



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.155 OF 2014**

**HEINZ ANDREAS SCHALLER.....1<sup>ST</sup> APPLICANT**

**KORNELLA KERSTIN SCHALLER.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**RULING**

On 25<sup>th</sup> May 2016, this court delivered a ruling in this application. It granted the application made by the prosecution to have certain funds that were held in the accounts of the Applicants to be placed in the custody of the National Police Service and the Director of Public Prosecutions pending further action pursuant to mutual legal assistance requested by the Federal Republic of Germany Police. On 19<sup>th</sup> July 2018, the 2<sup>nd</sup> Applicant filed an application before this court seeking orders that were made by this court on 25<sup>th</sup> May 2016 in respect of the funds held in Accounts No.xxxx and xxxx at Barclays Bank Diani Branch to be set aside. The grounds in support of the application are stated in the face of the application. The 2<sup>nd</sup> Applicant contends that the funds in the accounts belong to her and not to the 1<sup>st</sup> Applicant who was the main target of the request for mutual legal assistance made by the Federal Republic of Germany Police. She explained that she was discharged by the German Government in regard to the alleged criminal activity that was done by the 1<sup>st</sup> Applicant. In her affidavit, she swore that during investigations by the German Government she was placed in custody but was later released after it was established that she was not involved in the crime. It is on that basis that she was urging the court to order that the funds that were held in the two accounts be returned to her.

The application is opposed. Tobias Abondo, an investigator based at the Banking Fraud Investigations Unit of the Directorate of Criminal Investigations swore that the Federal Republic of Germany Police had not communicated to the Kenyan Government that it had discharged the 2<sup>nd</sup> Applicant from criminal liability as a result of funds that were lost. He urged the court to find that there was no justification or grounds to have the funds that were preserved by this court to be released to the 2<sup>nd</sup> Applicant.

During the hearing of the application, this court heard oral rival submission made by Mr. Oduor for the Applicant and by Ms. Sigei for the State. This court has carefully considered the said submission. It has also read the pleading filed by the parties in support of their respective opposing positions. Certain facts are not in dispute in this application. It is not disputed that the Kenya Government received a request for mutual legal assistance from the Federal Republic of Germany Police in respect of certain funds that got lost while in custody of the Applicants. The particular focus for the request for mutual legal assistance was the 1<sup>st</sup> Applicant. He is the husband of the 2<sup>nd</sup> Applicant. They maintained accounts at Barclays Bank, Diani Branch. The Federal Republic of Germany Police was of the view that the funds that were transferred to the two accounts were proceeds of crime and should therefore be frozen pending the resolution of the criminal case facing the Applicants.

In her application, the 2<sup>nd</sup> Applicant contends that she had been exonerated after investigations had been conducted. She was detained during the investigations by the police in Germany but was released after it was established that she was not involved in the crimes perpetrated by the 1<sup>st</sup> Applicant. She therefore applied to this court to have the funds that were preserved by the police to be released to her. On the other hand, it was clear from the affidavit sworn by the investigator in Kenya that the police in Germany had not communicated to the Kenyan police confirming the assertion by the 2<sup>nd</sup> Applicant that she was found innocent and therefore ought to access the said funds in the two accounts. This court agrees with the prosecution that it is only the Federal Republic of Germany Police that can exonerate the 2<sup>nd</sup> Applicant by writing to the Kenya Police not to take further precipitate action against the 2<sup>nd</sup> Applicant. This court cannot rely on the say-so of the 2<sup>nd</sup> Applicant. The fact that she was discharged from custody in Germany does not imply or mean that the issue of the funds in the two accounts and where they were transferred from had been resolved.

In the premises therefore, this court finds no merit with the 2<sup>nd</sup> Applicant's application. It is hereby dismissed. The 2<sup>nd</sup> Applicant must get a letter from the Federal Republic of Germany Police indicating that they have no issues with the funds held in the two accounts for the court to positively consider her application. It is so ordered.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2019**

**L. KIMARU**

**JUDGE**