



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL MISC. APPLICATION NO. 20 OF 2016**

**IN THE MATTER OF AN APPLICATION BY EXECUTIVE SUPER RIDES LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**IN THE MATTER OF ARTICLE 2, 3(1), 10, 19, 20, 21, 22, AND 23(1) & (3), 27(1), 27(4), 27(5), 40(1), 40(2), 47(1), 47(2), 50(1), 73(1), 73(2B), 157(6), 159(2)(E), 244(C), 253 AND 258(1) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 49(4), 49(13), 51(1)(B), 66(2) OF THE NATIONAL POLICE SERVICE ACT**

**AND**

**SECTION 3, 4, 6, 7 OF THE FAIR ADMINISTRATIVE ACT**

**AND**

**IN THE MATTER OF SECTION 180 OF THE EVIDENCE ACT CAP 80 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE’S COURT KITUI.....1<sup>ST</sup> RESPONDENT**

**KITUI COUNTY DCI.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT**

**AND**

**EXECUTIVE SUPER RIDER LIMITED.....EXPARTE APPLICANT**

**EQUITY BANK KENYA LIMITED.....INTERESTED PARTY**

## RULING

1. The Exparte Applicant approached this Court by way of Notice of Motion seeking: (i) The prerogative order of certiorari to issue removing to this Court for the purposes of being quashed the decision of the Chief Magistrate's Court at Kitui made on **29<sup>th</sup> June, 2016** in **Miscellaneous Criminal Application No. 83 of 2013** and in particular orders that:

**Corporal Elkana Mogire** be supplied with:

(a) The account opening documents for account No. **[Particulars withheld]** for **Executive Super Rides, Equity Bank Limited Lavington Supreme Branch**.

(b) Account Statements from **4<sup>th</sup> November, 2015** to **1<sup>st</sup> December, 2015**.

(c) All the over counter withdrawal slips, cheques RTGS and Deposit Slips.

(d) That the Account be frozen until the matter is heard and determined by the Court.

(ii) An order of prohibition to prohibit and restrain the interested party and the 2<sup>nd</sup> Respondent from acting upon the decision made by the 1<sup>st</sup> Respondent made on the **29<sup>th</sup> June, 2016**.

(iii) Any other order that would meet ends of justice.

2. The Exparte Applicant filed a statement and grounds in support of the application where he stated that the 1<sup>st</sup> Respondent, a Judicial Institution established pursuant to the provisions of **Article 169(a)** of the **Constitution of Kenya, 2010** issued a blanket warrant to freeze and investigate its Account Number **[Particulars withheld], Equity Bank Limited Lavington Supreme Branch** indefinitely extending to periods well before it (the Exparte Applicant) received the alleged amount without laying any basis to the Honourable Court of acts or circumstances that would necessitate such action; the decision is contrary to the rules of natural justice as the 1<sup>st</sup> Respondent abdicated from its mandate to promote integrity and fairness;

3. That the 2<sup>nd</sup> Respondent, a public body established under the National Police Service Act obtained warrants from the 1<sup>st</sup> Respondent to investigate the Exparte Applicant's bank account without any notice to and hearing of the Applicant in breach of the Exparte Applicant's right to a fair hearing and access to justice decreed and protected under **Article 48 and 50(1)** of the **Constitution of Kenya, 2010**. In allowing the application the 1<sup>st</sup> Respondent made a decision that is unreasonable and in defiance of logic, haphazard and incoherent because there were no judicial proceedings in existence; no nexus between the alleged offence and the accounts alluded to and there was no material placed before the Court to prove or establish the need to inspect the documents.

4. That the subordinate Court acted in excess of its jurisdiction when it granted the said orders since they were in express contravention of **Article 31** of the **Constitution of Kenya, 2010** and wider interest of justice will be served if the orders sought are granted.

5. In a verifying affidavit in support of the application, **Justine Kendi**, Director of Exparte Applicant deposed that the Bank Manager of the Interested Party called their offices to inform them that they had been served with an order to investigate and freeze Bank Account No. **[Particulars withheld] Equity Bank Limited Lavington Supreme Branch**. This made them realize the nexus between the orders obtained was a customer by the name **Nahashon Mutua Mule** that they had received **Kshs. 500,000/=** forming part of **Kshs. 65,000,000/=** allegedly stolen from Kitui County Government. The stated customer purchased a motor vehicle Registration Number **KCB 500X** at **Kshs. 5,250,000/=**. On **29<sup>th</sup> June, 2016**, the 2<sup>nd</sup> Respondent obtained an order to investigate the bank account over the alleged

purchase of the motor vehicle. The decision of the 1<sup>st</sup> Respondent contravenes rules of natural justice that is ultravires and calls for quashing. Failure to summon them was in contravention of **Article 47(2)** of the **Constitution** and **Section 4** of the **Fair Administrative Actions Act**.

The application for warrants to investigate their bank accounts without any reasonable or factual basis and issuance of the same was in breach of their right to privacy as enshrined in **Article 31** of the **Constitution**.

6. Further, that the warrants were granted by a Magistrate who signed the affidavit relied upon which offends the provisions of **Section 4(1)** of the **Oaths and Statutory Declarations Act**.

7. The Office of the Director of Public Prosecution responded to the application by way of replying affidavit deposed by **No. 43303 Corporal Patrick Wafula** who deposed that the order was issued to facilitate investigations of the offence of conspiracy to defraud contrary to **Section 268(1)(a)** as read with **Section 275** of the **Penal Code**. The order granted enabled him as the Investigation Officer to obtain account opening documents for Account Number [**Particulars withheld**] of **Executive Super Rides Limited Account**, Account Statements from **4<sup>th</sup> December, 2015** to **1<sup>st</sup> December, 2015**, all account withdrawal slips, cheques, RTGS and deposit slips.

Investigations carried out revealed that the Applicant had received **Kshs. 500,000/=** which was part of the **Kshs. 65,000,000/=** from one **Nahashon Mutua Mule** the brother of **Benjamin Mwaka Mule** and an Accused in **Criminal Case No. 1046 of 2015 (Kitui)** who was a witness of the buyer in the sale agreement.

8. Further, he stated that part of the **Kshs. 65,000,000/=** was used to purchase the motor vehicle therefore orders issued were to preserve exhibits (funds) pending hearing and determination of criminal cases. **Article 47(2)** of the **Constitution** has been complied with as the Exparte Applicant has been provided with reasons why the account was frozen. And that orders obtained were lawfully given.

9. The application was disposed off by way of oral submissions. **Mr. Ochieng**, Counsel for the Exparte Applicant submitted that they were challenging the decision of the 1<sup>st</sup> Respondent issuing a blanket order to freeze the Accounts of the Exparte Applicant on the ground that it had benefited from money stolen from the Government of Kitui. Failure to inform the Exparte Applicant of the ongoing investigation was violation of their right to a fair trial. He faulted the Magistrate who issued the orders after commissioning the affidavit sworn by the Investigation Officer.

10. In response, **Mr. Wanjala**, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the order was given to facilitate investigations into the offence of conspiracy to defraud contrary to **Section 317** of the **Penal Code** and **Stealing** contrary to **Section 275** of the **Penal Code**. Part of the sum being investigated – **Kshs. 65,000,000/=** was used to purchase a motor vehicle from the Exparte Applicant.

11. Further he argued that **Article 47(1)** of the **Constitution** protects the Complainant just as the other party. With regard to **Article 47(2)** he stated that the Exparte Applicant was provided with the information required.

12. First and foremost I will address the issue of the Magistrate having offended the provisions of **Section 4(1)** of the **Oaths and Statutory Declaration Act** which provides thus:

*“(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:*

*Provided that a commissioner for oaths shall not exercise any of the powers given by this section*

*in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”*

13. In the case of **Republic vs. Chief Magistrate’s Court at Kibera and Another Exparte Shashikant Vithaldas Badiani and Another**, Civil Appeal Misc. Civil Application No. 108 of 2012 eKLR the Court held thus:

*“There is no conflict in the action of the magistrate signing an affidavit and later issuing orders on the contents of the said affidavit. The magistrate was not the author of the affidavit and only swore the deponent in the course of judicial duties. The Applicants cannot fault the proceedings in the criminal trial on that score.”*

14. The learned Magistrate herein commissioned the affidavit in the course of her judicial function. There is nothing to suggest that the learned Magistrate had any interest in the matter. No concern in the matter is insinuated on her part. And needless to add that she was not the deponent of the affidavit’s advocate. The fact that the Magistrate commissioned the affidavit and subsequently heard the application and granted orders being challenged does not deprive it of legal efficacy.

15. The Applicant in the Lower Court **DCI – Kitui**, through **No. 77037 Corporal Mogere Elkana** approached the Court by way of Notice of Motion. No provision of law was cited to enable the Court determine if it was brought under an existent provision of the law. The application sought issuance of a warrant to investigate an account. A Judicial Officer derives the power to issue a warrant to investigate an account held at the bank from **Section 180** of the **Evidence Act** that provides thus:

*“(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.*

*(2) Any person who fails to produce any such banker’s book to the police officer or other person executing a warrant issued under this section or to permit such officer or person to scrutinize the book or to take copies of any relevant entry or matter therein shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding two thousand shillings or to both such imprisonment and fine.”*

16. It is argued by the Applicant that **Article 47(1)(2), 50(1)** of the **Constitution** required affected parties to be heard prior to the order being granted. **Article 47** provides for according fair administrative action to all persons. And where an administrative action is likely to affect an individual, they have a right of being informed in writing.

17. **Section 2** of the **Fair Administrative Action Act, 2015** defines **Administrative Action** as including-

*“(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or*

*(ii) Any act, omission or decision of any person, body or authority that affects the legal rights of interests of any person to whom such action relates.”*

The Act goes on to define an Administrator as a person who takes an administrative action or who makes an administrative decision.

18. In this matter after the order issued by the Court was served upon the Respondent in the Lower Court (Manager Equity Bank LTD – Lavington Supreme Branch) the Applicant was notified of the action taken.

19. It is argued that the order granted was unlawful. Pursuant to the provision of **Section 180** of the **Evidence Act**, it is apparent that the learned Magistrate had the discretion to issue the order. The Magistrate had the power to act upon reasonable suspicion in issuing the order for purposes of investigating the account. However, with regard to freezing of the account until hearing and determination of the suit, it would have been necessary for the Applicant to be heard. In the interest of justice an interim order should have been granted pending hearing of the account holder. In that respect, the account holder should have been made a party to the application.

20. A closer look of the application filed in the Lower Court clearly show that the orders sought were specific namely:

**“1. ....**

**2. That this honourable court be pleased to issue a search warrant to investigate account 018029949441 held at Equity Bank Limited Lavington Supreme Branch.**

**3. That orders of this Honourable court to be directed at and be served upon the Manager Equity Bank Limited Lavington Supreme Branch to supply NO. 77037 CPL Elkana Mogire with the following documents:- with information as per request affidavit paragraph 5.**

**4. ....**

**5. ....”**

Paragraph 5 of the Affidavit sworn by **No. 77037 Corporal Elkanah Mogire** states thus:

**“THAT The Manager Equity Bank Limited, Lavington Supreme Branch to furnish me with the following information (a) The account opening document for account No. 018029949441 for Executive Super-rides Limited (b) Account statement for 4<sup>th</sup> November, 2015 to 1<sup>st</sup> December, 2015 (c) all the over the counter withdrawal slips, Cheques and RTGS deposit slips, (d) That the account be frozen until the matter is heard and determined by court. (d) any other relevant information.”**

A reading of the paragraph would be interpreted to refer to the information that was required from the bank for purposes of investigation. The issue of the account being frozen as it appears in clause (d) is misplaced because that does not form part of the information the manager was required to provide.

21. The Applicant before Court – **No. 77037 Corporal Mogere**, an Investigator from DCI Kitui was heard by the Court. He concluded his prayer by stating thus:

**“..... I therefore seek the freezing of Account.”**

22. There is no ruling on record but an order of authority which is to this effect:

**“..... Now therefore I authorize.....”**

As I have aforesaid – clause ‘d’ of the order is not information to be supplied to an Investigator.

23. That notwithstanding, to obtain such an order, the Applicant is duty bound to demonstrate by laying the basis upon which such an order should be granted. A Judicial Officer granting such an order must analyze and consider the application then come up with a decision. Without any ruling on record there is nothing to suggest what made the learned Magistrate come up with the decision to freeze the account.

Failure to come up with a decision is tantamount to failing to take all relevant consideration into account prior to granting the order sought. This is erroneous as it is contrary to the rule of natural justice and therefore liable to judicial review.

24. In the result, I quash the Lower Court order freezing Account No. **[Particulars withheld] Equity Bank Limited Lavington Supreme Branch.**

25. This Court has been asked to issue an order of prohibition prohibiting and restraining the Interested Party and the 2<sup>nd</sup> Respondent from acting upon the decision of the 1<sup>st</sup> Respondent. The remedy of prohibition would ordinarily issue stopping the Respondent from doing something unlawful. The order made by the learned Magistrate authorizing the investigation to be carried out was provided for in law and investigations must have been undertaken and most probably concluded. The order freezing the account was erroneously granted therefore if the law is followed and basis laid it would be considered by a Court of Law. In the premises I decline to grant the order sought.

26. Each party shall bear its own costs.

27. It is so ordered.

**Dated, Signed and Delivered at Kitui this 4<sup>th</sup> day of May, 2017.**

**L. N. MUTENDE**

**JUDGE**