



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

**Misc Crim Appli 125 of 2007**

**FAMILY IN NEED ORGANIZATION.....PLAINTIFF**

**VERSUS**

**COMMISSIONER OF POLICE.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

The applicant, Family In Need Organization (**FINO**) filed a Notice of Motion under the provisions of **Section 362, 364 and 365** of the **Criminal Procedure Code** seeking the following orders of the court:

“(i) *That this Honourable court be pleased to issue an order to Post Bank Limited to open and/or defreeze the account of Family in Need Organization at it’s Kenyatta Market Branch in Nairobi to enable Family in Need Organization unlimitedly access the said account in order to withdraw, deposit, pay, transfer money and/or in any other way deal with the said account in the manner as provided for in the Constitution of the said Family In Need Organization.*

(ii) *That this Honourable court be pleased to issue an Order restraining the Respondents either by themselves, employees, servants and/or agents from interfering with Family In Need Organization or their bank accounts or funds in any manner.*

(iii) *That the warrant referred to as warrant to investigate account MISC.97 of 2007 issued by the Chief Magistrate’s Court Nakuru on 8<sup>th</sup> August, 2007 be declared by this Honourable Court as unconstitutional, unlawful, and illegal and should be cancelled.*

(iv) *That this Honourable court be pleased to issue an Order of declaration that FAMILY IN NEED ORGANIZATION are entitled and allowed to source and transfer and to deposit funds into their Post Bank Limited account or any other account in Kenya lawfully and without interference from any person or authority.*

(v) *That this Honourable court be pleased to make an order of declaration that the funds belonging to FAMILY IN NEED ORGANIZATION and held in their account at Post Bank Limited are their money and not obtained fraudulently.*

(vi) *That this Honourable court be pleased to make an order of declaration that the Affidavit of Luke Okumu Odiwuor sworn on 8<sup>th</sup> August 2007 is false and unlawful.”*

The application is based on the grounds stated on the face of the application and the annexed affidavit of John Leonard Wanyoike.

The application is opposed. Gitonga Enock Mugambi, a State Counsel in the office of the Attorney General swore a replying affidavit in opposition to the application. He deponed that the accounts maintained by the applicant at the Post Bank, Mombasa Branch and Post Bank, Kenyatta Market Branch, Nairobi were being investigated by the police since it was suspected that the applicant had collected the money from members of the public in a pyramid scheme. He urged the court to disallow the application.

At the hearing of the application, Mr. Ojienda for the applicant urged this court to exercise its powers of revision and examine the legality and the correctness of the proceedings which were commenced by the police in **Nakuru CM Misc.Criminal Appl.No.97 of 2007**. He submitted that the police had purported to act under the provisions of **Section 180 (1) of the Evidence Act** and had frozen the accounts of the applicant thus affecting its operations. He submitted that the law did not authorize any police officer investigating an account to secure its freezing. He maintained that **Section 180(1) of the Evidence Act** only allowed the police to investigate an account and not freeze it. He submitted that it is not sufficient for a police officer investigating an account to swear an affidavit and present it to the court and seek orders to investigate an account. He maintained that there must be sufficient proof before a court of law can freeze an account of an individual. He submitted that the order by the chief magistrate was illegal and not maintainable in law. Mr. Ojienda relied on the decision in **Nairobi HC Misc.Criminal Appl. No.9 of 2003 Erastus Kibiti Stephen vs Euro Bank Limited & Commissioner of Police** where it was held that the police could not invoke the provisions of **Section 180(1) of the Evidence Act** to freeze an account of an individual in a bank. He urged the court to find that the said order issued by the Chief Magistrate was illegal and unjustified in the circumstances and therefore should be revised and set aside as prayed in the application.

Mr. Mugambi for the respondent conceded that there was a *lacunae* in the law relating to how exhibits in the accounts maintained by banks should be treated. He submitted that **Section 118 of the Criminal Procedure Code** gave jurisdiction to the court to order the confiscation of exhibits found when warrant of searches are issued. He submitted that **Section 180(1) of the Evidence Act** only allowed the police to investigate accounts in a bank but not to preserve the said amounts in the bank. He submitted that the police had established that the deponent, John Leonard Wanyoike had opened accounts in Post Bank for the purposes of collecting money from the members of the public. He submitted that the amounts in the accounts maintained by the applicant are suspected to have been unlawfully obtained from the members of the public and if an order freezing the said accounts is lifted, then there was a possibility that the said amounts would be withdrawn from the said accounts and thus lead to the destruction or loss of crucial evidence. He urged this court to disallow the application and uphold the decision of the Chief Magistrate to freeze the accounts maintained by the applicant pending investigations and if need be, the prosecution of the deponent herein on criminal charges related to fraud.

I have considered the rival submissions made by the parties to this application. I have also read the affidavits filed in this application in support of the respective positions of the parties. The issue for determination by this court is whether there is a case established for this court to invoke its jurisdiction to revise the order issued by the Chief Magistrate, Nakuru freezing the accounts maintained by the applicant. **Section 362 of the Criminal Procedure Code** grant this court the jurisdiction to call for and

examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

In the present application, Inspector Luke Okumu Odiwuor swore an affidavit and presented it to the Chief Magistrate, Nakuru and obtained an order of the said Chief Magistrate to freeze the accounts maintained by the applicant at Post Bank, Mombasa Branch. The said order was effected and the said accounts were frozen. It is apparent that Inspector Odiwuor obtained the said order pursuant to the provisions of **Section 180(1) of the Evidence Act**. It has been conceded by Mr. Mugambi on behalf of the State, that the said section of the **Evidence Act** does not grant jurisdiction to a subordinate court to issue an order freezing an account in a bank. Mr. Mugambi however submitted that this court should find that the Chief Magistrate had jurisdiction under **Section 118** of the **Criminal Procedure Code** to freeze the said account pending the conclusion of investigations where it is suspected that the funds in the said account were fraudulently obtained from the members of the public in what is now known as pyramid schemes. The applicant on its part insists that the police had no authority in law to freeze the said accounts. It maintained that the police were only authorized to investigate the accounts and not to interfere with its operations. The applicant submitted that its operations had been prejudiced by the said unlawful order of the Chief Magistrate freezing its accounts.

I have carefully considered the provisions of **Section 180(1)** of the **Evidence Act**. As correctly pointed out by Mr. Ojienda for the applicant and by Mr. Mugambi for the respondents, the said section does not grant jurisdiction any subordinate court to freeze an account in a bank which is being investigated. (See **Erastus Kibiti Stephen vs Euro Bank Limited & Anor. Nairobi HC Misc. Criminal Application No.9 of 2003 (unreported)**). This court would have granted the application sought by the applicant were the said accounts maintained in a bank. **Section 2** of the **Banking Act** defines ‘a bank’ as a company which carries on or proposes to carry on banking business in Kenya and includes the Co-operative Bank of Kenya Limited but does not include the Central Bank. Post Bank is not a bank within the definition of the **Banking Act**. The Post Bank was set up by an **Act of Parliament in 1978**. (See ***the Kenya Post Office Savings Bank Act – Cap 493B of the Laws of Kenya***). The mandate of the Post Office Savings Bank is provided for by **Section 4 of the Act**. The said Act clearly provides that the Post Bank is not a bank as defined by **Section 2** of the **Banking Act**. It therefore follows that the accounts maintained at Post Bank are not bank accounts subject to the provisions of **Sections 176 to 181** of the **Evidence Act**.

Inspector Odiwuor therefore should have applied for the freezing of the said accounts as provided for by **Section 118** of the **Criminal Procedure Code**. The respondent maintained that the said accounts operated by the applicant were a collection account where members of public were duped into depositing their money. It is only proper that the police be given a chance to investigate the said accounts and determine if indeed there is just cause to charge the applicant with a criminal offence. This court would be acting against its inherent jurisdiction to preserve law and order and to do justice to citizens of this country if it were to order the defreezing of the said accounts and therefore allow the applicant to frustrate investigations by the police. This court noted that despite of the applicant claiming that it was a non governmental organization whose objective is to empower the poor and establish a revolving fund where the poor and the needy can draw, it was indeed strange that the accounts maintained purportedly by the applicant were in the personal name of the deponent John Leonard Wanyoike. This raises suspicion as to the operations of the applicant.

The upshot of the above reasons is that the application by the applicant is hereby disallowed. The order freezing the accounts purportedly in the names of the applicant (*but in actual fact in the name of the deponent John Leonard Wanyoike*) shall be maintained pending the conclusion of investigations by the police. For the avoidance of doubt, the said accounts are accounts Nos.KKMBBSA-0050313 at Mombasa Branch of the Post Bank and account No.KNAKBSA-60533 at Kenyatta Market Branch of the Post Bank or any other account in Post Bank are hereby frozen pending the conclusions of the investigations. The said accounts shall not be unfrozen until further orders of this court.

**DATED at NAKURU this 23<sup>rd</sup> day of November 2007**

**L. KIMARU**

**JUDGE**