



Biotech Organics Limited v Republic (Criminal Miscellaneous Application E025 of 2023) [2024] KEHC 8946 (KLR) (Crim) (15 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E025 OF 2023
LN MUTENDE, J
JULY 15, 2024**

BETWEEN

BIOTECH ORGANICS LIMITED APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Biotech Organics Limited, the Applicant, became an interested party in Milimani Chief Magistrate's Criminal Miscellaneous Case No. E2538 of 2022 filed after the DCI Railways obtained warrants to investigate accounts held by the applicant. Orders issued by the court restricted and froze account No. 0100010026541 in the name of the applicant held at Stanbic Bank (K) Ltd.
2. Through an application dated 24th January, 2023, the applicant seeks orders issued by the court to be reviewed, set aside and/or quashed.
3. The application is premised on grounds that the orders were issued exparte, without giving the applicant audience and the money in the account was for unpaid goods following a commercial transaction between the applicant and Bytech Savanna Ltd also registered as a company which goods have not been paid todate.
4. That the Criminal Case No. E 821 of 2022 was filed after the warrants were issued where charges have been preferred against Elphus Mutuma and Bridget Nyaga; and, the miscellaneous application file in Case No. E 22538 of 2023 where the freezing order emanated was closed but the orders were extended for an unspecified period.
5. That the applicant's application to set aside the order extending the restriction order was denied by the lower court on the ground that the court lacked jurisdiction.



6. The applicant contends that it is a distinct party from Bytech Ltd which was sued in the criminal case and that no charges have been preferred against it.
7. That the applicant did not have any other forum to set aside the orders and was also condemned unheard. That the freezing order is for an unspecified, indefinite period and that the applicant's operations have been paralyzed.
8. That the accounts are not exhibits in the criminal case and there is no ground warranting continuation of the impugned orders.
9. There was no response from the respondent.
10. Following directions given by the court the application was disposed through written submissions with only the applicant putting forward its argument. The applicant questioned whether the court's jurisdiction was properly invoked. That it did not get a chance to ventilate its issues and to challenge the seizure of items. In that regard reference was made to R -Vs- ARA John Wachira Wahome (2019) eklr and Ogola Mujre Advocates LLP -Vs- Banking Fraud Investigations Unit & 2 others (2016) eklr; and, Section 121 of the Criminal Procedure Code.
11. That there is no ground to disclose that the applicant was involved in the suspicious conduct of Bytech Organics Ltd or such criminal activities to warrant ex parte orders. That the applicant has been prejudiced by the impugned orders. The applicant is unable to discharge its contractual obligations and risks closure.
12. On its part the respondent did not file submissions in opposition of the application per the directions given by the court.
13. The lower court record indicates that the impugned orders were extended after the DPP brought charges in Criminal Case No. E821 of 2022. The accused in the case are Bridget Nyaga indicted in her capacity as the director of Bytech Savanna Ltd and Elphus Mutuma Murithi charged as a Director of Biometric Organics Ltd. The accused have been charged with Stealing by Director contrary to Section 282 of the Penal Code; Conspiracy contrary to Section 317 of the Penal Code and Obtaining money by False pretenses contrary to Section 313 of the Penal Code.
14. The amount of money stolen was stated to be Ksh 418,000/= the property of Bytech Savanna Ltd; It was further alleged that the accused with intention to defraud pretended to be in a position to supply 500 litres of Pathway and 1550 bags of plant protection Gypsum to Bytech Savanna Ltd.
15. This matter emanates from Misc. Application No.2538 of 2022 where the court ruled that the extension of the order was to preserve the substratum of the Criminal Case No. E821 of 2022.
16. An application for review of the order was declined for lack of jurisdiction. It is also noted that the orders were issued after investigations were concluded.
17. I have considered the argument advanced by the applicant. Section 362 of the Criminal Procedure Code refers to the power of revision vested on the High court. The court has jurisdiction to examine the record of any criminal proceedings before any subordinate court and interrogate legality correctness or propriety of the decisions taken. The stated provision of the law provides:
 - a. The High Court may 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 subordinate court.



18. Section 364 of the CPC empowers the High court to exercise its revisionary powers conferred to it as a court of appeal by Sections 354, 357 and 358.
19. As aforesaid the impugned orders were issued by a magistrate of concurrent jurisdiction. In criminal proceedings, the magistrate court does not have power to review or revise its own orders. This is a special jurisdiction bestowed on the High court.
20. Based on practice and law, a court cannot sit in review or appeal over its own decision or a court of concurrent jurisdiction and it is also notable that a court of law can only exercise jurisdiction as conferred upon it by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The court gave an *ex parte* order and granted the other party the opportunity to be heard. This was procedural. However, no step was taken by the Interested Party to respond to the application.
21. The honourable magistrate did not err in law in declining the application by the Interested Party.
22. Section 118 as read with Section 121 of the Criminal Procedure Code are a basis for the Investigating Officer to seek an order *ex parte* from the court to obtain warrants for investigating an account.
23. Section 118 of the Criminal Procedure Code provides that:

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 by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, 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.
24. The threshold is met where the magistrate is persuaded that a crime may have been committed. In *Mape Building & General Engineering -Vs- Attorney General & 3 others* (2016) eKLR, the court held that the orders are not granted as a matter of course but the court must be persuaded by affidavit of the investigating body. Affidavit evidence is sufficient to persuade a court to issue orders *ex parte* and run for a definite period. (See Section 121 of the Criminal Procedure Code).
25. The respondent contested the application before the trial court and through affidavit stated that the Co- director of Bytech Savanna Ltd lodged a complaint over dealings with the company's money and further dealings with the subject account.
26. The court was also convinced that there was ground for issuing the search and seizure warrants in aid of investigating the transactions.
27. The criminal proceedings against those indicted refer to theft and defrauding the company and also conspiracy by persons in their capacity as directors. The second accused is the director of the applicant.
28. The court was also well advised in freezing the accounts and extending the orders pending final determination of the criminal charges. As stated by the applicant, the two companies were involved in commercial transactions. However, where the transactions are investigated and are found to be suspect and reveal crime commission it follows that all evidence related to them should be preserved until a final determination is made.



29. 121(1) of the Criminal Procedure Code enacts that:

When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

30. The court was not obligated to reach a finding that the accounts were exhibit in the criminal case or that the applicant was part of the crime. The threshold is met where there is sufficient ground to restrain dealings with the accounts pending final prosecution of the matter.

31. In Mape Building & General Engineering case (ibid) the court held that warrants or seizure orders are obtained ex parte when any matter is still at the investigation stage and that the justification seems to fall within the provisions of Article 24 (1) of *the Constitution*. That the warrants and freezing orders were evidently necessary for the purposes of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations the 2nd Respondent was, justified in making the application for both the warrants and freezing order exparte.

32. Further, the criminal procedure Code unlike the Anti-Corruption & Economic Crimes Act does not give the suspect right to prior notice.

33. See the case of Director of Public Prosecutions -Vs- Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others (2019) eKLR

34. Similarly, the applicant's right to fair administrative action can be limited by law . There is no prejudice suffered since only ksh 418,000/= was to be withheld pending the case and not the entire amount in the account which was found to be prejudicial and infringing as stated in Brown Field Developers Limited -Vs- Banking Fraud Investigations Unit & 4 others [2016] eKLR . The orders are also for a definite period and were issued in the wider public interest.

35. The upshot of the above is that there was nothing irregular and/or illegal with the order requiring revision by this court.

36. Therefore, the application lacks merit. Accordingly, it is dismissed.

37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 15TH DAY OF JULY, 2024.

L. N. MUTENDE

JUDGE

