

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.903 OF 2018

SAMUEL MAINA GACENGO t/a

Hong Kong China Africa Link.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

On 8th November 2018, the police through the Office of the Director of Public Prosecutions filed an application in **Nairobi Chief Magistrate's Court (Milimani)** vide **Miscellaneous Criminal Application No.4230 of 2018** pursuant to the provisions of **Sections 118 and 121** of the **Criminal Procedure Code** and **Section 180(1)** of the **Evidence Act** seeking orders from the court essentially to freeze the accounts held by the Applicant at Barclays Bank, Moi Avenue Branch Nairobi. The application, made ex-parte, was supported by the annexed affidavit of the investigator Sgt Benjamin Chelanga. The application was granted on the same day. Orders were issued by the court freezing the said accounts.

Prior thereto, on 2nd November 2018, the Applicant had been arrested and charged in **Nairobi Criminal Case No.2094 of 2018 Republic - vs- Samuel Maina Gacengo & Another** with the offence of **obtaining by false pretences** contrary to **Section 313** of the **Penal Code**. According to the particulars of the charge sheet, it is alleged that between 25th June and 13th September 2018 while in Nairobi, the Appellant obtained the sum of Kshs.3,135,400/- from Kennedy Wachira Ndwiga by falsely pretending that he was an agent of Top Marine Shipping Company Limited and would clear some imported goods for the said Kennedy Wachira Ndwiga. The Applicant pleaded not guilty to the charge. The case is pending trial. Meanwhile, the Appellant has been released on bail pending trial.

On 16th November 2018, the Applicant filed an application before this court pursuant to the provisions of **Section 362 and 364** of the **Criminal Procedure Code** seeking essentially to have the order issued by the trial court on 8th November 2018, which froze his accounts, to be revised and the orders set aside. The Applicant complained that the said order was issued ex-parte without the Respondent seeking his participation in the proceedings. It is the Applicant's case that the order issued has resulted in the freezing of funds held on behalf of other partners and a business that are completely unrelated with the criminal case. The Applicant stated that the application was motivated by ill will and malice because the law presumed him innocent despite being charged. He lamented that his business had been crippled without any justifiable reason and without the court giving him an opportunity to give his side of the story. In the premises therefore, he urged the court to allow the application and lift the freezing order that was issued by the trial court.

During the hearing of the application, Mr. Muhatia for the Applicant reiterated the contents of the Applicant's application. He submitted that the orders issued were indefinite and patently illegal since it was made without the Applicant being given an opportunity to respond to the allegations made by the investigator in the application. He was of the view that the order was unprocedurally issued and should therefore be set aside. He pointed out that the Applicant's business was crippled by the order. He also pleaded that the monies in the account belonged to his partners and therefore it had nothing to do with whatever dispute that he may have with the complainant in the criminal case.

Ms. Sigei for the State opposed the application. She submitted that the order issued by the trial court was legal since it was issued pursuant to a request made by the investigator to have the particular account frozen. The Applicant was facing a criminal charge related to false representation that he made to the complainant that resulted in substantial loss of money. She explained that the funds in question were under the sole control of the Applicant and therefore they were subject to the criminal case that was pending before the trial court. The funds will be produced as exhibits before the trial court. She urged the court not to interfere with the decision of the trial court.

This court has carefully considered the rival submission made by the parties to this application. **Section 118** of the **Criminal Procedure Code** grants the court powers to issue orders of searching and seizing property that is subject to investigation so that such property may be dealt with in accordance with the law. **Section 118A** thereof provides that such an application shall be made ex-parte before a magistrate. The claim by the Applicant to the effect that the order was issued by the magistrate without jurisdiction by virtue of the fact that the same was issued ex-parte is therefore without merit. This court understands why such applications are made ex-parte. If there was a requirement that the application be served before an order pursuant to such application is given preserving the property that is the subject of investigation, nothing would prevent the person served from putting such property beyond the court's control and jurisdiction pending the determination of the criminal case.

In the present application, it was clear to this court that pursuant to the investigation conducted, the Applicant has already been charged. Although the Applicant claims that the amounts in the frozen accounts are not the subject of the charge, this court is of the opinion that that issue will only be determined after the trial and the trial court has rendered a verdict. This court is persuaded that the trial court has jurisdiction to consider any application related to the amount that was frozen. It can only do so after hearing the evidence presented before it. It is the prosecution's case that the amount that is frozen is evidence that will be produced before the trial court. This assertion was not

disputed by the Applicant. Other than raising issues concerning the propriety of the procedure adopted by the Respondent in securing the order, the Applicant did not challenge the thrust of the Respondent's submission which was to the effect that the amounts frozen were the subject of the criminal case.

The upshot of the above reasons is that the Applicant's application lacks merit and is hereby dismissed. However, depending on the stage of trial, the Applicant is at liberty to revisit the issue before the trial court. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE