



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL REV.NO.78 OF 2011

GRAHAM SAGWE.....1ST APPLICANT
DON BOSCO GICHANA.....2ND APPLICANT
OBADIAH GWARO.....3RD APPLICANT
GLADYS GICHANA.....4TH APPLICANT
ROBERTS MOSET ONKWANI.....5TH APPLICANT

VERSUS

REPUBLIC.....1ST RESPONDENT
FINA BANK LTD.....2ND RESPONDENT

RULING

The Applicants Graham Sagwe, Don Bosco Gichana, Obadiah Ogwaro, Gladys Gichana and Moseki Onkwani were arraigned as accused persons nos. 1, 2, 3, 4 and 6 respectively in **Criminal Case No. 1998 of 2010** before the Chief Magistrate's Court in Nairobi. They were severally charged with various offences of **conspiracy to commit a felony** and **stealing** contrary to **Sections 393** and **275** respectively of the **Penal Code**. The 2nd Respondent herein, Fina Bank Limited, is the complainant in the case. The Applicants are alleged to have been involved in stealing a sum of Kshs.96,759, 540/= from the 2nd Respondent. According to the 2nd Respondent, on 18th November 2011, a sum of Kshs.96,759,540/= was fraudulently transferred from its customer's bank account at Kimathi Street to various bank accounts at Ecobank Kenya Limited, Barclays Bank of Kenya Limited and Commercial Bank of Africa Limited. A report was made to the Anti-Banking Fraud Unit of the Kenya Police. After conclusion of the investigation, the Applicants were charged with the above offences at the Chief Magistrate's Court.

In a **Miscellaneous Criminal Application No. 14 of 2011** filed at the Chief Magistrate's Court, the Anti-Banking Fraud Unit moved the court seeking orders to freeze the bank accounts subject of the criminal proceedings at the Chief Magistrate's Court. The Chief Magistrate's Court issued the order freezing the said bank accounts at Eco Bank Kenya Limited, Barclays Bank of Kenya Limited and Commercial Bank of Africa Limited. On 25th January 2011, the 2nd Respondent filed an application in this court seeking to review the freezing order by the Chief Magistrate's Court. The application was heard on 4th February 2011 by Warsame J (as he was then). During the hearing of the application, the court was informed that

some of the stolen money had been recovered and were being held in the particular frozen bank accounts. Consequently, the Learned Judge directed that the said accounts be unfrozen and further that the money recovered be transferred back to the 2nd Respondent. The Applicants further agreed that the remaining amount would be refunded to the 2nd Respondent. Since then, several payments have been made to the 2nd Respondent by the Applicants. On 27th March 2012, this court gave a temporary order of stay of the criminal proceedings before the Chief Magistrate's Court.

With the balance of the refund still unsettled, Counsel for the 2nd Respondent made an oral application to this court on 12th November 2012 to lift the orders of the court staying the criminal proceedings in the Chief Magistrate's Court. During the hearing of the application, the Applicants were represented by learned counsel, Mr. Mutisya. In his response to the application, Mr. Mutisya told the court that he had no objection with the criminal proceedings proceeding at the Chief Magistrate's Court. Consequently, the order of stay of the criminal proceedings at the Chief Magistrate's Court was lifted.

The Applicants filed a Notice of Motion under Certificate of Urgency on 30th November 2012. The application has been brought under the provisions of **Article 159** of the **Constitution**, **Section 137** of the **Criminal Procedure Code** and **Section 1(a) & (b)** of the **Civil Procedure Code**. It seeks to review the order of court given on 12th November 2012. According to the Applicants, a review of the order would allow parties time to reach an out of court settlement of the disputed subject of the criminal proceedings in the Chief Magistrate's Court. In the alternative, the Applicants sought an order from this court admitting Criminal Case No. 1998 of 2010 into the Civil Division of the High Court and consolidating the same with the present suit. Finally, the Applicants sought an order from this court discharging them from Criminal Case No. 1998 of 2010 in the Chief Magistrate's Court. The application is supported by the grounds stated on the face of the application and the annexed affidavit of the 3rd Applicant.

The application is opposed. Sergeant Fredrick Muasya Musyoki swore a replying affidavit on behalf of the 1st Respondent in opposition to the application. On his part, Mr. Dipan Shah swore a replying affidavit on behalf of the 2nd Respondent. In essence, the 1st and 2nd Respondents' case is that the Applicants did not object to the application for revision of the order of stay of the criminal proceedings at the Chief Magistrate's Court. According to the 1st and 2nd Respondents, the Applicants had not demonstrated their willingness to settle the outstanding amount due to the 2nd Respondent having made their last payment on 16th October 2012. They were of the view that the Applicants' application was an abuse of the court process. They therefore urged the court to disallow the application and allow them to proceed with the trial at the Chief Magistrate's Court.

Prior to the hearing of the Application, Counsel for the Applicants and the 1st and 2nd Respondents filed written submission in support of their respective clients' opposing positions. During the hearing of the application, Mr. Nyaribo for the Applicants, Mr. Mureithi for the 1st Respondent and Mr. Mwangi for the 2nd Respondent highlighted their respective submission. In his submission, Mr. Nyaribo told the court that Criminal Case No. 1998 of 2010 at the Chief Magistrate's Court arose from a mistaken bank transfer of funds to the Applicants' bank accounts. He told the court that an agreement was struck in court between the Applicants and the 2nd Respondent for restitution of the said funds. The Applicants' case is that it would be in the interest of justice for this court to conclude the subject matter of the criminal proceedings at the Chief Magistrate's Court having substantially dealt with it. According to Mr. Nyaribo, the complainant's main concern was to recover the sum of money lost which it has. He therefore urged the court to invoke the provisions of **Article 159** of the **Constitution** in order to meet the ends of justice.

On his part, Learned State Counsel Mr. Mureithi submitted that **Article 159** of the **Constitution** could not be invoked in the circumstances as it would prejudice the 2nd Applicant. He was of the view that a court cannot review an order made by another court of the same jurisdiction. In addressing the issue of consolidating the criminal case in the Chief Magistrate's Court with the present suit, Mr. Mureithi drew the court's attention to the provisions of **Section 193A** of the **Criminal Procedure Code**. Mr. Mureithi submitted that an issue in a civil matter whether substantial or otherwise does not bar a criminal

proceeding. He submitted that under **Article 157(10)** of the **Constitution**, the Director of Public Prosecution does not require authority or consent from any person before commencing criminal proceedings against anyone. According to him, it is the Director of Public Prosecutions who has the power to continue or terminate any criminal proceeding before a court of law. He further submitted that the Applicants had been given sufficient time to refund the money but had failed to do so necessitating the 1st Respondent to invoke the provisions of **Article 150** of the **Constitution**. According to Mr. Mureithi, the delay in the hearing of the criminal case at the Chief Magistrate's Court has been occasioned by the Applicants.

On his part, Mr. Mwangi, learned counsel for the 2nd Respondent associated himself with the submission made by the Learned State Counsel for the 1st Respondent. In addition, Mr. Mwangi submitted that the case was brought to the High Court only for the purpose of unfreezing the accounts and restitution of the amount recovered. Mr. Mwangi submitted that the criminal proceedings at the Chief Magistrate's Court were stayed in the spirit of reconciliation. According to him, the order for stay of proceedings was lifted since the Applicants had defaulted in restituting money back to the 2nd Respondent. Learned counsel for the 2nd Respondent was of the opinion that the orders sought by the Applicants are unknown in law. He concluded by submitting that reconciliation could still be attempted at the Chief Magistrate's Court as provided under **Section 176** of the **Criminal Procedure Code**.

Having carefully considered the rival arguments made in this application, the issue for determination by this court is whether the Applicants made a case for this court to terminate proceedings before the criminal court or in the alternative grant the prayers sought by the Applicants to stay proceedings before the said criminal court. This case has a history. The subject matter of the criminal case were funds which were irregularly transferred from accounts held in the 2nd Respondent Bank. Through the intervention of this court (Warsame J (as he then was)) a substantial sum of the money that was irregularly transferred was refunded to the 2nd Respondent. There is still outstanding some amount which has not been repaid back to the 2nd Respondent. To facilitate the said refund, and with a view to promoting reconciliation between the parties, the court stayed criminal proceedings facing the Applicants before the Chief Magistrate's Court. However, it is apparent that the Applicants did not take advantage of the respite offered to them by the court by making good their promise to refund the entire sum that was irregularly transferred from the 2nd Respondent bank. It is in that regard that the prosecution wishes to proceed with the criminal case facing the Applicants. The prosecution argued that the three (3) years that the Applicants were granted to pay the balance of the sum irregularly transferred was more than sufficient for the Applicants to make good their undertaking. As it were, the prosecution and the 2nd Respondent are of the view that the Applicants have abused the orders of stay of proceedings granted in their favour by failing to fulfill their part of the bargain hence their insistence that the criminal case proceeds to its conclusion.

On their part, the Applicants argued that since they are facing a civil case before the High Court over the same subject matter, it is only fair and just that the criminal proceedings pending before the Chief Magistrate's Court be terminated or be stayed permanently pending the conclusion of the civil case. This court is unable to agree with the thrust of the submission made by the Applicants. As stated earlier in this Ruling, the consideration for staying the criminal proceedings in the Chief Magistrate's Court was to enable the Applicants make good their promise to refund the entire sum that was irregularly transferred from the 2nd Respondent bank. The Applicants have not made good their promise. They cannot have their cake and eat it at the same time. They have taken advantage of orders of stay of proceedings of this court but they have not fulfilled their part of the bargain. The fact that there exists a pending civil case over the same subject matter is not a factor that this court can take into consideration in determining whether or not to grant the orders craved for by the Applicants. **Section 193A** of the **Criminal Procedure Code** is clear in that regard. It provides that:

“Notwithstanding the provisions of any written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

The upshot of the above reasons is that this court finds no merit with the Applicants' application. The same is dismissed. The hearing of the criminal case in **Criminal Case No.1998 of 2010** shall proceed to its conclusion. In that regard, the Applicants shall present themselves before the Chief Magistrate's Court for Mention on 16th October 2015 with a view to taking appropriate directions for hearing of the criminal case. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE