



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. E365 OF 2021

LEAH NYAMBURA KAMORE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Leah Nyambura Kamore**, the applicant, through a Notice of Motion seeks interalia that: An order setting aside orders in Misc. Application No. 3072 of 2021 by unnamed Hon. Magistrate to the effect that account opening documents of Account No. xxxxxxxxxxxxxx in Equity Bank Limited in the name of Leah Nyambura (Applicant) and Bank Statements as from 1<sup>st</sup> April 2018 to 31<sup>st</sup> October 2019 be obtained; the orders dated 15<sup>th</sup> September 2021 in Misc. Application No. E3072 of 2021 by an unnamed Hon. Magistrate to the effect that the account opening documents of Account No. xxxxxxxxxxxxxx in NCBA Bank Limited in the name of Leah Nyambura and Bank Statements as from 1<sup>st</sup> April 2018 to 31<sup>st</sup> October 2019 be obtained; and, that the applicant be at liberty to apply for such further or other orders and/or directions as the court may deem just to grant.

2. The application is premised on grounds that: the applicant is a joint-Administrator with Hillary Mwangi Kamore in the High Court Succession Cause No. 763 of 2018, in the matter of the Estate of James Kamore Njomo (Deceased) which is pending in the Family Division, Nairobi. That various applications have been made in relation to benefits from Britam Insurance Company that the deceased had expressed his wishes according to the scheme rules, which were not supposed to be enjoined to the succession cause.

3. That the applicant in Misc Crim. Application No. E3072 of 2021 made averments and/or unsubstantiated claims and obtained orders to obtain account opening documents of Account No. xxxxxxxxxxxxxx in Equity Bank Ltd and Account No. xxxxxxxxxxxxxx in NCBA Bank Limited, both in the names of Leah Nyambura (Applicant) and bank statements as from 1<sup>st</sup> April 2018 to 31<sup>st</sup> October 2019 without her knowledge and/or knowledge of the Succession Court.

4. That the stated orders were obtained in a matter which she was not a Respondent hence her rights to fair hearing were tramped upon; rights that she seeks to be protected under Article 50 of the Constitution; that her rights have been prejudiced for not having been heard by a competent court accountable to criminal justice system as the orders were issued by an unnamed Hon. Magistrate.

5. The applicant swore an affidavit in support to the application where she reiterated what is stated in the body of the application and added that the affidavit sworn by No. 75579 CPL. Geoffrey Mwangi dated 14<sup>th</sup> September 2021 contains unsubstantiated statements and/or averments that she was not given a chance to defend.

6. That the alleged complainant Martin Henry Chege Thuo in the affidavit of CPL. Geoffrey Mwangi is a stranger to the Estate and the Succession Cause and the alleged Power of Attorney was neither presented before the Hon. Court nor served upon the Succession Court and is a figment of own imagination; the application is unopposed.

7. At the hearing, Mr. Okemwa learned counsel for the applicant urged that there is a Succession Cause that is pitting the applicant and her step-sons who are suspected to be using the 2<sup>nd</sup> Respondent to fish information forming their evidence. That there was nothing to show who made the application and the Magistrate who granted the orders which is an abuse of the Petitioner's rights. That the accounts being the applicant's personal accounts her rights were violated since she was not served with the orders.

8. The State through learned counsel, Mr. Mutuma did not oppose the application. He submitted that the applicant is pitted against her sons in the Succession Cause therefore she ought to have been served with the application in the lower court which was not done. That orders sought should have been obtained from a Civil Court but not Criminal Court.

9. I have duly considered rival submissions of both parties herein. The impugned orders herein were issued by the Chief Magistrate's Court Nairobi, presided over by Hon. R. Aganyo PM Exparte; The application was made by the 2<sup>nd</sup> Respondent, pursuant to **Section 118 and 121 (1)** of the Criminal Procedure Code (CPC) and **Section 180** of the Evidence Act. The alluded to Provisions of the laws provide thus:

**Section 118** of the CPC -

*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.*

**Section 121 (1)** of the CPC -

*(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.*

**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..*

10. The application was supported by affidavit evidence by No. 75579 CPL. Geoffrey Mwangi. Where he affirmed that he was investigating a case of conspiracy to defraud. This was following allegations purportedly made by Martin Henry Chege Thuo who allegedly held a Power of Attorney for one Hillary Mwangi Kamore whose share of inheritance from his late father was paid to an account that did not belong to him.

11. The argument by the applicant which is supported by the Respondent herein is that the person whose accounts were to be investigated (Applicant) and the complainants, her step sons are pitted in a succession wrangle and there exists a Succession Cause in the High Court Family Division that should have addressed issues that were taken before the Criminal Court. If indeed there is some conspiracy to defraud benefits of the deceased then investigations ought to be conducted since **Section 45** of the Law of Succession Act criminalizes disposing of the property of the deceased unless authorized by law.

12. The lower court has been accused of acting irregularly in granting orders, an illegality that this court is called upon to correct. **Section 362** of the CPC 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.*

13. According to **Section 118** of the CPC 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 other (2016) eKLR** 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"*

14. The applicant complains that her rights to fair trial were tramped upon since she was not made a respondent and the averments made were unsubstantiated. In the case of **Timothy Isaac Bryant & 2 others Vs. Inspector General of police & others (2014) eKLR** it was the view of the court that orders made affecting 3rd

parties should not be made final until after a party affected has been notified and given a chance to be heard.

15. But, in the case of *Okiya Omtatah Okoiti & 2 others Vs. Attorney General & 4 others (2018) eKLR* it was observed that to give the notice to the person to be investigated can easily jeopardize the incriminating evidence.

16. Although Exparte proceedings by the lower court were regular, as it is provided for in law, what is obvious was that the trial court did not satisfy itself of the fact of the complainant holding any power of attorney and there having existed a complaint by the alleged Hillary Mwangi Kamore the applicant herein having been mentioned adversely, she should have been included on the application as a party, in the premises the court could have granted exaparte temporary orders to await any response from parties affected, prior to granting final orders.

17. Further, it is argued that the Magistrate who granted the orders is not indicated in the order. A warrant is ordinarily issued under the hand of the judge or magistrate who issues it and it must bear the seal of the court. (See Section 102 (1) of the CPC) Therefore the omission of the magistrate's name was not fatal since it did not affect the validity of the warrant since the name of the magistrate is disclosed on the primary file. This court has been called upon to set aside orders made by the trial court. In the case of *Republic Vs. Chief Magistrate Milimani & another. Exparte Tusker mattresses Ltd and 3 others (2013) eKLR* 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 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 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.”*

18. Carrying out investigations is procedural. And since the warrants issued were for the purpose of facilitating investigation with a view of preferring charges this court cannot interfere by granting orders sought.

19. The application therefore stands dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14<sup>TH</sup> DAY OF DECEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Ms. Kibath for - ODPP