



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION APPLICATION NO. 173 OF 2019

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

JOSEPHAT KAMAU.....RESPONDENT

EQUITY BANK LIMITED.....INTERESTED PARTY

(Application by notice of motion dated 5.12.2019)

R U L I N G

1. The applicant herein moved this court under certificate of urgency seeking to stay the orders issued by the Eldoret Chief Magistrate's Court in Misc Criminal Application no. 444 of 2019. The said order is attached to the application. The order that the applicant is aggrieved about is as follows:

I. The honorable court does vary its orders of 7th November 2019 to the effect that the court grants an order that the applicant (Josphat Kamau) be and is hereby allowed to access(restriction removed from) at least one account, A/C No. 0130190481767 held at Equity bank Nakuru to a tune of Kenya Shillings Eight Million(Ksh 8,000,000/=) pending the hearing and determination of this application interparties.

II. The applicant to deposit logbook for KCP 870A with the prosecution as soon as possible and the matter be heard interparties on 9th December 2019.

2. The application is supported by an affidavit sworn by Fredrick Musyoki no.60040 S/SGT, a police officer attached with the applicant. He averred that the applicant is established under section 53 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). They have the power to identify, trace, freeze, seize and recover proceeds of crime. Further under section 53A(5) of the POCAMLA it has police powers to investigate money laundering. It was suspected that the following accounts numbers in Equity Bank have proceeds of crime. Account Numbers, 0310577112435, 0130190481767, 0130176621397 and 1460178607712. An inquiry file no.56/2019 was opened and the court issued orders to freeze these accounts for a period of 6 months. The respondent has filed a judicial review application number 29 of 2019 seeking an order of certiorari to quash the chief magistrate's decision to quash the order for freezing the accounts.

3. However the respondent was granted orders on 7.11.2019 varying the previous orders and could therefore access account number 0130190481767 held at Equity Bank.

4. The court was urged to refer to section 362 and 364 of the Criminal Procedure Code as read with Article 165(6) of the Constitution which grants the High Court power to call for and examine any record of any criminal proceedings. Further he deposed that it was in the interest of justice and in the public interest that the application be allowed to preserve the subject matter of the ongoing investigations.

5. In response to the application the respondent swore a replying affidavit dated 9.12.2019 and filed on 10.12.2019 opposing the averments in the application. He deposed that he was only allowed to access one bank account number 0130190481767 and could only access Ksh 8,000,000/= yet it had a balance of ksh 43,000,000/=. The court declined to issue access orders to the other accounts. This was after showing evidence that he had borrowed money to pay for his bail terms, which had to be repaid back and legal fees. The receipts to this effect were attached. The allegation that the orders granted on 4.12.2019 were issued in the absence of the applicant was untrue since Mr. Onkoba counsel for the prosecution and his advocate were present in court.

6. In submission, counsel for the applicant retaliated the contents in the application and the supporting affidavit. In addition, counsel stated that the office of the ODPP and that of the Asset Recover. Agency were two different entities established by the Constitution and the

Proceeds of Crime and Anti-Money Laundering Act respectively. In addition, the respondent had been charged for allegedly smuggling goods in excess of Ksh 9,000,000/=. The respondent's rights had not been violated in any way in regard to the Constitution and any Statutory provision and it was in the interest of justice and public interest the application be allowed. Counsel referred to the case in *Republic v. Diamond Trust Bank Limited & Anor* [2017] eKLR.

7. The court was urged to call for the lower court file and vary the orders being appealed against.

8. In response to applicant's submission the counsel for the respondent wished to rely on the affidavit dated 9.12.2019. The application leading to the lifting of the freezing orders was made on 3.12.2019 and heard on 4.12.2019 in the presence of the court prosecutor who addressed the court in regard to the application. The orders granted were therefore not ex-parte and order freezing the account for 6 months had not been vacated or lifted. Their application in regard to lifting orders was in regard to only one account. Section 68 of the Anti-Money Laundering Act gave the court powers to vacate orders in the event that what the applicant would suffer outweighs the risk that the property concerned may be destroyed.

9. In addition to this the respondent's value of the motor-vehicle deposited as security was Ksh 4.8 Million whose logbook had been surrendered to the prosecution. The applicants two other vehicles were being held at Eldoret police station. The applicant had a right to access the court and seek for review orders. This court was urged to dismiss the application and uphold the trial court's order.

10. In response Mr. Githinji for applicant averred that his main contention was that the orders were issued ex-parte.

11. The issue for determination is whether the orders granted on 4.12.2019 were merited and if so whether they were granted ex-parte.

12. This court has been granted supervisory powers over the subordinate court pursuant to section 362 and 364 of the Criminal Procedure Code together with Article 165(6) of the Constitution. Article 165(6) of the Constitution provides as follows,

“the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

13. The high court is superior and therefore this court has power to supervise the lower court if it is shown that the orders granted were in great violation of the law. The court can then call for the lower court file pursuant to Article 165(7) which provides as follows:

“For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

14. The order signed by the Chief Magistrate on 4.12.2019 indicates that the prosecutor was present in court when canvassing the application. The applicant's contention is that it was issued in their absence, the same is not the correct position. In criminal matters, the state is represented by the prosecutor who falls under the ODPP. The prosecutor came in handy at the time the respondent appeared in court for plea taking and in the whole criminal proceedings. The applicant herein was on record being represented by their counsel and their advocate was on record in the miscellaneous applications filed in court.

The application was not heard and the orders granted exparte as alleged by the applicant.

15. There were four accounts freezed which holds huge sums of money. The one where the order was lifted is Account No.0130190481767 which has a balance of 43,000,000/= and isonly 8,000,000/= the order allowed be accessed on very reasonable grounds. The 3rd Respondent is still a suspect and if he is totally financially crippled by the freezing order, that may not augur well for justice especially in circumstances where he has been able to present adequate securities for the needed sum.

16. What is fair is just, and the questioned orders were meant to achieve fairness to both parties. The application on the foregoing consideration is unmerited and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF DECEMBER 2019

In the presence of:

Mr. Kuria for the applicant

In the absence of Respondents

Ms Abigael – Court assistant

S. M GITHINJI

JUDGE