



**DIB Bank Limited v Republic (Criminal Revision E265 of 2022)  
[2023] KEHC 1498 (KLR) (Crim) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1498 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL REVISION E265 OF 2022**

**JM BWONWONG'A, J**

**MARCH 6, 2023**

**BETWEEN**

**DIB BANK LIMITED ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for revision of the ruling delivered on 12th September 2021 in Milimani Miscellaneous Application No. E2938 of 2022 Republic vs Dib Bank Limited & another)*

**RULING**

- 1 The application for determination was filed through a notice of motion dated 4<sup>th</sup> October 2022. The application was made pursuant to articles 50 (1) and (4) and article 165 (6) of the Constitution of Kenya and as well under sections 362 and 364 of the Criminal Procedure Code (Cap 75) Laws of Kenya.
- 2 The applicant sought orders to quash the orders of the subordinate court issued on 12<sup>th</sup> September 2022.
- 3 The application is premised on the grounds set out on the face of the notice of motion, which are reiterated in the supporting affidavit sworn by Farida Ghazi, a legal officer of the applicant.
- 4 The grounds raised are as follows. That the respondent filed an application by way of a notice of motion seeking to be issued with warrants to investigate the books of accounts of the applicant. The lower court issued the orders sought on 12<sup>th</sup> September 2022. It is claimed that the orders granted do not indicate/state the duration for which the order shall remain in force. That the trial court failed to give a return date to allow the applicant to raise any issue it may have with the order. Further, the order sought to investigate the applicant is based on confidential information pertaining to their customer. It



was averred that the execution of the order would compromise the applicant's duty of confidentiality (privilege).

5 The respondent did not file a response to the application.

### **The applicant's written submissions**

6 It was submitted that the impugned order did not indicate the duration for which it shall remain in force. Further, there was no return date thus making it impossible for the applicant to challenge its issuance. It was argued that the lower court made a final order without hearing the aggrieved party in violation of the principles of natural justice under article 50 of the Constitution of the Kenya.

7 It was also argued that the impugned orders fall short of legality, correctness, and propriety and thus should be revised, set aside or otherwise discharged. Reference was made to the case of Republic vs Prime Bank & another [2018] e-KLR. In that case, the court held that in order to keep the process fair, just and in line with article 50 of the Kenya Constitution, the learned magistrate moved under sections 118 and 121 of the Criminal Procedure Code and section 180 of the Evidence Act should, upon granting the *ex parte* order, issue directions on: give a return date for a progress report; indicating the period the orders should remain in force but should not exceed 14 days; and hearing both parties before any limited extension is given.

### **The respondent's written submissions**

8 Mr. Mutuma, senior prosecution counsel, for the respondent submitted that the decision of the subordinate court was premised on sections 180 of the Evidence Act (Cap 80) Laws of Kenya and section 118 of the Criminal Procedure Code (Cap 75) Laws of Kenya. He argued that the orders issued were lawful and satisfied the provisions of article 50 of the Constitution of the Kenya. This is because the subordinate court can only ask parties to appear for a hearing on a need basis.

9 He urged the court to dismiss the application.

### **Issues for determination**

10 I have considered the application, the submissions of the parties and the applicable law.

11 As a result, I find that the following is the issue for determination.

1. Whether the applicant has made out a case for the grant of the orders sought.

### **Analysis and determination**

12 The impugned orders sought to be revised were issued by the lower court on 12<sup>th</sup> September 2022. An application had been made by the respondent pursuant to sections 118 and 121 (1) of the Criminal Procedure Code and section 180 of the Evidence Act.

13 Section 118 of the Criminal Procedure states 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.”

14 Additionally, section 121 (1) of the [Criminal Procedure Code](#) provides that:

(1) “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.”

15 Furthermore, section 180 (1) of the [Evidence Act](#) -

(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..”

16 The application was supported by an affidavit of No. 90972 PC Bonface Muli. I find as credible the averment of the investigating officer that he was investigating a case of conspiracy to defraud and forgery. This follows allegations purportedly made by Antony Mbithi Mutuku in respect of his property that was allegedly charged by the applicant. The respondent therefore sought and was granted warrants to investigate the books of account of the applicant in respect of the charged property.

17 The argument by the applicant is that the accounts being investigated pertain to confidential information involving their client/customer. Further, they were not given an opportunity to be heard to enable them to challenge the impugned orders. The subordinate court was consequently accused of acting irregularly in granting orders, an illegality that this court is called upon to correct. Section 362 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya provides thus:

“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 such subordinate court.”

18 According to section 118 of the [Criminal Procedure Code](#), the application before the magistrate is to be made ex parte, but the court is called upon to address itself to the full facts of the case and reach a determination whether there is a reasonable cause in issuing orders sought. In the case of [Mape Building & General Engineering Vs. Attorney General and 3 others](#) [2016] e-KLR it was stated that:

“...The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of investigations. The order or warrant is never to be granted as a matter of course. It can thus be clearly understood why warrants or seizure orders are obtained ex parte when any matter is still at the investigation stage. The justification seems to fall within the provisions of Article 240 of the [Constitution](#)”

19 The applicant complains that their rights to fair trial were tramped upon, since they were not given an opportunity to challenge the decision of the court on the averments made. In the case of [Okiya Omtatab Okoiti & 2 others Vs. Attorney General & 4 others](#) [2018] e-KLR, it was observed that to give the notice to the person to be investigated can easily jeopardize the incriminating evidence.



20 From the record, the *ex parte* proceedings before the subordinate court were regular as provided by law. The applicant has not provided any evidence to indicate that the court failed to satisfy itself of the matter sought to be investigated.

21 This court has been called upon to set aside the orders issued by the trial court. In the case of *Republic Vs. Chief Magistrate Milimani & another. Exparte Tusker mattresses Ltd and 3 others* [2013] e-KLR the court stated that:

“The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial.

That this Court has the power to quash impugned warrants cannot be doubted. However, it is upon the *ex parte* applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so... The warrants were issued to enable the allegations to be investigated. Whether or not the investigations will unearth material which will be a basis upon which a decision will be made to commence prosecution of the *ex parte* applicants or any of them is a matter which is premature at this stage to dwell on.”

22 It is a universal rule that investigations in respect of allegations that offences have been committed are conducted in the absence and without the knowledge of the target or suspect. The purpose of conducting investigations *ex parte* is to prevent suspects from escaping, destroying evidence and it also protects innocent people from the public knowledge that they are under investigation. If disclosures were allowed during the investigation process, it will be prejudicial and distractive to the investigation process.

23 It is for the foregoing reasons that grand juries do conduct serious offences in secrecy (*ex parte*) in the USA pursuant to the V (5<sup>th</sup>) Amendment to the USA Constitution of 1787. See *U.S v Eng’g Inc.*, 463 U S 418 (1983).

24 In the instant application, the applicant cannot claim confidentiality between it and its customers to evade disclosure of the information that is needed by the police in the course of their investigations; which are conducted after obtaining a search warrant from the court. Additionally, the bank cannot claim any confidentiality once there is an order of the court to carry out the search in respect of the books of accounts of the bank. The applicant cannot claim privilege to avoid being investigated for suspected commission of crimes.

25 The allegation that the investigations would interfere with the confidentiality of their client is falls away once the investigations are carried out pursuant to a court order. The order issued by the court is specific. Furthermore, the warrants issued were to facilitate investigations with a view of preferring charges, and this court cannot interfere with the investigation processes of the police by granting the orders sought. The fair trial rights under article 50 of the Constitution of Kenya of an accused do not come into play during the investigation process and are only applicable when a suspect has been charged in court.



26 The investigation process and its outcome do not permit a participation by the applicant. The applicant may participate at the inter parties hearing subject to the applicable law.

27 The application dated 4<sup>th</sup> October 2022, is found to be lacking in merit and is hereby dismissed.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 6<sup>TH</sup> DAY OF MARCH 2023.**

**J M BWONWONG'A**

**JUDGE**

In the presence of-

Mr. Kinyua: Court Assistant

Ms Farah holding brief for Mr. Kaaya for the applicant.

Ms Odour for the respondent

