



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.407 OF 2019

AFRICA SPIRITS LIMITED.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE....2ND RESPONDENT

AND

WOW BEVERAGES LIMITED.....1ST INTRESTED PARTY

NATIONAL BANK LIMITED.....2ND INTRESTED PARTY

KENYA COMMERCIAL BANK LIMITED.....3RD INTRESTED PARTY

CHIEF MAGISTRATES COURT, MILIMANI.....4TH INTRESTED PARTY

CHIEF MAGISTRATES COURT, KIAMBU.....5TH INTRESTED PARTY

CHIEF MAGISTRATES COURT, THIKA.....6TH INTRESTED PARTY

KENYA REVENUE AUTHORITY.....7TH INTRESTED PARTY

RULING

On 16th August 2019, the 1st and 2nd Respondents filed **Misc. Criminal Application No.367 of 2019** before the Chief Magistrate's Court at Kiambu under **Section 180** of the **Evidence Act** seeking a warrant to enable them access, obtain information as well as documents relating to various bank accounts held at National Bank of Kenya and Kenya Commercial Bank belonging to the Applicant, the 1st Interested Party as well as several other companies. The Respondents' case was that they required access to the said bank accounts to facilitate investigations into the commission of the offences of failure to pay tax contrary to **Section 95** as read with **Section 104 & 105** of the **Tax Procedure Act**, being in **possession of counterfeit stamps** contrary to **Section 40** as read with **Section 41** of the **Excise Duty Act** and **being in possession of uncustomed goods** contrary to **Section 200(d)** of the **East African Community Customs Management Act**. The trial magistrate in her ruling dated 16th August 2019 allowed the Respondents' application as prayed.

The Applicant, aggrieved by the trial court's ruling filed a notice of motion in an application dated 27th August 2019 before this Court seeking *inter alia* for this Court to review the trial magistrate's ruling as well as stay the proceedings before **Kiambu Chief Magistrate Court in Misc. Application No.367 of 2019** and **Thika Chief Magistrate's Court Criminal Case No.742 of 2019** pending hearing and determination of **Nairobi Chief Magistrate's Court Criminal Cases No.1334 & 1342 of 2019**. The Applicant asserted that the three charges against the Applicant before the 4th, 5th and 6th Interested Parties were all founded on the same subject matter and particulars. It was the Applicant's case that the orders issued by the trial magistrate were illegal and improper since the same were awarded *ex parte* which violated the Applicant's right to be heard.

The Applicant's application was opposed. The 4th, 5th and 6th Interested Parties filed grounds of opposition dated 16th September 2019 in response to the Applicant's application. They asserted that they were merely neutral arbiters of the disputes presented before them and had no

interest in the said disputes or outcomes thereof. They averred that they acted within their jurisdiction and that parties were free to file an appeal or application for revision before the High Court. They denied granting any warrants to freeze any bank accounts in respect of the present applications. The 1st and 2nd Respondents also filed a replying affidavit sworn by PC Shem Gichuki on 17th September 2019 in opposition to the Applicant's application dated 27th August 2019. The Respondents maintained that the purpose of the warrant obtained was to facilitate investigations into commission of crimes that the Applicant and the 1st Interested Party had been charged with before the 4th Interested Party. Similar averments were made by the 7th Interested Party in their replying affidavit sworn by Ezekiel Obegi on 17th September 2019 in opposition to the Applicant's application.

The Respondents, in addition, filed a separate application before this Court dated 16th September 2019 under **Section 81** of the **Criminal Procedure Code**. In essence, the Respondents urged this Court to set aside stay orders given by the Chief Magistrate's Court in Kiambu on 13th September 2019 under **Misc. Criminal Application No.367 of 2019**. The stay orders were granted to the 1st Interested Party vide an application before the said court dated 28th August 2019. The trial court stayed the order earlier issued to the Respondents on 16th August 2019 which granted them a warrant to access and preserve bank accounts belonging to the Applicant, the 1st Interested Party and several other companies.

The Respondents' Application was opposed. The 1st Interested Party filed a replying affidavit sworn by Robert Thinji on 18th September 2019 in opposition to the Respondents' application. In essence, the 1st Interested Party averred that the duty to investigate any tax related matters was vested on the Commissioner and the 7th Interested Party. In addition, the 7th Interested Party had not made any demand for outstanding tax liability from the 1st Interested Party to warrant any interference with its bank accounts. The 1st Interested Party was of the view that the Application by the Respondents before the 5th Interested Party was made in bad faith. The Respondents had previously filed a similar application seeking warrant to access and preserve the said bank accounts before the 4th Interested Party. When they failed to get favourable orders, they filed the application before the 5th Interested Party seeking similar orders. The 1st Interested Party asserted that the actions of the Respondents amounted to abuse of the court process and as such their application before this Court ought to be dismissed.

The Applicant's application dated 27th August 2019 and the Respondents' application dated 16th September 2019 were consolidated and heard together as one. During the hearing of the applications, the Applicant, the 1st Interested Party and the Respondents filed their respective written submission. This court also heard oral submission from Mr. Miller for the Applicant, Ms. Mwaniki for the 1st and 2nd Respondent, Mr. Ouma for the 1st Interested Party, Mr. Mugusu for the 2nd Interested Party, Mr. Njenga for the 3rd Interested Party, Mr. Munene for the 4th, 5th and 6th Interested Parties and finally Mr. Ochieng for the 7th Interested Party.

It was Mr. Miller's submission that the Respondents were '*forum shopping*' by approaching several courts basically to seek the same relief. He asserted that the Respondents on 1st February 2019 charged the Applicant before **Thika Chief Magistrate's Court in Criminal Case No.742 of 2019** with the offence of being in possession of uncustomed goods. While that case was still alive, the Respondents charged the Applicant before the **Chief Magistrate's Court at Nairobi in Criminal Case No.1334 of 2019** with the same offence based on the same particulars. Counsel for the Applicant submitted that the two charges originated from the same O.B number (O.B No.04/31/01/2019). He asserted that the Respondents again moved the **Chief Magistrate's Court in Nairobi in Misc. Criminal Application No.3191 of 2019** on 9th August 2019 seeking *ex parte* orders to access and preserve the Applicant's and the 1st Interested Party's bank accounts. When they failed to get favourable orders, they filed a similar application before the **Chief Magistrate's Court in Kiambu (Misc. Criminal Application No.367 of 2019)** seeking similar orders. They managed to get *ex parte* orders which granted them access to the said bank accounts. The Respondents went ahead and extracted the order but mischievously included an order for preservation of the bank accounts which was not granted by the trial magistrate.

Counsel for the Applicant averred that the application before the 5th Interested Party was *res judicata* since the same was canvassed in **Nairobi Misc. Criminal Application No.3191 of 2019**. He cited the case of **Kivanga Estates Ltd vs National Bank of Kenya [2014] eKLR** where it was held that multiplicity of suits was an abuse of the court process. He asserted that the Respondents' action of seeking *ex parte* orders without disclosing all material facts to the trial court was in violation of the Applicant's right to a fair trial. To this end, he relied on the case of **Juma Chitembwe vs Edward Muriu & 4 Others [2011] eKLR** where it was held that no party ought to be condemned unheard. He also cited the case of **Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 Others [1995] eKLR** which asserted that a party seeking *ex parte* orders is required to make full disclosure of all material facts within its knowledge.

Counsel for the Applicant further urged this court to stay the proceedings before the 5th and 6th Interested Parties. He was of the view that the multiple charges filed against the Applicant were founded on the same facts and emanated from the same transaction. He asserted that the actions of the Respondents amounted to double jeopardy. To this end, he relied on the case of **Nicholas Kipsigei Ngetich & 6 others vs R [2016] eKLR** which reiterated similar sentiments. He urged this court to exercise its supervisory as well as revisionary powers and examine the relevant trial court files.

In response to the replying affidavit by the 7th Interested Party, Mr. Miller submitted that the allegation that an amount of money was owed to the 7th Interested Party by the Applicant was unfounded and not based on any evidence. He stated that the 7th Interested Party issued the Applicant with Tax compliance Certificates for the periods in question. He averred that the 7th Interested Party flaunted procedures set in their handbook in relation to investigation, compliance and tax audits. He pointed out that 7th Interested Party's affidavit failed to indicate the specific offences alleged to have been committed by the Applicant under the **East African Community Customs Management (EACCM) Act** and **Value Added Tax (VAT) Act**. In the premises, he urged this court to allow the Applicant's application as prayed.

Mr. Ouma for 1st Interested Party made oral submissions in support of the Applicant's position. He averred that 1st Interested Party was a licensed importer and distributor of finished products. He submitted that goods are never released to the 1st Interested Party unless all required taxes are paid. He maintained that the 7th Interested Party issued a Tax Compliance Certificate to the 1st Interested Party. He asserted that there existed no instances of failure to pay tax on the part of the 1st Interested Party to warrant purported investigations by the

Respondents. He was of the view that the Respondents' actions of seeking similar orders from different courts amounted to abuse of the court process. He submitted that the Respondents failed to disclose material information to the court when they obtained orders from **Kiambu Chief Magistrate's Court in Misc. Criminal Application No.367 of 2019**. In addition, the orders extracted by the Respondents were at variance with orders issued by the trial magistrate. He cited **Article 157(11)** of the **Constitution** which requires the Respondents to have regard to the need to prevent and avoid abuse of the legal process.

Counsel for the 1st Interested Party further averred that the assertion by the Respondents that the trial court does not have power to set aside its own orders was misleading. To this end he relied on the case of **Mape Building & General Engineering vs Attorney General [2016] eKLR** and the case of **Jotham Okome Arwa vs EACC [2019] eKLR**. He stated that after the Respondent extracted the *ex parte* orders granted by the 5th Interested Party, he failed to serve the same upon the Applicant as well as the 1st Interested Party. He added that the said application was filed under **Section 180** of the **Evidence Act**. He pointed out that the said Section only grants power to investigate and not to freeze a party's bank account. He therefore urged this court to allow the Applicant's application dated 27th August 2019.

The Applicant's application was opposed. Ms. Mwaniki for the State submitted that they were not opposed to this Court calling for the relevant trial court files to peruse the same. She averred that with regard to the case before the 6th Interested Party, the 1st Respondent applied for the file to be transferred to Nairobi Chief Magistrate's Court. However, the trial magistrate dismissed their application. The file was placed before the High Court in Kiambu and an order was subsequently made for the said file to be transferred to Nairobi Chief Magistrate's Court for consolidation purposes.

With regard to **Misc. Criminal Application No.3191 of 2019** filed before the Nairobi Chief Magistrate's Court, Learned State Counsel asserted that the order sought by the Respondents was restricted to attachment of the Applicant's assets and not bank accounts. Since the Respondents had not seized any assets, they were not in a position to file and serve an inventory. Ms. Mwaniki submitted that the application before the 5th Interested Party was filed because the Respondents discovered movement of large sums of money across the mentioned companies including the Applicant and the 1st Interested Party. The Respondents thus required the warrant to enable them investigate whether the said companies were involved in any crimes relating to money laundering. She asserted that **Section 180** of the **Evidence Act** read together with **Section 121** of the **Criminal Procedure Act** grants the police authority not only to access bank accounts but also to freeze them. To that end, she cited the case of **Ogola Mujeru Advocates vs Banking Fraud Investigation Unit & 2 others [2016] eKLR** where the same was held.

Learned State Counsel further submitted that the Respondents are vested with a constitutional mandate to investigate crimes involving public interest. She urged this court to allow the Respondents to complete the said investigations. She was of the view that if this court allows the Applicant's application, money held in the said bank accounts will be interfered with, which will in turn prejudice investigations. She averred that a magistrate's court had no jurisdiction to stay or reverse its own orders and therefore the orders of stay made by the 4th and 5th Interested Parties were illegal.

Ms. Chege who was appearing together with Ms. Mwaniki for the Respondents averred that the *ex parte* orders freezing the bank accounts was only for the purpose of maintaining *status quo* of the said bank accounts pending inter-parties hearing. She stated that the Respondents had a duty to ensure that the companies involved did not hinder the investigations. She cited the case of **Aurelian Akwaro vs Republic [2009] eKLR** where the court granted an investigator ninety (90) days to conclude his investigations relating to a party's bank account. She maintained that the application before the 5th Interested Party was not brought in bad faith. She opined that the court ought to consider the rival submissions before arriving at its determination. In the premises, she urged this court to allow the Respondents' application dated 16th September 2019 and dismiss the Applicant's application dated 27th August 2019.

Mr. Ochieng for the 7th Interested Party made oral submission in support of the Respondents' application and in opposition to the Applicant's application before this court. He asserted that the 7th Interested Party is mandated by **Section 5** of the **Kenya Revenue Act** to enforce all laws relating to taxation matters in the country. He stated that some of those statutes include the **Excise Duty Act** and **EACCM Act**. The criminal charges against the Applicant and 1st Interested Party emanated from the said **Acts**. He submitted that investigations conducted by the 7th Interested Party revealed tax related criminal activities by the Applicant. As such, the 7th Interested Party reported the matter to the police. The 2nd Respondent then took over the investigations. He was of the view that the 7th Interested Party was in essence the complainant in the criminal charges against the Applicant. The 7th Interested Party therefore sought assistance of the Respondents to ensure preservation of the bank accounts mentioned in the application before the 5th Interested Party.

Mr. Ochieng further submitted that **Section 31** of the **Tax Procedure Act** allows the 7th Interested Party to make any amendments necessary to the original tax assessment of a party. **Section 105** of the said **Act** facilitates recovery of unpaid tax even in cases where a party is convicted by a court of law. He stated that preservation of the funds in the bank accounts was in relation to assessed tax amounts due from the named companies. Counsel averred that the 7th Interested Party did not issue a notice pursuant to **Section 61** of the **Tax Procedure Act** since the 2nd Respondent took over the investigations. He submitted that a Tax Compliance Certificate was evidence of compliance as at the date of issuance and that the same was based on information available to 7th Interested Party at that time. He asserted that the Tax Compliance Certificate does not hinder the 7th Interested Party from conducting further audits and assessments in the event material non-compliance is discovered. In the premises, he urged this court to grant orders that protect the interest of the 7th Interested Party.

Mr. Munene made oral submissions on behalf of the 2nd, 3rd, 4th, 5th, and 6th Interested Parties. He asserted that the 2nd and 3rd Interested Parties opted not to make any submission and that they would abide by the decision of the court. On behalf of the 4th, 5th, and 6th Interested Parties, Mr. Munene submitted that no orders of preservation of the bank accounts were made by the trial court in **Kiambu Chief Magistrate's Court Misc. Criminal Application No.367 of 2019** since the same were not prayed for. The 5th Interested Party reviewed its orders of 16th August 2019 to ensure clarity and avoid any ambiguity or confusion. With regard to the issue of multiplicity of suits, Mr. Munene averred that **Section 35** of the **Criminal Procedure Code** provides for joinder of counts if the offences are founded on the same facts. He was of the view that an order consolidating all the suits against the Applicant was more practical as opposed to an order of stay of

the proceedings before the 5th and 6th Interested Parties. He urged the court to give appropriate directions as to how the various suits would proceed.

In response to the Respondents' and 7th Interested Party's oral submission, Mr. Miller for the Applicant averred that the 2nd Respondent did not have mandate to investigate offences the Applicant was charged with before the **Nairobi Chief Magistrate's Court in Criminal Case No.1334 of 2019**. The Applicant was charged with the offence of **being in possession of unaccustomed goods** contrary to **Section 200(d) (iii) of the East African Community Customs Management Act. Section 4(1)(b)** of the said **Act** directs that the Commissioner of Customs shall have the mandate to enforce custom laws. **Section 5(2)** of the said **Act** grants the responsibility of collection of revenue to the Commissioner of Customs. **Section 7 and 156** of the said **Act** provides that a customs officer shall have powers similar to that of a police officer. It was his submission that the 2nd Respondent had no business to carry out any investigations in relation to charges against the Applicant. He pointed out that the Respondents failed to give a notice of seizure contrary to provision of **Section 234(1)** of the said **Act**. **Section 123(6)** of the said **Act** provides that failure to give such notice constitutes a criminal offence.

Mr. Miller further submitted that **Nairobi Chief Magistrate's Court Criminal Case No.1342 of 2019** was founded on the **Excise Duty Act** and the **Tax Procedure Act**. He asserted that **Section 36(4)** of the **Excise Duty Act** provides that the **East African Community Customs Management Act** shall apply in cases where goods are being imported. **Section 7** of the **Tax Procedures Act** grants authorized KRA officers' powers inherent to a police officer. It was the counsel's view that the 7th Interested Party erroneously delegated their powers to the Respondents. He pointed out that **Section 28** of the **Tax Procedure Act** allows a taxpayer to make a self-assessment of the amount of tax payable. In the event that a tax payer fails to submit a tax self-assessment, a default assessment is issued. Mr. Miller asserted that the 7th Interested Party failed to demonstrate that they issued a default assessment to the Applicant. He maintained that the 7th Interested Party failed to follow the set procedures and that the action by the Respondents and the 7th Interested Party in criminally charging the Applicant was premature.

Mr. Miller further submitted that the charges filed against the Applicant before the 6th Interested Party were similar to and founded on the same facts as the charges against the Applicant filed before the 4th Interested Party. He averred that the Respondents have been conducting the investigations for close to eight months since the Applicant's factory was raided in January 2019. He was of the view that the Respondents should not have charged the Applicant if investigations were still pending. He asserted that an application for preservation of the bank accounts is required to be made under the **Proceeds of Crime and Anti-Money Laundering Act**. In addition, **Section 43(3)** of the **Tax Procedure Act** provides that such an application ought to be made before the High Court. He was of the opinion that the Application by the Respondents to preserve the bank accounts was filed before the wrong court. In essence, it was Mr. Miller's submission that the various mechanisms set by the above outlined statutes to deal with tax related offences were not adhered to by the 7th Interested Party. Instead, they made the decision to immediately lay criminal charges against the Applicant which was in contravention of the said statutes. Similar sentiments were aired by Mr. Ouma for the 1st Interested Party. Both counsels therefore urged this court to allow the Applicant's application as prayed.

This court has carefully considered the rival submission made by the parties to this application. As stated earlier in this Ruling, this court will deliver one ruling in respect of the two applications that were filed by the Applicant and the Respondents respectively because both applications essentially seek the intervention of this court in respect of the orders that were issued by the Magistrate's Court in **Kiambu Chief Magistrate's Court Criminal Case No.367 of 2019**. Before rendering the Ruling, it is important for this court to set out the prayers that the Respondents sought in their application dated 16th August 2019. The application was said to be predicated under **Section 180(1)** of the **Evidence Act** and it is an ex-parte notice of motion which sought the following orders:

“1. THAT this application be deemed fit for hearing on priority basis.

2. THAT the Honourable Court be pleased to issue a warrant to the Applicant No.100649 PC NOAH BIEGO an investigator attached to DCI Headquarters, to have access and obtain information and carry away certified documents relating to the Bank Accounts listed below;

A. Account No.01020077777100 National Bank of Kenya Limited belonging to African Spirits Limited.

B. Account No.1175731978 Kenya Commercial Bank belonging to WOW Beverages.

C. Account No.1107096243 Kenya Commercial Bank belonging to Dalbit Petroleum Limited.

D. Account No.012560666 Kenya Commercial Bank belonging to Rine Hart Limited.

E. Account No.1132506085 Kenya Commercial Bank belonging to Section Investment Limited.

F. Account No.1170040942 Kenya Commercial Bank belonging to Janus Continental Group Limited.

G. Account No.1183798032 Kenya Commercial Bank belonging to Belgravia Construction Limited.

H. Account No.1161942106 Kenya Commercial Bank belonging to Azalea Holdings Limited.

I. Account No.1131884590 Kenya Commercial Bank belonging to Kisima Management Company Limited

3. THAT the order of this honourable Court be served upon the manager of National Bank Limited and Kenya Commercial

Bank Limited.

4. ***THAT there be no orders as to cost of this application.***

The application was supported by the grounds stated on the face of the application and the annexed affidavits of PC Noah Biego, a police officer attached to the Directorate of Criminal Investigations. In paragraph 2 of the affidavit, the investigating officer deponed that he was investigating cases essentially related to tax evasion under the **Tax Procedures Act, the East Africa Community Customs Management Act 2004 and the Excise Duty Act**. The Respondents in their application were National Bank of Kenya Limited and Kenya Commercial Bank Limited. It is instructive that none of the account holders mentioned in the application were listed as Respondents in the application. It was also clear from the submission made that none of the affected account holders were served with the application by the Respondents in this application.

The application was granted by the trial magistrate. However, when the Respondents extracted the order, this is what the order stated:

“ORDER

WHEREAS it has been proved to me on oath that for the purpose of investigations into the commission of the following offenses; Failing to pay Tax contrary to section 95 as read with section 104(1) and 105 of the Tax procedure Act, 2015, being in possession of counterfeit stamps contrary to section 40 as read with section 41 of the exercise duty act 2015 and being in possession of un-customed goods contrary to section 200(d) (iii) of the East African Community Customs Management Act 2004, it is desirable to have access, preserve the funds under listed Bank Accounts:-

- (A) Account No.0102007777100 National Bank of Kenya Limited belonging to African Spirits Limited.***
- (B) Account No.1175731978 Kenya Commercial Bank belonging to WOW Beverages.***
- (C) Account No.1107096243 Kenya Commercial Bank belonging to Dalbit Petroleum Limited.***
- (D) Account No.012560666 Kenya Commercial Bank belonging to Rine Hart Limited.***
- (E) Account No.1132506085 Kenya Commercial Bank belonging to Section Investment Limited.***
- (F) Account No.1170040942 Kenya Commercial Bank belonging to Janus Continental Group Limited.***
- (G) Account No.1183798032 Kenya Commercial Bank belonging to Belgravia Construction Limited.***
- (H) Account No.1161942106 Kenya Commercial Bank belonging to Azalea Holdings Limited.***
- (I) Account No.1131884590 Kenya Commercial Bank belonging to Kisima Management Company Limited.***

NOW THEREFORE I authorize No.100649 PC NOAH BIEGO by this warrant to; Access and investigate in the BANK ACCOUNTS held at National Bank Limited and Kenya Commercial Bank Limited and to require the production of documents for his scrutiny and take exhibits relating to;

- i. Bank account opening documents.***
- ii. Names and documents of the signatories of the Bank account numbers.***
- iii. Bank account statements for periods between January 2014 to March 2019.***
- iv. Any other relevant documents that shall assist us in our investigation***

The preservation of any funds held in the accounts above for a period of 90 Days. And take certified copies of all relevant entries or matter in such books.”

It was clear from the above extracted order that the same was not in terms of prayers that the Respondents had sought in their application before the said Magistrate’s Court. The application sought orders from the court to access the named accounts and obtained information therefrom and not to preserve or freeze the accounts in question. It is instructive that the account holders were not named as respondents in the application nor were the affected respondents served with the order or the application. It was the Applicant’s submission that it became aware of the order when it attempted to withdraw funds deposited in its account and was informed by the bank that the account had been frozen pursuant to a court order.

The Applicant made an application before the trial court pointing out the anomaly between the extracted order and the application that was sought by the Respondents. After considering the application, the trial magistrate allowed the application and set aside the order. The Respondents questioned whether the trial magistrate had jurisdiction to set aside an order that it had issued. It was the Respondents’ submission that once the order was issued by the trial magistrate, any question concerning its legality should have been addressed to the High Court in an application for revision. On the other hand, the Applicant reiterated that the trial magistrate had jurisdiction to rectify an extracted

and illegal order which did not reflect the substance of the order that was issued by the court.

The issue in dispute between the Applicant and the Respondents raises a fundamental issue regarding the jurisdiction of the court under **Section 180(1)** of the **Evidence Act** upon which the initial application to the Magistrate's Court was predicated. **Section 180(1)** of the **Evidence Act** provides thus:

“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 investigations in 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.”

The above **Section** of the **Evidence Act** grants a police officer investigating an offence power to access to an account held in a bank for the purposes of investigations. The **Section** does not grant the investigating officer power to apply for the seizure, freezing or the preservation of the contents in the account. If the investigating officer desired such orders, then the application should have been predicated upon **Section 118**, **Section 118(A)** and **Section 121(1)** of the **Criminal Procedure Code**. It was therefore clear to this court that in the application that the Respondents sought before the magistrate's court at Kiambu, they did not seek an order to “*preserve*” or “*freeze*” the accounts in question. The application is clear: they sought orders from the court to access the said accounts to enable them investigate whether an offence had been committed under the tax laws.

A disturbing aspect of this application is the manner in which the Respondents sought to deal with the bank accounts in question, some of which were held in the name of the Applicant and the 1st Interested Party. As early observed in this Ruling, the Respondents in the application before the Kiambu Chief Magistrate's Court were the two banks where the accounts were being held. The account holders were not made parties to the application. When the Applicant and the 1st Interested Party complained that their rights to fair trial as guaranteed under **Article 50(2)** of the **Constitution** were not taken into consideration when the said application was made, they have a case. In conducting investigations, the police must at all times respect the rights of those they are investigating. That right includes the right to enable those affected by the orders issued by the court to be heard.

Although **Section 180(1)** of the **Evidence Act** does not specifically provide that where an application for a warrant to investigate a bank account is made by an investigator, the holder of such account should be served at the appropriate time, courts have recognized that the constitutional precepts of fair trial requires that the affected party be served with the application and order (if any) at the appropriate time. Recognizing this lacunae in the law, Ong'udi J in **Hassan Mohammed vs EACC & Another [2019] eLKR** when dealing with ex-parte application made under **Section 118** and **121(1)** of the **Criminal Procedure Code** (which is made in similar circumstances to the application that is the subject of this Ruling) held thus:

“Owing to many complaints arising from the ex parte issuance of search warrants by the Magistrate courts under section 118 and section 121(1) CPC and for proper management of the process, as a Division, we have decided to issue the following guidelines,

- (i) Upon issuance of the orders under section 118 and 118A of the Criminal Procedure Code the Magistrate must state the duration which the order shall remain in force.*
- (ii) The duration shall not exceed 14 days.*
- (iii) The court shall give a return to court a date soon after the 14 days for the following purpose:*
 - (a) For the investigation to appraise the court on what he or she has done.*
 - (b) For the affected party to raise any issues it may have*
 - (c) The Court could extend the search warrant by a maximum of 7 days if satisfied of the need to do so.*
 - (d) The affected party must be served within 48 hours of the issuance of search warrants.”*

In the present application, it was evident that the application made before the Chief Magistrate's Court at Kiambu breached the established law. In the first instance, the affected parties were not named as Respondents in the application so as to give the court the opportunity to have the affected parties served. The name Respondents *i.e.* the two banks, had no interest in the application because they were not the affected parties. To that extend, the application was on the face of it incurably defective.

Secondly, the orders sought in the application and the order that was granted, although made ex-parte, did not give authority to the Respondents to preserve or freeze the accounts mentioned in the application. The order that was extracted and served upon the bank was not the order that was issued by the trial magistrate. For the Respondents to argue before this court that the said order ought to be enforced in the interest of the public is to say the least, a misdirection and misapprehension of the law. The Respondents cannot therefore seek to benefit from an outright illegality and claim that they are acting in the public interest. One of the tenets of the public interest is respect for the Rule of law for the benefit of the whole society. This court does not think the Respondents want this court to hold that in protecting public interest, the Respondents as the enforcers of the law can break the law. Such a holding would be a travesty and the very antithesis of a country that is governed by constitutional order and the Rule of Law. That is not to say that when a proper application is presented before court, the court cannot aid investigators in their quest to fight crime and enforce the law.

Thirdly, the Respondents were required to serve the affected parties within the shortest time possible. From the affidavit evidence and the submission made before this court, it was apparent that after obtaining the order from the Kiambu Chief Magistrate's Court, the Respondents did not serve the affected parties. The affected parties became aware of the order issued when they sought to access their respective bank accounts. That was in clear breach to the fair trial provisions of the **Constitution** specifically **Article 50(2)** that requires them to be informed of any adverse action that may be taken against them. Again, the Respondents cannot say they are acting in public interest if they have breached the affected parties' constitutional rights.

Fourthly, it was apparent that the Respondents have filed a multiplicity of cases, both civil and criminal against the Applicant and the 1st Interested Party. This court cannot comment on the criminal charges that have been brought against the Applicant, the 1st Interested Party and their respective directors. That is an issue that the trial court will deal with. This court declines the invitation by the Applicant and the 1st Interested Party to comment in regard to the manner in which they have been charged in various courts on what they allege to be issues arising from the same cause of action. That is an issue that will be addressed at another forum and not the present one.

However, it will be remiss of this court not to comment on an earlier application which had been filed by the Respondents seeking essentially the same orders against the Applicant and the 1st Interested Party. That application is **Nairobi Chief Magistrates Miscellaneous Application No.3191 of 2019**. That application was predicated upon **Sections 40, 41, 105 and 108** of the **Tax Procedures Act, Section 71** of the **Prevention of Crime and Money Laundering Act, Section 64 of National Police Service Act** and **Sections 118, 118A and 121** of the **Criminal Procedure Code**. In the application, the Respondents sought warrants to search the Applicants and 1st Interested Party with a view to seizing, restraining and preserving any movable property so that the same could be dealt with in accordance with the law. The application was dated 9th August 2019. It was made ex-parte and was granted on 9th August 2019.

According to the Respondents, this order was not given effect to. It later emerged that the Chief Magistrate's Court in Nairobi had issued an order staying the said order that had earlier been issued on 9th August 2019. When the Respondents made the application before the Kiambu Chief Magistrate's Court on 16th August 2019, they did not disclose to that court of the earlier existing order in respect of the Applicant and the 1st Interested Party that had earlier been issued by the Nairobi Chief's Magistrate Court. The complaint by the Applicant and the 1st Interested Party that the Respondents were abusing the due process of the court is not without merit. It is trite law that where a party intends to present its case before a court, it must do so in one case and not in filing a multiplicity of suits and seek orders by instalments. That is clearly a practice that is deprecated.

Finally, there are various legal regimes that govern the administration of certain **Acts** of Parliament. For instance, under our tax laws, the body that is recognized as authorized to administer our tax laws are the officers of Kenya Revenue Authority. Under **Section 7** of the **Tax Procedures Act 2015** and **Section 7** of the **East African Community Customs Management Act 2004**, Kenya Revenue Authority officers have been given *"all powers, rights, privileges and protection of a police officer"* in the performance of their duty. Indeed, the two **Acts** envisage that the Kenya Revenue Authority officers, as authorized officers have the power to investigate and in appropriate cases, seize and forfeit goods (See **Section 43 and 44** of the **Tax Procedures Act** and **Section 210** of the **East Africa Community Customs Management Act**). Under the **Proceeds of Crime and Anti-money Laundering Act** and **Section 2** thereof, an authorized officer include the Asset Recovery Agency director, Commissioner of Customs and any other person designated by the Minister as an authorized person to perform any function under the **Act**. In the instance case, the application that is the subject of the application for revision was filed by the Directorate of Criminal Investigations. In performance of his duties, the Directorate of Criminal Investigations must exercise jurisdictional deference to other authorities that have been established by statute to fulfill their mandates (see **Section 64** of the **National Police Service Act**). In this case, it is evident that there was an element of jurisdictional overreach by the Directorate of Criminal Investigations on matters which are statutorily under the jurisdiction of the Asset Recovery Authority and the Kenya Revenue Authority.

The upshot of the above reasons is that the order that commends itself to this court is as follows:

- I) The application filed by the Respondents before the Kiambu Chief Magistrate's Court in **Kiambu Chief Magistrate's Court Miscellaneous Criminal Case No.367 of 2019** is hereby brought to this court for the purposes of revision. The same is revised as it was filed in breach of the law. That application is ordered dismissed.
- II) The order emanating from the proceedings in the said application before the Kiambu Chief Magistrate's Court is set aside and shall have no legal effect.
- III) This court makes no orders regarding the pending criminal cases against the Applicant and the 1st Interested Party because this court cannot interfere with jurisdiction of the respective trial courts in considering the merits of the criminal cases upon evidence being presented to those courts.
- IV) The Respondents are at liberty to pursue whatever action they deem appropriate in the case provided they follow the laid down procedural, statutory and constitutional requirement that protects the rights to fair trial of the Applicant and the 1st Interested Party.

It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE