose in the said matter: (a) whether an affidavit alone would be construed as both the application and evidence in support of such an application and (b) whether an application is ever sworn before a Commissioner for Oaths or a Magistrate. The courts have held that “an affidavit by itself cannot be construed as both the application and evidence in support of such an application” and further that “an application is never sworn before a Commissioner for Oaths or a Magistrate. It is merely signed by the Applicant’s advocate”.

5. The courts have also held, that “an application under Section 180(1) is not *ex parte*, it is expected to be an application within the judicial proceedings where the other parties to the proceedings are also expected to be on notice to the extent that even applications by the police under Section 19 of the Police Act, Cap 84 Laws of Kenya, “must give elaborate statements of facts, circumstances and reasons proving the need for the warrant to issue.”

6. In light of the law as stated above, the application by which the Applicant’s accounts were frozen was found wanting. It was for those reasons, that I allowed the Applicant’s application dated 13/08/2008.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of November 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Maseki (present) for the Applicant

No appearance for the Respondents

Weche – court clerk