

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.128 OF 2019

THE COUNTY COUNCIL OF KISUMU.....APPLICANT

VERSUS

REPUBLIC (DCI HEADQUARTERS).....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, MILIMANI.....2ND RESPONDENT

AND

DIAMOND TRUST OF (K) LTD.....INTERESTED PARTY

RULING

On 12th March 2019, the Director of Criminal Investigations filed an ex-parte application before the Chief Magistrate's Court under **Section 118** and **Section 121(1)** of the **Criminal Procedure Code** and **180** of the **Evidence Act** seeking orders from the court to allow PC Isaac Ogutu, an investigator attached to the Financial Investigation Unit, Directorate of Criminal Investigations to have access and obtain information and carry away certified documents related to an account held at Diamond Trust Bank, West End Branch at Kisumu in the name of City of Kisumu AFD Project Advance. The Director of Criminal Investigation further prayed that a preservation order be placed on the account pending the outcome of investigations. Both orders were granted by the court on 14th March 2019. The reason that the Applicant gave for seeking the said orders from the court was because there was suspicion that the account was being used to launder money and therefore the investigations were being conducted with a view to establishing whether an offence had been committed under **Sections 3, 4** and **7** of the **Proceeds of Crime and Anti-money Laundering Act 2009**.

The Applicant was aggrieved by this decision and filed an application before this court seeking to have that order revised, varied, set aside or substituted so as to accord with fair administration of justice. The Applicant complained that the freezing of the account had resulted in derailment of the programs that were to be funded through a credit facility which is being disbursed through the account. The Applicant explained that the Government of Kenya had in 2010 entered into an agreement with the French Agency for Development (AFD) whereby AFD agreed to loan to a project dubbed the Kisumu Urban Project (KUP) which was to be used to improve identified infrastructural facilities in the City of Kisumu. The project was intended to be implemented for a period of four (4) years. It was however extended in September 2016 for a further period of three (3) years to enable successful implementation of the project. The Applicant explained that the disbursement of the loan was to be made through a special account maintained by the Applicant at Diamond Trust Bank. Before the loan was disbursed, the expenditure had to be approved by the Ministry of Transport, Infrastructure, Public Works, Housing and Urban Development and the Treasury.

The Applicant stated that on 3rd December 2018, it presented a bill of Kshs.994,260,948/- to the Ministry and the Treasury for disbursement to contractors who had undertaken the projects under the KUP program. The disbursement of the said sum was approved by both the Ministry and the Treasury. Unfortunately, instead of the sum being credited to the designated special account at Diamond Trust Bank, the amount was sent to the Applicant's account at Kenya Commercial Bank. Upon learning that the amount had been sent to the wrong account, the Applicant requested Kenya Commercial Bank to transfer the said amount to Diamond Trust Bank. The Bank refused to transfer the said amount as requested by the Applicant. Instead, Kenya Commercial Bank advised the Applicant to request the Ministry and the Treasury to recall the funds. This was done. The amount was returned to the Ministry which then credited it to the correct account at Diamond Trust Bank.

The movement of the funds from the Treasury, then to the Ministry of Transport Infrastructure Public Works, Housing and Urban Development to the County Government of Kisumu and then back to the Ministry and the Treasury attracted the attention of the Director of Criminal Investigations. From the submission made, there was legitimate concern that there was likelihood that the said funds were being transferred to a non-designated account for the purposes of money laundering or perpetration of criminal activity. It is this concern that led the Director of Criminal Investigation to seek orders freezing the account that is the subject of this application. The Director of Criminal Investigations informed the court that investigations were at an advanced stage. Several witnesses had been interviewed. The Director of Criminal Investigations requested the court to be given about two (2) months to conclude his investigations. Meanwhile, the Director of Criminal Investigations was not averse to the sum of Kshs.675,000,000/- being disbursed from the account. Whereas the Applicant welcomed this development, it expressed its concern that unless it was allowed to operate the said account without any restriction, the program, which is time specific, would be frustrated by delay in disbursement of the sums due to contractors. The Applicant expressed fear that if the sums were not disbursed in time, then it would be impossible for the designated projects to be completed by the end of the year (2019) when the implementation of the projects are supposed to be concluded.

This court heard oral rival submission made by Mr. Oraro for the Applicant and Ms. Aluda for the State. This court has benefited from reading the annexures to the affidavits sworn in support of the application. This court takes the following view of the matter: The Applicant

established that it was a beneficiary of a credit facility entered between the Government of Kenya and a French Government Agency known as Agence Francaise De Developpement (AFP). This facility was to be disbursed and implemented under a project known as Kisumu Urban Project (KUP). Its objective, *inter alia*, was **“aimed at enhancing the living conditions of Kisumu’s population by introducing a comprehensive Euro 40 million (€40,000,000) urban programme (i) consisting of various investments in solid waste management, urban renewal for informal settlements, commercial infrastructure, public facilities and other urban infrastructure, (ii) combined with a capacity building programme focused on financial management, physical planning and supervision of works and further targeting the enhancement of municipal performances in specific services.”**

A fundamental clause in the agreement required the Applicant to open a special designated account at Diamond Trust Bank so that the disbursement of funds and implementation of the project could be monitored and audited. As is usual in such agreements, the Central Government through the Treasury and the Ministry concerned with monitoring the implementation of the project was a signatory to the agreement. Indeed, the Cabinet Secretary, Treasury signed the two agreements on behalf of the Kenyan Government. It was a further condition of the agreement that before the sums could be disbursed, a request had to be made by the Applicant and an audit done by the Ministry to confirm that the project had been implemented in accordance with the terms of the agreement. It was on this basis that the Applicant made the request for the sum of KShs. 994,260,948/- to be disbursed to contractors who had completed their designated works. As stated earlier in this Ruling, both the Treasury and the concerned Ministry approved the disbursement of the requested sum.

The attention of Director of Criminal Investigations would not have been attracted if the sum had not been credited to the correct special account instead of the ordinary account operated by the Applicant. The Director of Criminal Investigations commenced investigations to establish why the said sum was disbursed to the wrong account. The suspicion by the Director of Criminal Investigations is legitimate. However, in the period of about two months that investigations have been conducted, it is apparent that, so far, no crime has been detected. The Director of Criminal Investigations informed the court that it would require two more months to complete its investigations. That is a legitimate request. However, it was clear to this court from the agreements annexed to the affidavit in support of the application that unless the Applicant is allowed to disburse the said funds to the contractors, the project would be frustrated to the detriment of the residents of the City of Kisumu. This court was persuaded that the credit facility that was offered to the Applicant, being time specific ought not to be impeded while the Director of Criminal Investigations is investigating the matter.

In the premises therefore, this court finds merit in the Applicant’s application as a result of which the order issued by the Magistrate’s Court on 14th March 2019 is hereby revised and set aside. The order freezing the Applicant’s account at Diamond Trust Bank West End Branch specifically Account No.xxxxxxxxxx is lifted. For the avoidance of doubt, the Director of Criminal Investigations is at liberty to continue with his investigations and should it discover any criminal activity in the management of the account, he is at liberty to approach the court for appropriate orders. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF MAY 2019

L. KIMARU

JUDGE