



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC MISC. CR. APPLICATION NO. 10 OF 2018

SANLAM INVESTMENTS EAST AFRICA LIMITED1ST APPLICANT

STANBIC BANK KENYA LIMITED.....2ND APPLICANT

VERSUS

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

MARTIN GACHARE WANJOHI.....2ND RESPONDENT

SANLAM INVESTMENTS LIMITED.....3RD RESPONDENT

RULING

INTRODUCTION

1. Through a Notice of Motion dated 16th May 2018 and filed on 17th May, 2018 pursuant to Sections 362 and 364 of the Criminal Procedure Code Cap 75 Laws of Kenya, the Applicants sought orders as hereunder:

- (1) That application be certified as urgent and service of it be dispensed with in the first instance and heard on a priority basis.**
- (2) That proceedings to execute the order of 27th April 2018 by the lower court in Misc. Criminal Application No. 748 of 2016 be stayed pending the hearing and determination of this application.**
- (3) That all proceedings in the lower court in Misc. Criminal Application No. 748 of 2016 be stayed pending the hearing and determination of this application.**
- (4) That this honourable court be pleased to review the court orders granted on 27th April 2018 by the Principal Magistrate K. Cheruiyot.**
- (5) That this honourable court be pleased to direct that the matter of the ownership of the funds held by the 1st Applicant in the 2nd Applicant be resolved inter partes.**
- (6) That this court be pleased to grant any other orders it may deem fit in the circumstances of this case.**

2. The application is premised upon grounds set out on the face of it and a supporting affidavit sworn on 16th May 2018 by Jonathan Stichbury, being the Chief Executive Officer of the 1st Applicant. On 18th May 2018, the court granted ex parte orders thus granting prayers 1, 2 and 3 and directed for service of the application upon the Respondents for inter partes hearing on 30th May 2018. Despite service, the director of criminal investigations (1st Respondent) did not file any response. Equally, the 3rd Respondent Sanlam Investments Ltd. did not file any response given that it had already been acquired by the 1st Applicant as part of its business enterprise hence a common entity.

3. The second Respondent opposed the application vide his replying affidavit sworn on the 30th July 2018 and filed the same day. On 19th September 2018, parties agreed to dispose of the application by way of written submissions. Subsequently, the Applicants filed their submissions on 7th August 2018 and the second respondent on 21st September 2018.

Applicant's Case

4. The genesis of the application emanates from a dispute over ownership of money deposited by various depositors at the 2nd Applicant's various banking branches under the 3rd Respondent's account name being a unit trust account business enterprise independently operating then under the name of Pan African Unit Trust before it was acquired by the 1st Applicant on 1st January 2018.
5. The amount in question refers to Kshs 3,000,000/= deposited in cash on 30th November 2015 by Wangui Gethi and the 2nd Respondent jointly at the 2nd Applicant's Chiromo Branch in Nairobi. The second deposit of Kshs 5,000,000/= was made on 1st December 2015 by Eden Restaurant and Charity Wangui at the 2nd Applicant's Kenyatta Avenue Branch in Nairobi. The 3rd deposit of Kshs. 1,000,000/= was made in cash in the afternoon of 1st December 2015 by Adarnage – the 2nd Respondent at the 2nd Applicant's Chiromo Branch Nairobi.
6. The said amount totalling to Kshs.9,000,000/= was held in a general account for all unit trust investors pending formal opening of individual investment accounts. That on 2nd December 2015, the 2nd Respondent presented account opening forms in the name of Parachute Insurance Agency a business name registered by one Gervase Maina Ndonga although he indicated that the signatories to the account would be him and Peris Wanjiku Wangu.
7. At that point, the second Respondent was then asked to disclose the source of the funds and provide an account to which the money would be paid in the event the investment account holder wanted to uplift the funds from the trust.
8. In response, the 2nd Respondent gave his bank details but later changed to that of Gervase Maina Ndonga and Grace Mathenge. Again he changed and gave the name of Charity Wangui and her Id no. minus her bank details. On 4th April 2016, the 2nd Respondent wrote a demand letter to Pan African Asset Management Ltd (3rd Respondent) seeking release of the funds to him. That the 3rd Respondent refused to release the money claiming that there was no bank details given to which the money would be released.
9. That on 6th April 2016, the Applicants learnt that there was a court order vide Misc. Cr. Application No. 748/16 freezing any dealings with the said funds in the account. That the 2nd Respondent's effort vide his affidavit sworn on 14th July 2016 to lift the orders was dismissed as the funds were allegedly associated with NYS corruption scandal relating to the various criminal charges then pending in criminal case No. 301/16 where the 2nd Respondent and Charity Wangui Gethi were charged.
10. The Applicants further averred that on 12th April 2018, the 2nd Respondent presented the 1st Applicant with a court order dated 12th June 2018 from the Chief Magistrate's court vide Misc. Case No. 748/16 unfreezing the funds (account) held at the 2nd Applicant's account then known as CFC Stanbic Bank.
11. That to the 1st Applicant's surprise, the 2nd Respondent again served her with another court order issued under the same file on 27th April 2018 directing the release of the amount in question to him or to any other person as he (2nd Respondent) may instruct. Aggrieved that the orders of 27th April 2018 were made unilaterally without being given a hearing, the Applicants decided to file this application to stay the lower court proceedings and set aside the orders of 27th April 2018 by way of revision claiming that there was an illegality and irregularity in the manner in which the proceedings were conducted and the impugned orders issued.
12. In their submissions, Miss Mutea counsel appearing for the Applicants reiterated the averments contained in the affidavit in support of the application urging that the money in question is a subject of proceeds of crime under the proceeds of Crime and Anti Money Laundering Act 2009 which should not be released without proof of a legitimate source. Learned counsel further submitted that the money is a subject of a preservation order in Cr. Case NO. 301/16 wherein the 2nd Respondent is an accused person together with Charity Wangui Gethi. Further, Miss Mutea opined that the orders issued ex parte on 27th April 2018 amounts to a breach of a fundamental right to a fair hearing. Arguing that the court has wide discretionary powers to review an illegal order from a subordinate court, counsel referred the court to the case of **Director of Public Prosecutions vs Samuel Kimuchu Gichuru and Another (2012) eKLR.**

2nd Respondent's Case

13. Relying on his averments contained in his replying affidavit, the 2nd Respondent stated that he had variously made deposits of Kshs.9,000,000/= in the manner and style elucidated in the Applicants' affidavit. He however justified the source of the money claiming that he was only instructed by Horizon Company Limited to invest for them in his capacity as a financial advisor.
14. He denied engaging in any money laundering activities as claimed by the Applicants. To vindicate his assertion, he produced court orders issued on 12th April 2018 and 27th April 2018 unfreezing the account and directing release of funds to him respectively. It was his argument that the 1st Respondent having frozen the funds through Misc. Cr. Application No. 748/16 on 6th April 2016 for purposes of investigations and the same having been lifted on 12th April 2018, the court should order for the release of funds.
15. He accused the Applicants of malice alleging that they secretly reported his financial transactions to Financial Reporting Centre. The Respondent attached a letter dated 27th March 2018 (Ex 8) from the DPP's office addressed to the 1st Respondent directing closure of the investigations concerning a sum amounting to Kshs.245,279,765 in relation to payments made to Horizon Ltd in NYS saga.
16. In his submissions, Mr. Njenga advocate appearing for the 2nd Respondent urged the court to dismiss the application terming it malicious and an abuse of the court process. Counsel reiterated the averments contained in their replying affidavit. He contended that the Applicants had not proved that the money was a product of proceeds of crime or generally from an illegal source. To buttress his position, counsel

relied on the case of **Ethics and Anti-Corruption Commission vs Jimmy Mutuku Kiamba Misc Civil Appl. No. 804/2014** and **Kenya Revenue Authority vs Jimmy Mutuku Kiamba (2015) eKLR** where the court held that a deserving party should not be blocked from accessing his money merely because of suspicion of the source of money.

17. Mr. Njenga further argued that an order for stay of proceeding and subsequent review should adhere to the threshold set out under Order 45 of the CPR's rules. He opined that the stay order is not in the interest of justice and that there was no error on the face of the record nor discovery of any new evidence. To bolster this position counsel relied on the case of **Global Tours & Travel Ltd Nairobi HC winding up cause No. 43/2000** as quoted in the case of **Kenya Power & Lighting Company Ltd. vs Esther Wanjiku Wokabi (2014) eKLR**.

18. Finally, counsel submitted that the Applicants have come to court with dirty hands as they have disobeyed a court order. He referred the court to the case of **Kawaljeet Singh Rakhi vs Peter Wainaina Kamau & 2 others (2016) eKLR** in which the court emphasized on the maxim that he who seeks equity must come with clean hands. Counsel urged the court to dismiss the application.

Analysis and Determination

19. I have carefully examined the application herein, supporting affidavit, replying affidavits and materials in support. I have further considered submissions by both counsels. Issues that crystallize for determination are:

(a) Whether the trial court acted correctly, regularly or properly in issuing the orders of 27th April 2018.

(b) Whether the lower court proceedings were regularly conducted.

20. The authority to exercise supervisory powers by the high court over a subordinate court or quasi judicial bodies is enshrined in Article 165 (6) and (7) of the Constitution. These powers are operationalized under Section 362 and 364 of the Criminal Procedure Code Cap 75.

Section 362 provides –

the high court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

Section 364 (1) further amplifies the power to supervise subordinate courts as follows –

in the case of a proceeding in a subordinate court, the record of which has been called for or which has been reported for orders, or otherwise comes to its knowledge, the high court may:

(a) in the case of a conviction, exercise any of the powers confirmed on it as court of appeal by Section 354, 357 and 358, and may enhance the sentence.

(b) in the case of any other order other than an order of acquittal, alter or reverse the order”.

21. The purpose of supervision of subordinate courts or quasi judicial bodies is to correct or prevent any miscarriage of justice arising out of the impugned orders or directions sanctioning the commission or omission of certain acts. The high court therefore must ensure that certain minimum deserved legal standards are adhered to (**see Enock Wekesa and Another vs R (2010) eKLR and Director of Public Prosecutions vs Samuel Kimuhu Gichuru & Another (Supra)**).

22. The high court is seized with unfettered discretion to ensure that substantive justice is done to deserving parties through revisionary orders.

23. In the instant case, a great deal of facts are uncontested. There is no dispute that a sum of Kshs.9,000,000/= was deposited by the 2nd Respondent and some other people in the 1st Applicant's account held at the various branches of the 2nd Applicant. It is also not in dispute that the same funds were frozen when the office of Director of Criminal Investigation obtained investigation and freezing orders on 6th April 2016 vide Misc. Cr. Application No. 748/16 after suspecting that the money was a subject of proceeds of crime and money laundering pursuant to an alert raised by the 3rd Respondent.

24. It is also admitted that the said orders were lifted by the same court on 12th April 2018. Up to that point, the trial court had become functus officio. The purpose for which the Misc Application No. 748/16 was opened was spent.

25. Was the subsequent application by the 2nd Respondent on 26th April 2018 to have the funds in question released to him a subject of the court? By filing an application under the same Misc criminal file to have the funds in question released, the court had converted the miscellaneous proceedings to a civil claim. After the court lifted the freezing orders, it was incumbent upon the concern parties to continue with their commercial business or transactions as intended prior to the intervention of the investigations and freezing orders by the court.

26. The court had no business venturing into civil proceedings bordering on breach of contract between an investor and an investment agency. This is clearly a commercial transaction to which parties should seek a remedy before a civil court. It is upon the Respondent to establish that there is a court order preserving the accounts. If they do not, the Applicants shall be at liberty to sue them in a civil suit for refund of the deposits in their account.

27. It is not for the criminal court on an ex parte order to determine who the owner of the money was. The application necessitating the opening of Misc. Cr. No. 748/16 was investigation and preservation of accounts which would have attracted criminal proceedings if positively confirmed that the money was a product of crime proceeds or money laundering.

28. Considering that investigations did not connect the amount of money in question to crime, the role of the court ended upon unfreezing the accounts. What the parties do with the money thereafter is none of the trial court's business. It is my finding that the trial magistrate overstretched his mandate thereby incorrectly making illegal orders on 27th April 2018 by directing release of the money to the second respondent without the knowledge of the other parties.

29. It is apparent that even as the unfreezing orders were made the applicants were not party to the proceedings. There is no evidence of service of the application dated 26th April, 2018 upon the applicants. The orders were made ex parte thus breaching Article 50 (2) of the Constitution which underpins the right to be heard.

30. It is constitutional imperative that the right to be heard is not limited under whatever circumstances (**See Article 25 of the Constitution**). I have considered the argument by Mr. Njenga that the orders for stay and review do not meet the threshold under Order 45 of the CPR. Unfortunately counsel is confusing revisionary orders in a criminal case issued under Article 165 (6) and (7) of the Constitution and Sections 362 and 364 of Criminal Procedure Code. Order 45 of the Civil Procedure Rules is not applicable in the circumstances.

31. Having held as above, it is my finding that the orders of the trial court made on 27th April 2018 under Misc. Cr. Case No. 748/16 were incorrect, illegal and improper and the proceedings giving rise to the said order irregular. Accordingly, it is ordered that the orders dated 27th April 2018 be and are hereby set aside and the proceedings thereof quashed. The file in respect to Misc. Cr Case No. 748/16 is hereby marked as closed and no further proceedings shall be entertained under the same file. The aggrieved parties are at liberty to pursue a civil remedy in a separate suit for refund of their money. The original file is hereby returned to the trial court for necessary action and retention.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF OCTOBER, 2018.

J.N. ONYIEGO

JUDGE