



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC.CRIMINAL APPLICATION NO 571 OF 2002

SANJAY SHAH ARUNJAIN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

By a warrant to investigate account given by a subordinate Court on 25th March, 2002, an Inspector of Police, one Rugendo Mbogori, was authorized to require the production for his scrutiny the book or books of Charterhouse Bank Limited which related to the account of Orbit Express Limited with the said bank.

The said warrant was allegedly issued pursuant to Misc. Application No.154 of 2002. The same was addressed to the General Manager of the said bank and, according to the material before the court it was received at the said bank by a Mr. Aron Jain the bank Manager.

The Managing Director of the said bank according to affidavits filed herein is one Mr. Sanjay Shah. The two officers of the bank declined to honour the court order.

On 28th March, 2002, M/s Orbit Express Limited filed an application seeking to set aside the order of 25th March, 2002 aforesaid. This was vide Misc. Criminal Application No.13 of 2002. When the application came up for hearing, the learned counsel for the Republic informed the court that, the two bank officers were to appear before the Chief Magistrate charged with the offence of disobeying the court order C/s180(2) of The Evidence Act, that same morning and hence sought an adjournment. The application for adjournment was opposed. The learned trial magistrate then made an order that:

“This matter is now stayed. The court declines to make any orders on the application.”

It is not clear from the above order which “matter” the learned trial Magistrate “stayed” or which application she declined to make any orders on. Be that as it may, sure enough, on 15th April, 2002, Sanjay Shah and Aron Jain were arraigned before the Chief Magistrate under Criminal Case No.974 of 2002 for failing to produce Banker’s book to a Police officer executing a warrant to investigate an account C/s 180(2) of the Evidence Act Laws of Kenya.

The learned counsel for the accused in that case sought a stay of proceedings and/or rejection of the charge but after submissions were made by both parties, the learned chief magistrate gave time to the accused to seek redress in the High Court. Effectively, proceedings in that case have been stayed pending the determination of the present application. So much for the background.

The present application was brought by the applicants under Sections 362 and 364(1) (b) of the Criminal Procedure Code Cap 75 Laws of Kenya. Considering the issues involved, I deemed it prudent to

order service of the application so that the parties could address the court under Section 365 of the Criminal Procedure Code. This they have done.

The substantive orders sought by the applicants are

1. That the warrant issued under section 180(1) of the Evidence Act without there being judicial proceedings before the court in Miscellaneous Application No.154 of 2002 be set aside.
2. That the charge or complaint accepted by the magistrate under section 89 of the Criminal Procedure Code in Criminal case Number 974 of 2002 be rejected and/or quashed.
3. A declaration that information relating to a bank account is not relevant to an offence of tax evasion, and,
4. A declaration that Police Officers cannot obtain warrants to investigate an account in an offence of evasion of tax in the absence of a charge with such an offence.

The application is supported by an affidavit sworn by Sanjay Shah in addition to the several grounds set out in the body of the Originating Summons. I also have the submissions of the learned counsel for the applicants. The Republic opposes the application and the learned counsel appearing has also made his submissions.

I believe I have jurisdiction to address and determine the issues raised herein under Sections 60 and 65(2) of the Constitution of Kenya and Sections 362 and 364 of the Criminal Procedure Code Cap. 75 Laws of Kenya.

Section 180 of the evidence Act Cap. 80 Laws of Kenya provides:

“180(1) Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker’s book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker’s book, and such warrant shall be sufficient authority for the production of any such banker’s book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker’s book.

(2) Any person who fails to produce any such banker’s book to the police officer or other person executing a warrant issued under this section or to permit such officer or person to scrutinize the book or to take copies of any relevant entry or matter therein shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand shillings or to both such imprisonment and fine.”

The affidavit that facilitated the issuance of the warrant to investigate account appears in Misc. Application No. 154 of 2002. It reads in part as follows:- “I Rugendo Mbogori an Inspector of Police currently attached to C.I.D headquarters Fraud Investigation do hereby make oath and state as follows:

- 1 That I am investigating a criminal case of fraudulent evasion of tax contrary to Section 187(f) of Customs & Excise Act Cap 472 Laws of Kenya
- 2 That I have reasons to believe that evidence material to this investigation may be found in the manner of Bank Statement Cheques, Bank account opening records of ORBIT EXPRESS LTD through payment order P003/15/2001 dated March 2001
- 3 That the said account is being held at the CHARTER HOUSE BANK LTD, LONGONOT

PLACE 6TH FLOOR.”

The said affidavit was sworn before a Resident Magistrate on the same day, that is, 25th March, 2002 where upon the words:

“Order to Issue”

appear at the bottom thereof and signed by the said learned magistrate. On the foregoing, the warrant was also signed addressed to the General Manager of the said bank.

In the absence of any other document, the said affidavit stands alone. I am yet to come across a case where an affidavit per se 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. One does not have to go beyond paragraphs 2 and 3 of the said affidavit to note that the contents thereof are wanting not only in substance, but also any proof as required in law.

The administration of justice in this country is adversarial. 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.

I am fortified in that argument by the fact that the bank – customer relationship is based on a fiduciary understanding with its own attendant obligations. Further, if any authority is given an order that may be used on a fishing expedition, the same may be misused and/or abused. In the instant case, now that the court has the benefit of an affidavit by one of the applicants Sanjay Shah, it now transpires that the bank did not have in its possession the records sought to be investigated. Had there been any application, duly filed and served, all these matters would have been canvassed before the learned trial magistrate. There has been in my view a miscarriage of justice.

Had there been no warrant in the first place application NO.13 of 2002 and Criminal Case No.974 of 2002 would not be before any court today. The issuance of the warrant was un-procedural, misplaced and misconceived. That being the case, it must be vacated. It is so ordered. It follows therefore that, the foundation having collapsed all subsequent proceedings based thereon must also fall by the wayside. The criminal charge in criminal case no 974 of 2002 is therefore also struck out and terminated.

I have also been asked to make declarations as to the relevance or otherwise of the information sought in relation to tax evasion charges. I have declined to address those issues for the sole reason that not sufficient material has been canvassed and/or submitted to make such orders. In any case the same rules of natural justice apply.

In the end, the application succeeds. The warrant issued on 25th March, 2002 is hereby vacated and Criminal Case No. 974 of 2002 is accordingly struck out.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of June, 2002.

A. MBOGHOLI MSAGHA

JUDGE