REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION 232 OF 2016

KENYA COMMERCIAL BANK LIMITED……APPLICANT.

VERSUS

FRANCIS GACHUGU NJUGUNA……...…….1ST RESPONDENT.

REPUBLIC…….....…….2ND RESPONDENT.

RULING

By a Notice of Motion dated 17th June, 2016, the Applicant prays for stay of ruling and order in Limuru Misc. Cr. App. No. 30 of 2016 to the effect that the Applicant does pay to the 1st Respondent the sum of Kshs. 6,900,000 purportedly held by the bank in account No. [particulars withheld] pending the hearing and determination of an appeal against the said order. The main grounds on which the application is premised is that the learned magistrate, Hon. G. Oduor in Limuru Misc. App. No. 30 of 2016 ordered that the said amount of money be released to the 1st Respondent when in fact there was no such money that the Applicant was holding that was entitled to the 1st Respondent, that the Applicant has filed an appeal against the decision citing that the court had not jurisdiction to give an order of a civil nature in a criminal matter, that the appeal has a high chance of success and that the 1st Respondent has threatened to file contempt proceedings in execution of the said order.

The order was issued pursuant to an application dated 5th April, 2016 by the 1st Respondent seeking orders that the manager of the Applicant bank, Limuru Branch releases the money to the Applicant. The 1st Respondent advanced a case before the learned magistrate that the money was frozen by the Applicant in which case he could not access it thereby causing him immense prejudice and suffering. Furthermore, it was also an affront on the 1st Respondent's constitutional right to own property. In that case, the 1st Respondent argued, the freezing of the money was arbitrary.

To make the matter clearer, the 1st Respondent was charged before the Chief Magistrate's Court Limuru in Criminal Case No. 8 of 2013 with stealing contrary to Section 268(1) as read with Section 275 of the Penal Code. It was alleged that on 28th day of December, 2012 at Kenya Commercial Bank, Limuru Branch in Kiambu County jointly with others not before court stole Ksh. 7,000,000/ million the property of the said Kenya Commercial Bank. The case was withdrawn under Section 87(a) of the Criminal Procedure Code. The 1st Respondent claimed innocence as a result of which he moved the court in the miscellaneous application for the release of the money that was subject of the case. The 1st Respondent was an employee of the said Commercial Bank and it was alleged that the Kshs. 7 million was deposited in his account by a third party as part of a loot stolen from the bank. The bank accordingly took back the

money from his account. As at the date the money was withdrawn from the account, the Respondent had spent Kshs.100,000/= thereby leaving a balance of Kshs. 6.9 million which is the subject matter in this application.

The application was opposed by the 1st Respondent both in his Replying Affidavit sworn on 4th July 2016 and a Supplementary Affidavit sworn on 7th November, 2016. He deposed that he was entitled to a refund of the money by the Applicant because it was clear that he had deposited the same into his account. He annexed a deposit slip and a bank statement as at 28th December, 2012 evidencing the presence of the money. Furthermore, the money that the Applicant withdrew from his account was subject of the criminal trial which was withdrawn under Section 87(a) of the Criminal Procedure Code. In that case, he still remained presumed innocent and it was illegal of the Applicant to purport to own money that it did not prove he stole. Further, it was deposed that the Applicant had not produced a bank statement as at 28th December, 2012 to rebut the fact that the funds were not in the 1st Respondent's account. The 1st Respondent stated that he had numerously requested for the bank statement to no avail.

In the oral submissions before me, learned counsel, Mr. Njenga for the Applicant submitted that it was the trial court in the criminal case that had the jurisdiction to order the release of the money. Further, that the 1st Respondent did not make an application for the release of the money after the withdrawal of the case. In any case, no order for freezing of the funds had been made pursuant to which the learned magistrate in the Criminal application would have ordered the release or unfreezing of the funds. He submitted that the 1st Respondent could only prove that the Applicant had his money through a bank statement. The bank statement adduced by the 1st Respondent only evidenced a balance of Kshs. 2169.25. Therefore, if any unfreezing order were to be made, if would only affect the sum of Kshs. 2,169.25. Mr. Njenga also argued that the contention by the 1st Respondent that the Applicant had failed to account for the Kshs. 6.9 million was within the jurisdiction of a civil court. He submitted that it was misleading to arrive at a conclusion that the withdrawal of the criminal case conferred ownership of money to the 1st Applicant; any ownership ought to have been demonstrated by way of evidence which was not adduced. In any event, a withdrawal of a criminal case under Section 87(a) of the Criminal procedure Code did not imply that the 1st Respondent was innocent. Instead, it was intended to allow room for further investigations in the criminal case. Mr. Njenga urged the court to stay the order of the said trial magistrate pending hearing of an appeal against the same.

Mr. Chivachi for the 1st Respondent opposed the application. He submitted that there was evidence by way of a bank statement and a deposit slip that the 1st Respondent's account was deposited with Kshs. 7 million as at 28th December, 2012. He was of the view that there was no need of filing a civil suit because the order was made on the miscellaneous application which was procedural. Furthermore, upon the collapse of the criminal trial, the learned trial magistrate was duty bound to order the release of the funds that were subject of the trial to the 1st Respondent. He submitted that the Kshs. 2169.25 related to a period between 30th June, 2013 and 5th May, 2016 but not the period of the year 2012 that is in question. He urged that the application be dismissed.

Learned State Counsel, M/s Nyauncho for the 2nd Respondent opposed the application and associated herself with submissions of the counsel for the 1st Respondent. In addition, she submitted that the 1st Respondent's account was frozen pursuant to the withdrawal of the criminal case for want of sufficient evidence. According to her, upon the withdrawal of the case, the money ought to have been released to the 1st Respondent. She also queried the Applicant's *locus standi* to file an appeal in the criminal case as that was the jurisdiction of the Director of Public Prosecutions.

In rejoinder, Mr. Njenga submitted that the Applicant had a right of appeal against orders made in Misc. Cr. App. No. 30 of 2016 because it was named as the 1st Respondent. He also argued that the Applicant provided a statement as at the date the order for release of funds was made to demonstrate that the 1st Respondent's account had no funds capable of being released. Further, the Respondent had failed to provide the court with any freezing order issued that warranted an order to unfreeze the account to issue.

He urged the court to allow the application.

I have accordingly considered the application and the respective submissions made before me. The prayer sought before me is basically to stay the order of the release of the sum of Kshs. 6.9 million purportedly held in the 1st Respondent's Bank account No. [particulars withheld] pending the hearing of an intended appeal by the Applicant against the said order. Both parties have made rival submissions for and against the prayer sought. In my view, the test that this court must apply is that the court must be satisfied that the funds that were ordered to be released to the 1st Respondent were available. The second test is whether, if the court fails to grant the orders sought the intended appeal would be rendered nugatory. On the first test, the 1st Respondent produced a bank statement and a deposit slip evidencing the availability of the money in his account as at 28th December, 2012. The documents are marked as FNG1 and FNG2 annexed to the Replying Affidavit. The question that arises is whether the funds that were the balance as at this date were withdrawn by the Applicant to justify the Applicant releasing the same to the 1st Respondent. As rightly argued by the Applicant, the only piece of evidence that could attest to the availability of the funds on the date the order was issued and further that after 28th December, 2012 the funds were withdrawn or frozen by the Applicant was a bank statement for the period after the said date. Unfortunately, the 1st Respondent was unable to provide the court with this crucial piece of evidence. He has alluded to the fact that the Applicant failed to provide him with the statement despite several requests. My take on this is that he would have sought redress from the court to compel the Applicant to do the needful. As the adage goes, *"equity does not aid the indolent"* the court is unable to come to the rescue of the 1st Respondent where there is no evidence supporting his submission. The Applicant on the other hand produced a statement of the 1st Respondent's account evidencing that the amount of Kshs. 6.9 million was not available for release as at the date the order was issued. It was crucial that a sequence in the transactions in the account be demonstrated so that the court could ascertain how the sum of Ksh. 6.9 million moved from the 1st Respondent's account and who the recipient of the said money was. Without this link, I am unable to find that there was sufficient ground on which the learned trial magistrate ordered the release of the funds to the 1st Respondent.

That said, it is trite to note that the Respondents alluded that in issuing the order of 14th June, 2016, the learned trial magistrate was unfreezing the 1st Respondent's account. I have gone through both the Misc. Cr. Application and the trial files and I have not seen any order made by either the trial magistrate Hon. G. H. Oduor or the trial court freezing the 1st Respondent's account. It was therefore a misdirection on the part of the said learned magistrate to hold that any funds were available for unfreezing. But even assuming that the Applicant had frozen the funds, that would only have been demonstrated in a bank statement. No such statement was adduced. As such, the basis on which the Applicant was held accountable was untenable. All the same, the final orders issued by the learned trial magistrate did not give specific reference to a freezing order but generally issued orders allowing the application before him. As I have noted herein above, it was not demonstrated and has not been demonstrated before me that the Applicant had either withdrawn or frozen any funds belonging to the 1st Respondent to warrant the order for release of the funds.

Let me also comment that the order for the release of the funds ought to have been made in the trial file. The rationale is that the 1st Respondent argued that he made the application pursuant to the withdrawal of the trial. Therefore, the application would have been made instantly upon the withdrawal of the case through the prosecution who in any case, in this application supports the 1st Respondent. All the same, the mistake does not invalidate the miscellaneous application.

On the issue of the appeal, the only evidence exhibited tending to demonstrate existence of an appeal is a Petition of Appeal dated 17th June, 2016 annexed to the Supporting Affidavit to the application. Unfortunately, that Petition of Appeal does not bear a court stamp as evidence that it was filed. Even in the subsequent affidavits filed by the Applicant a duly stamped Petition of Appeal was not exhibited. An appeal only exists if the Petition of Appeal is duly received by the court. In the present case, it is evident then that no appeal exists. Be that as it may, it is the right of the Applicant to appeal against the decision

of the learned magistrate. Issues of jurisdiction would be canvassed in that appeal. Equally, the submission that the mere withdrawal of the criminal trial under Section 87(a) of the Criminal Procedure Code conferred the right to ownership of the money to the 1st Respondent is a matter that would only be argued in an appeal.

In the result, I find that this application is meritorious. I will therefore allow the same with orders that the order of the learned magistrate directing the release of the sum of Ksh. 6.9 Million to the 1st Respondent is stayed pending the hearing and determination of the intended appeal. The Applicant must file an appeal within 14 days from the date hereof failing which the order for stay automatically lapses. It is so ordered.

Dated and Delivered at Nairobi this 2nd day of March, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Ochieng h/b for Mr. Njenga for the Applicant

2. Mr. Chirachi for the 1st Respondent.

3. M/s Sigei h/b for m/s Nyauncho for the 2nd Respondent.