REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 47 OF 2018

REPUBLIC.....APPLICANT

VERSUS

PRIME BANK.....1ST RESPONDENT

ESTHER GATHONI MWANGI.....2ND RESPONDENT

RULING

1 The Applicant filed a Notice of Motion application dated 12th October 2018 under Articles 22,23, 50,165 (6) & (7), 159 of the Constitution of Kenya 2010, section 362 and section 364 of the Criminal Procedure Code Cap 75 Laws of Kenya , section 180 of the Evidence Act as read together with section 118 and 121 of the Criminal Procedure Code 75 Law of Kenya seeking several orders.

2 Upon service of the application, the 2nd Respondent filed a replying affidavit and raised a Notice of Preliminary objection dated 17th October 2018. In the Preliminary Objection, the 2nd respondent raised the following grounds:-

1. THAT Miscellaneous Criminal Case No. 2500/2018 was filed by an incompetent and unqualified Person under the provisions of the Advocates Act and therefore no application, appeal or review can lie on it.

2. THAT Miscellaneous Criminal Case No. 2500/2018 is void and a nullity in law which in incurably bad and every proceedings which is founded on it is also bad and incurably bad and void ab initio.

3. THAT the Applicant herein did not file Miscellaneous Criminal Case No. 2500/2018 and therefore has no right to make the instant Application.

4. That the Applicant's application NO 2500/2018 was Res judicata as the Applicant had filed suit raising similar issues against the 2nd Respondent in the following matters in Milimani;

a) Miscellaneous Criminal Application No. 2413 of 2018

b) Miscellaneous Criminal Application No. 992 of 2018

c) Miscellaneous Criminal Application No. 225 of 2018

d) Miscellaneous Criminal Application No. 1536 of 2018

e) Miscellaneous Criminal Application No. 68 of 2018

f) Miscellaneous Criminal Application No. 3605 of 2018

g) Miscellaneous Criminal Application No. 2500of 2018

h) Miscellaneous Criminal Application No. 1354 of 2018

i) Miscellaneous Criminal Application No. 1266 of 2018

j) Miscellaneous Criminal Application No. 83 of 2018

5. THAT the said matters were determined by a Court of competent jurisdiction and there is no appeal filed in relation to the same.

6. THAT this Court lacks jurisdiction to hear and sit on an appeal, issue orders on a matter that is not before it. The effect of Orders being sought herein is to indirectly Appeal or to vary the orders and finding in Miscellaneous Criminal Application No. 2413 od 2018.

7. THAT this Honourable Court lack requisite jurisdiction to entertain this application /grant the orders sought.

8. THAT the order or remedy (if any) available to the Applicant lies within the jurisdiction of the trial court as the matter is still pending hearing and final determination.

9. THAT the issues of accounts was extensively dealt in Nakuru HCC No. 224 of 2010, William Charles Fryda v Assumption Sisters of Nairobi Registered Trustees and Another and the subsequent interpleader HCC No 1/2018 (O.S), Prime Bank Limited v Assumption Sisters of Nairobi and Others.

10.THAT the application dated 12th October 2010 before this Honourable Court is an abuse of the court process and the same ought to be struck out in limine under the Court's inherent jurisdiction.

3 In support of the Preliminary Objection, Senior Counsel Mr. Ahmednassir submitted on 3 grounds. On ground 1 he submitted that by referring to the ruling of this court in Misc. Application No. 4o of 2018 where they had raised an objection to the effect that the proceedings had been filed by an unqualified person i.e a policeman. He therefore submitted that the substratum of the Applicant's application which seeks to review this order was drawn by an unqualified person and the DPP cannot apply for a stay order of a matter that is illegal.

4 On ground 2 Senior Counsel submitted that the instant application is *res judicata* as it was litigated on in Misc. Cr. Application Na.2413 of 2018 and on 30/8/2018 whereby Hon. K. Cheruiyot delivered a ruling on those 5 bank accounts. He relied on the case on **Mwangi Njangu V Meshack Mbogo Wambugu HCC No. 2340/91** where the court dealt with a matter with many applications.

5 On ground 3 senior counsel submitted that they already have 16 suits filed in this matter by the DPP, who when he loses; he files a fresh cause without filing an appeal. He relied on **Hunter v Chief Constable of West Midlands and Another [1981]3 ALL ER 727** and submitted that the court has a duty to protect it's process. He also relied on the case of **Graham Rioba Sagwe & 2 Others v Fina Bank Limited & 5 Others [2017]eKLR** in support of his argument.

6 Counsel contended that when a multiplicity of cases are filed, it amounts to abuse of process.

7 M/S Sigei for the Applicant opposed the Preliminary Objection and relied on their written submissions and list of authorities. Counsel submitted that the Notice of Preliminary Objection is premature as the issues it seeks to address touch on proceedings in Misc Cr. 2500/18. That the court can under section 362 of the CPC and Article 165 of the Constitution, call for the said file and examine it.

8. Counsel submitted that this court has jurisdiction to hear this matter as per the Chief Justice's directions. It was her argument that Misc. Application No. 40 of 2018 was struck out hence the filing of the current application. Further, that the issues in respect of Misc. Criminal No. of 2500 2018 cannot be part of this application. She defended the Police officers action in Misc. Cr. Application No. 2500 of 2018 as he acted under section 35 of the Police Service Act, section 118 & section 121 Criminal Procedure Code and Section 180 of the Evidence Act. She further submitted that all that the officer sought was an extension of existing orders.

9 In reference to the applications filed she submitted that they constituted different parties, various accounts having been closed hence the new applications being filed. She argued that the application before this court is not res judicata as it has not been established whether the money in the 2nd Respondent's account belongs to the firm or clients.

10 She further submitted that when Hon. Cheruiyot heard the Application, the 2nd Respondent had not been charged and neither had she taken plea. There are however two others who have been charged with criminal offences together with the 2nd Respondent. She urged the court to dismiss the Preliminary Objection.

11 Mrs. Wambugu for the 1st and 2nd interested parties submitted that the DPP is in order to be before this court. In reference to Misc. Cr. 2500 of 2018, she submitted that a police officer can approach the court and seek orders of preservation which he competently did.

12 On *res judicata*, she submitted that Misc. Cr. No 2413/18 was an application by Assets Recovery Authority which was dismissed after the police had already been issued with the orders. She argued that the crime is money laundering and people have been charged. It was thus her argument that the offence of money laundering involves several persons and bank accounts and that the 2nd Respondent as an advocate was not immune from being charged.

13 Senior Counsel in reply to the above submissions urged the court to allow the preliminary objection, saying that pleadings had been filed by an unqualified person.

DETERMINATION

14 I have considered the 2nd Respondent's preliminary objection, the written submissions plus the arguments for and against it and the authorities cited. The issues for determination are:-

1. Whether the Preliminary Objection raised qualifies as one.

2. Whether the Application as filed by the Applicant is res- judicata.

15 With regard to the first issue for determination I refer to the essence of a preliminary objection given by Law, JA and Sir Charles Newbold P. in **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696**. At page 700, Law, JA stated that:

> **"…a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

Sir Charles Newbold P. added as follows at page 701:

> **"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion**."

16 In this case, the preliminary objection relates to proceedings in Misc Cr. 2500/18. 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, which provides:

Section 362

> **"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".**

17 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)**.

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

19 In the instant case, I have called for the file in Miscellaneous Application 2500 of 2018, **Banking Fraud Investigation Unit v Prime Bank & Esther Gathoni Mwangi** where the court on 12th September 2018 issued an order unfreezing bank accounts no. 3000128927, 400000964713, 400000964706 and 400000964737 in the names of M/S Mwangi E.G & Co. Advocates held at Prime Bank at Riverside drive branch after hearing an application filed by the 2nd Respondent. This was done ex parte. The amounts in those accounts totaling to Kshs. 153,468,000.00 had been preserved through orders issued on 8th May 2018 and extended on 16th July 2018.

20 The provisions of the law that were relied on in seeking the warrants were **Sections 118** and **121** of the **Criminal Procedure Code** and **180** of the **Evidence Act.**

21 Section 180 of the Evidence Act provides for the initial procedure to facilitate investigation into a bank account and reads as follows:

> ***"(1) 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 investigation into 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.'' (emphasis provided).

22 The Act, through this provision, takes into account acts which have been done to necessitate investigation into the possibility of commission of a criminal offence. This provision alone authorises the Court to issue orders of investigation. It does not give powers to order the freezing of a bank account

23 A similar observation was made by Waki, J. (as he then was) in the case of **Erastus Kibiti Stephen vs. Euro Bank Ltd. and the Commissioner of Police Criminal Application No. 9 of 2003,** where the judge noted that:

> **"Section 180(1) does not encompass the freezing of a bank account. On the plain reading of the Section, this is indeed so. But one may loudly wonder why the law should permit the inspection of Banker's books…when it does not safeguard the funds existing in those accounts…How else would the investigator ensure that the horse has not bolted from the stable as it were before he finalizes his inspection? The answer, I think, lies in enacting a law whether substantive or procedural to resolve that difficulty."**

24 The limitation of **Section 180 Evidence Act** therefore warrants the need to invoke the provisions of **Section 118** and **121** of the **Criminal Procedure Code**. **Section 118** provides:

> ***"Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law."***

25 The foregoing section should be read together with **Section 121(1)** which goes further to provide that:

> ***When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.***

26 On whether **Section 118** does not apply to bank accounts as it provides for seizure of an item in a premises that is, a '*place, building, ship, aircraft, vehicle, box or receptacle'* I do associate myself with the sentiments expressed by the Hon. Judge in the case of **Erastus Kibiti Stephen** (Supra), concerning the lacuna in the provisions of **Section 180** of the **Evidence Act**. The section fails to make a further provision for safeguarding evidence in the form of money held in a bank account.

27 This position was clarified by the Court of Appeal in the case of **Samuel Watatua & Another v Republic, Court of Appeal, Nairobi, Criminal Appeal No. 2 of 2013 (unreported),** where the Court said,

> ***"A reading of Section 180 of the Evidence Act together with Sections 118 and 121 of the Criminal Procedure Code leaves no doubt in anybody's mind that the Court, upon application, has power not only to authorize access by police to bank accounts of suspected criminals but also to freeze those accounts for the purposes of preserving evidence and the subject matter of the alleged crime."***

And further,

> ***"In this case, we find that the limitations in Section 180 of the Evidence Act together with Sections 118 and 121 of the Criminal Procedure Code are in consonance with Article 24 of the Constitution."***

28 On this basis, I find that the lower Court in Cr.Misc Application No 2500/18 had jurisdiction to issue the orders of inspection and freezing of the subject bank accounts by the police for purposes of investigation.

29 On 12th September 2018, the lifting of the freezing order was done *ex parte*. Provisions of Section 118, Section 121 CPC and Section 180 Evidence Act allow the party applying to do so *ex parte*. There is no return date nor limited existence of the said order, nor even provision for challenging of the *ex parte* order through an *inter partes* hearing in any of the above provisions. It's therefore clear that the parties adversely affected by such orders remain at the mercy of the investigator. This does not however avail an avenue for each party appearing to be granted *ex parte* orders as happened in Misc. Criminal Application 2500/18.

30 Article 50 of the Constitution provides for the right to be heard. In the case of ***Samuel Watatua & Another*** *(supra)* the Court of Appeal further said;

> ***"In certain cases as stated in the Kibiti case (supra) where properties or monies in bank accounts may be dissipated before the matter is heard inter partes, ex parte orders may be granted but only for a short period. Thereafter, the application should be served upon all persons likely to be affected by any ensuing orders and no final orders should be made until the matter is heard inter partes with all parties, pursuant to Article 50 of the Constitution, being accorded an opportunity to be heard."***

31 In order to keep the process fair, just and in line with Article 50 of the Constitution, the Magistrate's Court moved under Sections 118

and 121 of the CPC and Section 180 of the Evidence Act should upon granting the *ex parte* order issue the following directions;

i. Give a return date for a progress report.

ii. Indicate the period when the orders issued will remain in force but should not exceed 14 days.

iii. Hear both parties before any limited extension is given. This calls for direction on service of the application and orders after the first exparte hearing.

32 In Miscellaneous Criminal Application no. 2500 of 2018, the trial court did not issue directions after freezing the 2nd Respondents bank accounts and then went ahead to unfreeze the said bank accounts *ex parte.*

33 It is this unfreezing order made by the Chief Magistrate's Court that forms the genesis of the present application. From the affidavits sworn by Sergeant Paul Ouma and CPL Samuel Epara, the officers were acting on intelligence information. The bank accounts held at Prime Bank Riverside Branch are exhibits in criminal cases as already William Charles Fryda and Seth Manera have taken plea and their cases are ongoing. As for the 2nd Respondent, she filed a Constitutional Petition in the Constitution and Human Rights Division of the High Court which halted her arrest until the Petition is determined.

34 As to whether the present application is *res judicata* the doctrine of *res judicata* is set out in the **Civil Procedure Act** at **Section 7** as follows:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

35 The **Civil Procedure Act** also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

"Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.''

36 In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of ***HENDERSON VS HENDERSON (1843-60) ALL E.R.378***, observed thus on the subject:

"…where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

37 From my observation, Miscellaneous Criminal Application 2413 of 2018 was filed by Asset Recovery Agency which is an independent body created under the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 for the sole purpose of preserving funds. All other applications filed related to different bank accounts which had been closed leading to new applications being filed. Furthermore, it has not been established to whom the money in the 2nd Respondents account belongs to. This can only be determined if the investigations are completed or case is heard. When Hon. Cheruiyot heard Miscellaneous Application no. 2413 of 2018, investigations were still ongoing and no person had been charged.

38 In respect to High Court Misc. No. 40 of 2018 which was struck out by this court, the same was not heard nor determined on merits. Section 118, 121 CPC do not state who should file an affidavit before the Magistrates Court. All that needs to be done is proof on oath. However, the procedure before the High Court is different. There are established institutions/agencies that will file their matters before the High Court. The Application in Misc. No. 40/18 was by a police officer hence it being struck out, as he was not an agency or an institution.

39 The DPP is properly before this court as the office that deals with investigations & prosecution as provided for under Article 157 of the Constitution.

40 I therefore find that it is in the interest of justice to have the court hear and determine the Notice of Motion filed by the DPP on merit.

The Preliminary Objection lacks merit and is hereby dismissed with costs.

41 The interim order issued by this court on 15th October 2018 freezing, preserving and conserving account no. **3000128927, 400000950587, 400000964713, 400000964706 and 400000964737** all in the names of **M/S Mwangi E.G &CO. Advocates** held at **Prime Bank Riverside drive** shall remain in force pending the hearing and determination of the Applicant's application.

Orders Accordingly.

Signed, dated and delivered this 6th day of December 2018 in open court in Nairobi.

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HEDWIG I. ONG'UDI.

JUDGE