



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APP. NO. 179 OF 2018.

TIMOTHY GACHEHE KANG'ARUA.....APPLICANT

VERSUS

BANKING FRAUD INVESTIGATION UNIT.....RESPONDENT

EQUITY BANK LIMITED.....INTERESTED PARTY

RULING

1. Timothy Gachehe Kang'arua, hereafter the Applicant brought the instant application under Articles 48, 49 and 50 of the Constitution as well as Section 362 of the Criminal procedure Code seeking orders that; (i) this court be pleased to call for and examine the criminal proceedings in Miscellaneous Application Number 990 of 2018 for the purpose of satisfying itself as to the correctness, legality or propriety of the finding, sentence or order recorded or passed on 28th March, 2018 and as to the regularity of the proceedings before the subordinate court, and (ii) the court be pleased to set aside and/or vacate the orders of the subordinate court issued on 28th March, 2018.
2. The application is premised on the grounds that the Applicant was the holder of account number 152 *****, with Equity Bank's Juja Branch and that the Respondent had arbitrarily obtained *ex parte* orders stopping any transactions in the account from the Chief Magistrate's Court at Nairobi through misrepresentation and through non-disclosure of material facts. That while the Applicant is currently the subject of criminal proceedings in Criminal Case 1937 of 2017 the orders obtained in Misc. Application 990 of 2018 had the effect of subjecting him to double jeopardy in violation of his right to be presumed innocent. Further, that the Respondent did not seek the prayers in the application before the magistrate's court, therefore the orders were irregular and completely unfounded.
3. The application is supported by an affidavit sworn by the Applicant which reiterates the grounds set out above.
4. The application was canvassed before me on 14th November, 2018 with learned counsel, Mr. Mburu acting for the Applicant while learned State Counsel, Ms. Nyauncho acted for the Respondent. Mr. Mburu filed skeleton submissions on 2nd November, 2018 which he reiterated in his oral submissions. He set out the background of the order forming the crux of the application and pointed out that the Applicant's co-accused persons in Criminal Case 1937 of 2017 had filed applications seeking to have their accounts unfrozen which the prosecution did not oppose and orders sought were granted accordingly. However, when the Applicant made a similar prayer on 4th May, 2018 the application was declined notwithstanding the fact that the same was unopposed. He submitted that this was an incorrect finding which occasioned a miscarriage of justice. He cited two authorities, **Justice Jeanne W. Gacheche & 5 others v. Judges and Magistrates Vetting Board & 2 others[2015] eKLR** and **Republic v. Anthony Thuo Karimi[2016] eKLR** to buttress the submission. He pointed out that the investigating officer was ordered to conclude investigations, which he did, and there was therefore no reason why the account should be still frozen. He also argued that the investigating officer had no locus to file a replying affidavit as he was merely a witness in the trial. He urged the court to strike out his affidavit.
5. Ms. Nyauncho opposed that application. She relied on the replying affidavit of the investigating officer sworn on 30th July, 2018. She agreed that the accounts of two accused persons were unfrozen on condition that the stolen money in the accounts is preserved in the account. That in the case of the Applicant he was charged of stealing Kshs. 6,906,397/- yet his account had less than this amount. She submitted that the money was suspected to be proceeds of crime and should thus be frozen pending the hearing and determination of the case. She conceded that the applicant and other accused persons had taken plea and the investigations had been concluded. She urged the court to dismiss the application.
6. This court in a desire to ably determine the matter called for the file in Miscellaneous Application No. 3753 of 2017 and 990 of 2018. They disclosed that the investigating officer, IP. Nzau made the applications in question to inter alia facilitate the investigations into the accounts in question. The applications also sought information of the accounts. In his affidavit to this court, he concedes that, upon conclusion of the investigations, he charged the Applicant. He further concedes that the freezing of the accounts was meant simply to facilitate investigations into a legitimate complaint. He thus urged the court to freeze the account pending the hearing and determination of

the trial.

7. From the above chronology, it is clear that the orders granted by Hon. Njagi on 27th November, 2017 and 28th March, 2018 have been overtaken by events as their goal, to facilitate investigations, is clearly concluded as conceded by the investigating officer. By continuing to be effective, the orders have morphed from their intended role to what now mirrors a preservation order. The procedure to be followed in effecting a preservation order is set out under Part VIII of the Proceeds of Crime and Anti-Money Laundering Act, 2009. The Act as well provides for the procedure to be followed when applying for an order of preservation and the effect of such an order, the duration of the order and the process of varying and rescinding such an order.

8. In the present case, it appears from the submissions by the Respondent that they are seeking a preservation order through the back door by seeking to have the freezing orders granted to facilitate investigations subsist pending the determination of the trial. This is clearly improper as orders issued by the learned magistrate served their purpose. Thus, the court in the exercise of its supervisory role as ably set out under Article 165(6) must of necessity set aside the orders. However, in light of the criminal proceedings before the lower court this court will extend the orders for a period of 10 days to enable the Respondent, through the mandated Authority to apply for preservation orders if necessary through the correct procedure. I have given this order having in mind the interests of doing justice which override the existence of procedural technicalities.

9. In the end, the application partially succeeds. I hereby set aside the orders of Hon. Njagi made on 27th November, 2017 and 28th March, 2018 stopping transactions in account at Equity Bank numbers 115*****, 115*****, 115*****, 110*****, 590*****, 176*****, 840*****, 960*****, 590*****, 590*****, *****, 152*****, 870*****, 009*****, 095*****, 176*****, and 152*****. This court substitutes the same with an order stopping all transactions in the accounts for a period of only ten days from today, after which if the Respondent shall not have filed a proper application in the proper court, the freezing order shall automatically lapse. It is so ordered.

Dated and delivered at Nairobi This 14th Day of December, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. No appearance for the Applicant.
2. M/s Nyauncho for the Respondent.
3. No appearance for the Interested Party.