



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.87 OF 2016

KENYA COMMERCIAL BANK LIMITEDAPPELLANT

VERSUS

REPUBLIC.....1ST RESPONDENT

FRANCIS GACHUNGU NJUGUNA.....2ND RESPONDENT

(Arising out of the Ruling and Order of Hon. G. Oduor SPM Limuru delivered on 14th June, 2016 in Misc. Criminal Application No. 30 of 2016)

RULING

The Appellant, Kenya Commercial Bank Ltd was aggrieved by the decision of the trial magistrate's court (SPM- Hon. G. Oduor) in which the trial magistrate allowed the 2nd Respondent's application which sought an order directing the Appellant to release to the 2nd Respondent's funds amounting to Ksh.6,900,000/- allegedly being held at the 2nd Respondent's Account No.[xxxx] at the said Bank. The Appellant filed an appeal to this court challenging the said decision. In its petition of appeal, the Appellant raised several grounds of appeal challenging the trial magistrate's decision. The Appellant stated that the trial court had no jurisdiction to hear and determine the 2nd Respondent's application. It stated that the 2nd Respondent's application was founded on a contractual relationship between the Appellant and the 2nd Respondent and was therefore purely a civil claim. It was aggrieved by the order of the trial court stating that the same was not founded on any legal basis. The Appellant faulted the trial magistrate's decision stating that the same was made in the absence of any evidence that the Appellant held any such funds in the 2nd Respondent's account. It was aggrieved that the trial court made substantive orders in **Misc. Criminal Application No.30 of 2016** yet the orders made were based on a different suit being **Limuru SPM Criminal Case No.8 of 2013 Republic vs Francis Gachungu Njuguna**. In the premises therefore, the Appellant urged this court to set aside the ruling and order of the trial magistrate court made on 14th June 2016.

During the hearing of the Appeal, the parties filed their respective written submission. This court also heard oral rival submissions made by Mr. Njenga for the Appellant and Ms. Nyauncho for the State. Mr. Njenga submitted that no evidence was presented before the trial court to show that the Appellant held any funds belonging to the 2nd Respondent in an account in the bank. He stated that the 2nd Respondent only availed a deposit slip for the said funds. The 2nd Respondent failed to avail the order directing the freezing of his bank account. He asserted that no such funds were being held by the Appellant at the credit of the 2nd Respondent. Counsel for the Appellant averred that the trial court had no jurisdiction to hear and determine the 2nd Respondent's application. He was of the view that the application was civil in nature. In the premises therefore, he urged this court to allow the Appellant's appeal.

Ms. Nyauncho for the State opposed the appeal. She stated that the 2nd Respondent was charged in **Limuru SPM Criminal Case No.8 of 2013** with the offence of **stealing** contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. Consequently, his bank account at Kenya Commercial Bank Ltd was flagged for purposes of investigations. The case was however withdrawn under **Section 87(a)** of the **Criminal Procedure Code**. Learned State Counsel averred that the 2nd Respondent was entitled to access the funds in his bank account since the criminal case was withdrawn. She pointed out that the 2nd Respondent produced bank statements and deposit slips which proved that he had the funds sought in his bank account as at 28th December 2012. She asserted that the trial court had jurisdiction to hear and determine the 2nd Respondent's application since it was based on a criminal case that had been filed against the 2nd Respondent. She therefore urged this court to dismiss the Appellant's appeal.

This being a first appeal, this court is required to re-evaluate and reconsider afresh the arguments placed before the trial court before reaching its own independent determination whether or not to uphold the decision of the trial court. In the present appeal, the issue for determination by this court is whether the 2nd Respondent's application dated 5th April 2016 was merited and whether the trial court erred in granting the orders sought therein.

The 2nd Respondent, Francis Gachungu Njuguna filed **Misc. Criminal Application No.30 of 2016** at the Senior Principal Magistrate Court at Limuru seeking an order directing the Manager, Kenya Commercial Bank Ltd Limuru Branch, to release to the 2nd Respondent's funds amounting to Ksh.6,900,000/- allegedly being held in the 2nd Respondent's bank Account No.[XXXX] at the said bank. The 2nd Respondent attached a deposit slip allegedly issued by the Appellant dated 28th December 2012 for the amount of Ksh.7 million deposited at his said bank.

The 2nd Respondent stated that he was charged with the offence of **stealing** contrary to **Section 268(1)** as read with **Section 275 of the Penal Code** at the Senior Principal Magistrate Court at **Limuru in SPMC CR. Case No.8 of 2013** as consolidated with **Nairobi CM CR. Case No.5 of 2013**. The 2nd Respondent alleged that his bank Account No.[XXXX] at Kenya Commercial Bank Ltd Limuru Branch was frozen following the institution of the stated criminal charges on account that the funds in the said account were the subject matter of the criminal case. The said criminal case was withdrawn on 1st December 2015 under **Section 87(a)** of the **Criminal Procedure Code**. Following the withdrawal of the criminal case, the 2nd Respondent filed **Misc. Criminal Application No.30 of 2016** seeking release of the funds in his frozen bank account.

The trial magistrate, in his ruling dated 14th June 2016, allowed the 2nd Respondent's application and ordered the funds amounting to Ksh.6,900,000/- which were allegedly being held in the 2nd Respondent's bank account by the Appellant to be released to the 2nd Respondent. It is this Ruling that provoked the Appellant to file an appeal before this Court seeking to set aside the ruling and order of the trial court.

This court has considered the rival arguments made by the parties to this appeal. This court has perused the trial court's record. It is noted that there is no court order on record made by the trial court directing the freezing of the 2nd Respondent's bank account. The 2nd Respondent in his application filed before the trial court failed to attach the alleged freezing order that he sought to be set aside. It is therefore not understandable how the trial court gave an order in the release of funds from an alleged frozen account belonging to the 1st Respondent without any proof of the existence of a freezing order in the first instance. The trial magistrate in his ruling did not make any reference to a freezing order.

In addition, the 1st Respondent did not avail before court proof of existence of the funds (Ksh.6.9million) he sought to be released to him as at the date of filing his application before the trial court. The 1st Respondent attached a deposit slip for the sum of Ksh.7 million that was deposited to his bank account on 12th December 2012. However, he failed to attach a bank statement indicating that the said funds were in the alleged frozen account as at the date of filing his application or that the funds had been withdrawn by the Appellant as alleged by the 2nd Respondent. The 1st Respondent ought to have availed current bank statements showing the activities of his bank account to prove that the said funds were in his account.

As it is, no evidence was availed before the trial court to show that the 1st Respondent's bank account was frozen, or that there existed funds in the said account that he sought to be released to him. The Appellant on their part denied that the 1st Respondent's bank account was frozen. In addition, they denied that the 1st Respondent had Ksh.6.9 million in his account which he sought to be released to him. The Appellant availed a bank statement indicating that the 1st Respondent held Ksh.2,169.25 in his bank account as of June 2015.

This court is of the view that the trial court was misdirected when it gave the unfreezing order in the absence of proof of a freezing order. No evidence was presented before the trial court by the 1st Respondent to show the existence of a freezing order of his bank account or existence of funds in his bank account. In addition, no evidence was adduced to prove that the Appellant had withdrawn any funds from the 1st Respondent's account. The orders issued by the trial court directing the Appellant to pay a sum of Ksh.6.9 million to the 1st Respondent were not based on any legal basis. This court therefore finds merit in the appeal lodged by the Appellant. The Appellant's appeal is hereby allowed. The ruling and order of Hon. G.H. Oduor (SPM) dated 14th June 2016 in **Misc. Criminal Application No. 30 of 2016 Limuru** is hereby set aside. The 1st Respondent's application dated 5th April 2016 is dismissed. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF JULY 2019.

L. KIMARU

JUDGE