REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO 9 OF 2003

ERASTUS KIBITI STEPHEN ……..APPLICANT

VERSUS

EURO BANK LIMITED

COMMISSIONER OF POLICE …….....……...RESPONDENT

RULING

Although this matter was overtaken by events, the subject Bank having been placed under liquidation, the parties still seek to have a ruling on it. The matter was brought to the attention of the Court by Erastus Kibiti Stephen (Kibiti) for adjudication under the powers of revision vested in this Court under Sections 362 and 364 Criminal Procedure Code. Kibiti however brought up the matter as if it was a contested one between him and Euro Bank Ltd (the Bank) of the one part, and the Commissioner of Police (the Commissioner) of the other part. Neither sections 362, 364 or 3(3) all of which are invoked envisage the procedure of Chamber Summons that has been adopted here. Indeed section 365 of the Criminal Procedure Code prohibits the hearing of any person or his advocate in applications for revision unless the court in its discretion decides to do so. Perhaps an application for judicial review would have served the applicant better on the orders he seeks.

Be that as it may, I decided to hear submissions from Kibiti's advocates, the Attorney General for the Commissioner, and the Bank's advocates.

The background to the matter is this:- Kibiti deposited some Kshs 30million with the Bank at its Hamilton House branch on 02. 05. 2000 and obtained fixed deposit receipts, numbers 001325, 001326 and 001327. The fixed deposits were for 6 months ending on 02. 11. 2000. When he went to withdraw the money on maturity however, he was told he could not do so. And the reason given by the Bank was that the deposits were being investigated by the police. The Bank showed him some warrants served on it by the police on 13. 7. 2000 and 17. 8. 2000 freezing the accounts. Now, those warrants are exhibited with the application. There is also exhibited an affidavit sworn prior to the issuance of the warrants.

The first affidavit was sworn by a police officer from the Banking Fraud Investigations Unit on 13. 7. 2000. He was investigating the offence of theft by a person employed in the Public Service contrary to section 281 of the Penal Code. He believed that some Accounts he was investigating under the name of one Shadrack Mwiti had been closed and reopened in the name of Kibiti with the same Bank, and he required not only a warrant authorizing such investigations but also an order freezing the Accounts.

The warrant was issued accordingly on the same day 13. 7. 2000 and the officer was authorised ..

".. to investigate the said Account and to require the production for his scrutiny of any such book or books and to take copies of any relevant entry or matter in such book or books."

There was no reference to the Accounts being frozen. The officer however swore an identical Affidavit on 17. 08. 2000 and a similar warrant was issued this time with the added clause "and to freeze the operations of the said Account."

Those are the documents which are challenged as having been issued unlawfully and without jurisdiction. Kibiti through learned counsel Mr Nyamodi submitted that the warrants could only purport to have been issued under section 180 (1) of the Evidence Act although it was not so stated in the warrants. The section provides:

"When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."

He submitted that the section makes no reference to freezing of Accounts and is limited to Inspection of Bankers' Books. He cited three similar cases where three different judges of this Court declared such warrants unlawful. The first was a ruling by Mitey J made on 25. 05. 2002 in

HCCR Appl 71/2001 *Crucial Properties Ltd Vs Charterhouse Bank & 2 others*. It related to a warrant issued by the Chief Magistrate Nairobi to

"investigate and freeze" some two Accounts held by the respondent Bank. It was held that the "freezing order" was irregular and illegal. The second Ruling was by Onyancha J in an undated Ruling in Mombasa *HC Misc Cr Appl 80/2001 Crescent Forwarders Ltd Vs Middle East Bank Ltd & Another*. The Applicant sought the reversal of a "freezing order" of a Bank Account. It was held that "the subordinate court went beyond its powers as provided under section 180 (1) of the Evidence Act." Finally Mbogholi J added by his voice in a Ruling delivered on 26. 6. 2002; HC Misc Cr Appl 571/2002 *Sanjay Shah Arunjan Vs Republic.* He was of the view that the procedure for seeking the warrants under section 180(1) did not envisage a mere affidavit without any application in support thereof and proof beyond reasonable doubt. It did not also envisage that the proof be tendered *ex-parte*.

For those reasons Mr Nyamodi called for nullification of the warrants.

The Bank's lawyer Mr Njenga did not oppose the order for nullification save the proposal that the Bank should be ordered to pay out the money to Kibiti forthwith. Matters of the Bank Account, he submitted, were between the Bank and the customer.

Finally I heard Mr Gacivih for the Attorney General. In one breath he conceded that the warrants could only have been issued under section 180(1) of the Evidence Act which says nothing about "Freezing of Bank Accounts" and that therefore the application cannot be opposed. In another breath he submitted that there was no procedure set by the courts and that there exists a Lacuna in the law. It is that Lacuna that has been used by the Government to protect Public funds from thieving hands as it has a duty to do so. The procedure has been used for a long time and should not therefore be disturbed. He sought the guidance of the court in the matter.

With respect, I think the proper guidance that the Court can give is that the provisions of the law as enacted by Parliament be followed. It is common ground that the relevant applicable law in this matter is section 180 (1) of the Evidence Act (cap 80) Laws of Kenya. It is reproduced above.

I agree with Mr Gacivih that section 118 of the Criminal Procedure Code is inapplicable. Parliament found it necessary to enact special provisions relating to "Bankers Books" which appear in chapter VII of the Evidence Act. In other Jurisdictions like England and India, there are special Acts of Parliament to deal with the subject on its own. That underscores the special nature and sensitivity of banking and banking transactions. It is at the very core of a people's commercial life. For a banker is not bound to disclose the state of a customer's Accounts except on reasonable and proper grounds such as where the

disclosure is under compulsion by law, or there is a duty to the public to disclose; or where the interest of the bank requires the disclosure or where the disclosure is made by the express or implied consent of the customer. See *Tournier vs National P&U Bank of England* [1924] 1 KB 461. The power to determine whether all those exceptions exist is reposited in the Court, hence the requirement that there should be proof on oath. I defer to the ruling of my three brothers above which were made on the peculiar facts of the cases before them. There is the common view expressed however that section 180(1) does not encompass the freezing of a bank account. On the plain reading of the section this is indeed so. But one may loudly wonder why the law should permit the inspection of Banker's Books which by definition includes ledgers, day books, cash books, accounts books, and all other books used in the ordinary business of the Bank, which in this day and age would cover computer records. When it does not safeguard the funds existing in those Accounts! Take this case: the facts presented are that a large amount of public funds suspected to have been stolen were hidden in the Accounts sought to be inspected. The same funds had earlier been withdrawn and reinvested in different Accounts even when the investigators were busy inspecting the Bankers Books under other warrants of inspection granted by the Court. How else would the investigator ensure that "the horse has not bolted from the stable" as it were, before he finalises his inspection?

The answer lies I think in enacting a law, whether substantive or procedural to resolve that difficulty. It is not the first time the difficulty has arisen as there are at least three cases already decided by the High Court in the last two years highlighting it. There has been no challenge to those decisions.

Why the Attorney General has not taken the cue to put the law beyond doubt is beyond me. As it is, unscrupulous and corrupt elements in society may easily get away with crime if the balance between the sanctity of

Banking and Banking Accounts, and the duty to fight crime is not properly weighed.

In my view, as the Law now stands, an officer wishing to inspect Bankers Books must satisfy the Court on the reasons for such course. Although I accept the view that the Affidavit presented to the court should be accompanied by an application, I do not subscribe to the view that the order may not be obtained *ex-parte* at the first instance where the circumstances so dictate, for example where prior notice to the customer would lead to the closure of the Account, thus defeating the very purpose of the exercise. But the application ought to be served soon after on the customer and the Bank for their response. Where it is desired that the

Accounts be frozen, a separate application ought to be filed and contested *inter partes* for the investigator to satisfy the Court that there is sufficient basis for the order.

The warrants challenged in this case appear to have been obtained in contravention of the law as it stands. They are for quashing and I so order.

The further order sought that the Bank be ordered to release the funds forthwith cannot be made within the purview of the revisionary powers of the Court and I do not make it. At all events it is common knowledge that the Bank is now legally disabled and any such order would therefore be issued in vain.

Dated and delivered on this 5th day of March, 2003

P.N. WAKI

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JUDGE