



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 194 OF 2014

TIMOTHY ISAAC BRYANT.....1ST APPLICANT

GITONGA GERRY GRAHAM.....2ND APPLICANT

(Both practicing law in the firm of Bryant & Associates)

REGISTERED TRUSTEES KENYA YOUTH HOSTELS ASSOCIATION....3RD APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT.....2ND RESPONDENT

ADAN AHMED HASSAN.....3RD RESPONDENT

DESIRAL KENYA LIMITED.....1ST INTERESTED PARTY

JAMES OSOGO.....2ND INTERESTED PARTY

GIDEON CHRIS MAINA.....3RD INTERESTED PARTY

MUSA MUKANGWA.....4TH INTERESTED PARTY

FRANCIS MUTHINI.....5TH INTERESTED PARTY

(Being an application for revision of the original order of E. Agade (RM) in Nairobi cm Misc. Criminal Application No. 640 of 2013 made on 14th May 2013)

RULING

1. This is a revision instituted by way of a Notice of Motion dated 10th July 2013 and brought under **Sections 362 and 364** of the **Criminal Procedure Code**. The Applicants are seeking the following orders:
 - a. That the Respondents be restrained from arresting or charging the Applicants pending the hearing of the Application,
 - b. Determination as to whether to hear the parties under **Section 365** of the **Criminal Procedure Code**,
 - c. The 1st Applicant being the customer in respect of bank account No. *[particulars withheld]* at Cooperative Bank Ltd. Upperhill Branch, be authorized to operate the bank account pending the full determination of the matter,
 - d. The 1st Applicant to furnish full financial accounts to the 3rd Applicant and thereupon transfer from Bank Account No. *[particulars withheld]* at Cooperative Bank Ltd. Upperhill Branch the sale proceeds of the property Nairobi LR 2009/965/2 sold by the 3rd Applicant pursuant to **Section 4** of the **Trustee (Perpetual Succession) Act**,
 - e. The record of the subordinate court in **Nairobi CMC Misc. Criminal Application No. 640 of 2013** be called for, examined and reviewed,
 - f. The order and warrant issued under **Section 180** of the **Evidence Act** on 14th May 2013 to investigate the bank account without judicial proceedings be set aside,
 - g. The Respondents be restrained from investigating or in any other way inquiring about or freezing the said bank account or any other account held by the Applicants.
2. The Application is supported by the Affidavit of the 1st Applicant sworn on 2nd July 2013 and a Further Affidavit sworn on 30th January 2014. The 1st Applicant depones that since the bank account No. *[particulars withheld]* at Cooperative Bank Ltd. Upperhill Branch, (hereinafter 'the subject bank account'), is a client account, the police are, by virtue of **Section 134** of the **Evidence Act**, not entitled to have access to it save under stringent conditions. He adds that the Applicants had no knowledge of the Revision Application or orders issued by the lower Court until the Applicants were notified by the Bank in a letter dated 3rd June 2013. He states that the provisions of the law relied on in issuing the said orders do not authorize Courts to freeze bank accounts and further that **Section 121(1)** of the **Criminal Procedure Code** was not complied with since the police did not report back to the Court that issued the orders.
3. The deponent believes that the continued freezing of the account is unlawful since no criminal charges have been instituted as contemplated by **Section 121(3)** of the **Criminal Procedure Code**. As a result, the Applicants have been denied their right to be heard. The Applicants have also challenged the procedure followed in the lower Court for the reason that the Application was improperly readmitted after it was initially rejected by the lower Court. The Supporting Affidavit to the said Application has also been challenged as having been commissioned after it was filed, and was incompetent for the reason that it was commissioned by the same Magistrate who presided over the matter and further that its jurat was not in conformity with **Section 5** of the **Oaths and Statutory Declarations Act**. The deponent states that no funds have been diverted or stolen to create any reason for the police to seek the orders since no evidence was adduced in the Application and there was therefore, no basis for the allegations made.
4. The Applicants also challenge the legitimacy of complaints made to the police for the reason that the same claims which had been instituted by the said complaints against the Applicants in a civil suit were subsequently recanted. Thus, the warrants issued were baseless. Further, that complaints against the Applicants were motivated by ulterior motives by a person who lacked authority over the subject property. The deponent adds that the Application in the lower Court was not supported by any evidence including the statements of the complaints and were therefore mere allegations. The police officers being aware of the civil claims ought not to have criminalized the matter. It is also stated that the issuance of the orders prejudices the Applicants' rights in a pending civil suit. The 1st Applicant adds that the sale of the subject suit property was a result of a threatened action of the Association's property owing to an outstanding loan that had been granted by the

International Youth Hostel Federation to the Association.

5. In his Further Affidavit dated 30th January 2014, the 1st Applicant contended that the Interested Parties claiming to be the trustees of the Association did not provide proof in the form of a Certification of Registration. The 1st Applicant is apprehensive that unless the Revision is granted the Interested Parties will access funds in the subject bank account without concrete determination by the Court as to the lawful representative of the Association. The 1st Applicant adds that the suit **HCCC No. 517 of 2013** upon which the Interested Parties have placed reliance was dismissed by Havelock, J. on 30th October 2013, thus, the Interested Parties lost their claim. Furthermore, the Applicants state, the sale agreement relied upon by the 1st Interested Party for the claim of Kshs. 23 million was a forged document. Therefore in the absence of a basis for grounding their claims, the Interested Parties' claims amount to an abuse of court process and not justified. He adds that if the position of the Interested Parties is upheld, the Applicants stand the risk of suffering double jeopardy since the claims have been dismissed in a civil suit.
6. The Application was opposed by the Respondents and the Interested Parties who were enjoined to these proceedings by a Ruling of this Court on 14th November 2013. In the Supporting Affidavit of Gideon Chris Maina sworn on 21st November 2013 on behalf of the 2nd, 3rd and 4th Interested Parties, it is alleged that the sale of the property to Superiorfone Communications Ltd. was irregular and that no monies, being the proceeds of the said sale, have been transferred to the Association. The parties' interest is to therefore, have the money preserved so that is it not released to persons who they believe, are not the legitimate trustees of the Association. In this respect, it is deponed that civil proceedings have been instituted against the Applicants and the persons claiming to be the legitimate trustees in **HCCC No. 1042 of 2013** which is still pending in Court.
7. According to the Replying Affidavit of Jane Muasya sworn on 22nd November 2013, Desiral Kenya entered into a sale agreement with the Association, for the purchase of the suit property at a purchase price of Kshs. 130,000,000 subsequent to which the company paid Kshs. 23 million as deposit. That further, it was discovered that the same property had been sold to another purchaser, Superiorfone Communications Ltd. This was the basis of a suit instituted by Desiral Company Ltd. **HCCC No. 157 of 2013**. It is stated that the 1st and 2nd Applicants have failed to disclose material facts to the Court, that there is an application for attachment before judgment in the said suit concerning the subject matter herein. That upon learning that the property had been transferred to another purchaser, of the sale of the property which the company intended to purchase, a complaint was lodged to the police on 13th May 2013.
8. The 1st Interested Party's case is also supported by the Affidavit of John Katiku, who acted for Desiral Limited in the sale transaction, sworn on 18th December 2013. He depones that reliance on the Affidavit of Ignatius Mutua recanting the claims in the **HCCC No. 157 of 2013** is misplaced since the same deponent swore a subsequent Affidavit on 18th June 2013 recanting the joint Affidavit between the said Ignatius Mutua and Andrew Kale sworn on 7th May 2013. The deponent adds that on the account of Ignatius, there is *prima facie* evidence of the existence of a crime, thus the need for investigations.
9. When the Application was canvassed before me on 19th March 2014. Mr. Saende appeared for the 1st and 2nd Applicants while Mr. Okello appeared for the 1st and 2nd Respondent. The 1st Interested Party was represented by Mr. Ojiambo while Mr. Mbaabu appeared for the 2nd, 3rd, 4th and 5th Interested Parties. Mr. Saende submitted that under **Section 134** of the **Evidence Act**, police officers are not entitled to information pertaining to the advocates' records save under very stringent exceptions. Further, that the Application in the lower court did not lay sufficient grounds to warrant the grant of the orders that were sought since no evidence was advanced to support the allegations apart from the Affidavit of Adan Ahmed Hassan that there was suspicious or criminal

activity.

10. Furthermore, the property in question was being sold by the 3rd Applicant whose representation is evidenced in the trust document and Certificate of Incorporation. In addition, he submitted, the sale was executed by trustees recognized in law therefore the averments by Adan Ahmed Hassan that the transaction was being carried out by other persons other than the ones recognized lacked basis. The cases of **Shahjay Shah v Republic Misc. Criminal Application No. 517 of 2002**, **Vitu Ltd v Republic Msa, HC Misc. App. 75 of 2004** and **Crescent Forwarders Ltd. v Middle East Bank Ltd. & Another MSA HC Misc. App 80 of 2001** were cited. It is the Applicants' submission that there was no legitimate complaint made to the police since one of the complainant, Ignatius Mutua, recanted similar allegations in the civil suit. The Applicants also submit that the particular application was filed for ulterior motives to settle civil matters. The cases of **Republic v Commissioner of Police KLR 2003 582** and **Republic v Chief Magistrates' Court at Mombasa ex parte Ganjee & Another [2002] 2 KLR** were cited in support.
11. Mr. Okello for 1st and 2nd Respondent, in opposition stated that **Section 134** of the **Evidence Act** was not relevant since its application is limited to communication between an advocate and his client and does not apply to an advocates account. He submitted that the *Sanjay case* does not bar the court from issuing freezing orders to protect funds in accounts. He added that the standard of proving that the inspection of a bank account is necessary is not proof beyond reasonable doubt since at the stage of initial investigations, a police officer would not be in a position to tender all the evidence.
12. Mr. Okello submitted that the Affidavit in support of the Application laid down the basis for the granting of orders and warrants, being the complaints made by the complainants. On the suitability of Ignatius Mutua as a complainant, it was submitted that the information relating to the civil suit was not within the knowledge of the investigating officer. He added that although the investigations were incomplete, the money deposited in subject bank account had already been disbursed since only Kshs. 31 million was remaining out of the 48 million that had been deposited, an indication of misappropriation of funds. He added that the Investigating Officer's Affidavit is not made up of allegations since the facts deponed to were the beginning of investigations which revealed evidence of funds having been misappropriated.
13. Mr. Mbaabu on his part, also opposing the Application submitted that there was no dispute as to the officials of the trust, and that the **HC ELC. No. 1042 OF 2013** captures the dispute. He added that the sale of the property in question was executed by trustees whose representation has been disputed and further that the said trustees lacked mandate on expenditure or execution of documents. Counsel submitted that the deposit and expenditure of KES 125 million was not mandated, therefore validating the investigations by police since the money in the account belonged to the Association. Further, no prayer had been made by the Applicants for the release of the money to the Association. Mr. Mbaabu, citing the Constitution, proceeded to make an application to have the monies removed and deposited into Court. He added that the threshold for orders to be issued was met since investigations revealed more facts to show that the orders issued were warranted.
14. Mr. Ojiambo for the 1st Interested Party supported the application for deposit of funds into Court since no prejudice would be suffered by the Applicants who claim that they hold the funds as lawyers. Counsel noted that if that were the case, the Applicants ought to have filed interpleader proceedings once a dispute arose as to ownership of the funds for the court to determine ownership. He submitted that the 1st Interested Party has a right to ask that the money be held safely until ownership is determined, adding that the law does not bar law enforcement agencies from investigating advocates, accounts. Furthermore, Counsel stated, the subject bank account is not a client account, but a joint account where the 1st Applicant is the sole signatory. He submitted that if the Revision is allowed, the right of the 1st Interested Party would be abrogated. He cited the case of **Samuel Watatua & Another v Republic, Criminal Appeal No. 2 of 2013**

(unreported) in support of this position.

15. In rejoinder, Mr. Sande submitted that the standard of proof required is proof beyond reasonable doubt. He added that the Certificate of Registration showed the legitimate trustees and therefore no fraud has been proven since the property was the subject of a loan, and the orders sought by the Interested Parties in the civil proceedings were never granted. He added that the investigations were commenced for ulterior motives to defeat a civil case and the Court ought to exercise its jurisdiction to review erroneous orders to enable the Applicant complete his mandate to his client.
16. Having laid out the parties' cases and their submissions including the supporting law, I have framed the issues for determination as follows:
 - a. Whether this Court has jurisdiction to entertain the Application.
 - b. Whether the Application seeking the warrants sought was properly made before the lower Court.
 - c. Whether the lower Court had jurisdiction to grant the orders sought on the basis of the cited provisions of the law.
 - d. If yes to the above, whether the threshold for granting of the inspection and freezing orders was met
 - e. Whether it was proper to uphold the orders sought without granting the Applicants a fair hearing.

Jurisdiction of the High Court to hear the Application

17. **Section 362, 364 and 365 of the Criminal Procedure Code and Article 165(6) of the Constitution** grant the High Court supervisory powers over the lower Court. Under **Section 362 CPC** the court has power to *'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** provides for the powers of the High Court on revision.

18. This power is echoed under **Article 165** of the **Constitution** as follows:

"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of administration"

19. I however need to elaborate on **Section 365** of the **Criminal Procedure Code** which provides that:

"No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:

Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364 (2)."

For reasons elaborated later in this Ruling, this Court exercised its power to hear the Applicants and the Interested Parties. One of the conditions to be satisfied is that, under **Section 364(2)**, no orders ought to be made to the prejudice of the accused persons unless he is given an opportunity to be heard. The Applicants as well as the other parties to be affected by the orders of this Court were afforded an opportunity to be heard with this condition in mind.

Legality of the Application in the Lower Court

20. Two complaints have been raised regarding the propriety of the Application made in the lower Court. Firstly, that the Application was not properly made before the lower Court and secondly, that the Supporting Affidavit was commissioned by the same Magistrate who presided over the matter. The record of the lower Court's proceedings shows that **Misc. Criminal Application No. 640 of 2013** dated 14th May 2013 was first presented to Court and rejected for the reason that it was not signed while one of the Affidavits had not been commissioned. It appears that the Police officer complied with the requirement and presented the same Application which was then admitted in Court. I do not find any problem with the process since the Application that was eventually admitted had been signed.
21. On the second issue, the Affidavit was challenged on account of its non-compliance with Section 5 of the Oaths and Statutory Declarations Act. **Section 4(1)** of the **Oaths and Statutory Declarations Act** provides that: oaths

“A commissioner for oaths may by virtue of his commission in any part of Kenya administer an oath or take any affidavit for the purpose of any court or matter in Kenya....

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 proceedings or concerned in the matter or clerk to any such advocate or in which he is interested.”

22. This issue has been well-settled in several cases. The exception contemplated in the proviso to the provision cited above is with respect to the author of the affidavit in question since one cannot commission his own authorship. The Magistrate was not the author of the affidavit and is not said to be connected to any parties to the proceedings. Thus, the act of commissioning the Affidavit by the Magistrate did not invalidate it since the Magistrate is not an Advocate of the party to the proceedings. In **Republic vs. Chief Magistrates Court at Kibera, and Another Ex Parte Shashikant Vithaldas Badiani and Another**, Civil Appeal Misc. Civil Application 108, 2012 eKLR, the Court held that:

“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 this score.”

Jurisdiction to issue orders to inspect and freeze bank account

23. It was alleged by the Applicants that the provisions of the law relied upon by the Police in seeking the orders to freeze the bank account do not afford the Court jurisdiction to make such orders. The provisions of the law that were relied on in seeking the warrants were **Sections 118 and 121** of the **Criminal Procedure Code** and **Sections 134 and 180** of the **Evidence Act**.

24. The Applicants assert that the subject bank account is a client account that is not subject to inspection by virtue of the provisions of **Section 134** of the **Evidence Act**. Mr. Okello and Mr. Ojiambo countered this assertion, stating that the said provision only applies to privileged communication and does not apply to an advocate's account. The **Advocates (Accounts) Rules, 1996** define a client account as

“a current or deposit account at a bank or with a building society or a financial institution (as defined in the Banking Act) in the name of the advocate but in the title of which either the word “client” or the word “trust” appears;”

25. It has not been shown that the account in question satisfies the condition set up in the above

definition. Initially, this account was a joint account in the names of the 1st and 2nd Applicants. Subsequently, one of the signatories relinquished the operations of the account, thereby leaving the 1st Applicant as the sole signatory. Even as a joint account, it did not qualify to be a client account according to the definition above. The holding of money which belongs to a client does not qualify the holding account to be a client account by that mere fact.

26. Another claim that was made was that an advocate's account is not subject to any investigation by virtue of **Section 134** of the **Evidence Act**. The provision relied on read in part as follows:

“(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:” (Emphasis mine)

27. The interpretation by Counsel for the Applicants that an advocate account is protected from any investigation under this provision is incorrect. The provision seeks to protect communication between an advocate and the client made in the course of an advocate's professional engagement. Besides, **Section 180** of the **Evidence Act** does not provide for any exception to the bank accounts which may be investigated. In fact, the relevant part of the said provision 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...”

28. The enabling provisions of the law that give power to the court to issue freezing orders are to be found in the provisions under the Evidence Act read together with the Criminal Procedure Code.

29. **Section 180** provides for the initial procedure to facilitate investigation into a bank account. This provision 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.

30. The Applicants' assertion that the provision was not applicable for the reason that it contemplates existence of criminal proceedings does not stand for the reason that the Act, by this provision, takes into account acts which have been done to necessitate investigation into the possibility of commission of an 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. 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 he 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.”

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

“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.”

Section 121(1) 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.

32. It was urged that that **Section 118** does not apply to bank accounts as it provides for seizure of an item in premises i.e. 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 vs. Euro Bank Ltd. and the Commissioner of Police** (Supra), concerning the lacuna in the provisions of **Section 180** of the **Evidence Act** for failing to make a further provision for safeguarding evidence in the form of money held in a bank account. A plain reading of this provision as advanced by the Applicants goes against the practical reality that the law anticipates the need for preservation of evidence for purposes of not extinguishing the objects of a criminal trial where the item in question is or may be the subject matter.

33. A plain reading of **Section 121** as adopted by the Applicants would imply that a bank account does not encompass the objects covered by that provision. However, the purpose of this provision is to allow the search of anything capable of holding an item that can be seized. A bank account does qualify to the extent that it holds money. Money in a bank is also a special kind of item. It cannot be practically seized as an object to be physically presented in Court, the act of ‘seizing’ money is by way of freezing the account. The understanding of this provision ought to be viewed in the context of its object and that is, to preserve evidence to facilitate the investigation and prosecution of offences.

34. 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 stated,

“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.”

35. On this basis, I find that the lower Court had jurisdiction to issue the orders of inspection and freezing of the subject bank account.

Failure to accord the Applicants a hearing.

36. The Applicants have challenged that the proper procedure was not followed in freezing the subject bank account, stating that the learned Magistrate was obliged to ensure that the police were ordered to report the result of their investigation to the Court in order to safeguard supervision of the police by the Court. They added that since no one was charged with any offence thereafter, the alleged freezing of the account has been rendered unlawful. It was submitted on behalf of the Respondents that the Application ought to be made *ex parte* in the first instance so that the funds are preserved, and further that the freezing orders were not in force indefinitely. The Respondents conceded that the investigating officer was required to report back on the outcome of investigations.

37. **Section 118** of the **Criminal Procedure Code** requires that once anything is seized in execution of a warrant, it should be taken *before a court having jurisdiction to be dealt with according to law*. A further reading of **Section 121(1)** indicates that further detention of seized items is to be done with the direction of the Court. **Section 121(3)** further directs that:

(3) If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise.

38. The Applicants case is therefore, that the continued freezing of the subject bank account is against the law. The above provision emphasizes the earlier fact that it is important that once anything is seized, there needs to be a return to the court to be dealt with in accordance with the law. The purpose of this requirement is to inform the court of the outcome of the search and inspection, and to get direction on whether or not the seizure of the subject matter will be maintained. Since the warrants are often granted *ex parte* due to the nature of the orders, **Sections 118** and **121** have laid a condition of a return to Court, and as **Section 121** implies, further detention of the subject items is upon the direction of the Court. It is therefore implied that, the persons so affected would have an opportunity, at this stage, to challenge the seizure of items. The purpose of laying down the conditions is to ensure that the Court continues to maintain a supervisory role over the police.

39. A bank account being a special kind of place, not capable of seizure in the sense of the word, would, in practical terms be 'frozen' so as to preserve the contents of the account until further direction of the court. This requirement is important as it goes in accord with the constitutional requirement under **Article 50** that all persons should be granted an opportunity to be heard on matters affecting them. As stated by the Court of Appeal in **Samuel Watatua & Another v Republic (Supra)**

“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 order should be made until the matter is heard inter partes with all parties, pursuant to Article 50 of the Constitution, accorded an opportunity to be heard.”

40. As an observation and from previous matters before me, a situation often arises where parties affected invoke the revisionary jurisdiction of the High Court as soon as they become aware of the orders adverse to their interests. Such knowledge may not be surprising since a bank account under obligation to freeze a client's account will often bring such order to the attention of its clients. This however, does not take away the duty of the police officer, to serve the parties involved so that they may be represented during the return to court with the outcome of execution of the warrants as required by the law. The duty is upon the police officer, upon executing the warrants freezing the account, to serve the parties affected and notify them of the date for appearing in court.

41. That said, often, the return to court which would serve as the *inter partes* hearing does not often happen. This failure may also happen where the police do not as a matter of duty return to Court with the result of their findings. As a result, parties come before the High Court to challenge the lower Court's orders that granted the warrants. The effect is that the High Court is at this stage, sitting in what ought to be the *inter partes* hearing that should have first taken place in the lower Court. Subsequent to the orders of the lower Court after such *inter partes* hearing, any aggrieved party may approach the High Court to challenge such orders. This also creates the rare occasion where interested parties will seek to be heard on the same issue, while ordinarily they would have had an opportunity to be heard in court and presented further evidence that would have been availed to the trial Court during the date parties return to court.
42. In this case, the orders were issued on 14th May 2013. According to the Applicants, no information was shared to them with respect to these orders. They only learnt of them through a letter from the bank two weeks after the issuance of the lower Court's orders. This was unprocedural. Perhaps to avoid the scenario presented by the proceedings before me, the police officer as a matter of practice, ought to follow the procedure as articulated by the Court of Appeal and laid down under the Criminal Procedure Code. Further to this, it would be advisable on the part of the Court issuing the orders to require the Applicant seeking its orders to serve the orders on the affected parties after executing the warrants, and to give direction as to when parties will appear before the Court for hearing before final orders can be made as to whether or not to allow continued seizure of the property or freezing of the bank account. Such directions ought to be indicated in the order granting the warrants as opposed to the usual practice of granting the warrants in generalized orders that appear to give an open cheque to the police officers. It is upon such an order that any aggrieved party would approach the High Court.
43. The Application before me was filed on 10th July 2013, almost two months after the impugned orders were issued. There is no apparent reason as to why the police officer did not return to Court to report on the outcome of the execution of its orders and seek further directions from the Court. Since some time has already passed, the interests of justice demand that, I do consider this application on its substantive merits and not dismiss it for the reason of procedural flaw on the part of the police officers. I reason so on the basis that by this Application, all parties have had an opportunity to be heard, including the Interested Parties who claim a stake in the money being held in the subject bank account.

Whether the threshold for granting of inspection and freezing orders was met

44. The Applicants stated that the lower Court's proceedings were initiated for ulterior motives. One of the claims made by the Applicants in this regard is that there was neither a legitimate complaint nor complainant to justify the orders granted. This, the Applicants stated, was largely because the Interested Parties came to court to settle a matter that has been a subject of civil proceedings. Further, that one of the complainants is unreliable having made different claims in different Affidavits in the civil proceedings, one of which recanted his earlier statements on the same matters that are the subject of the investigations initiated by the issuance of the impugned warrants. Further, the Applicants have stated that the Interested Parties have come to the criminal court after failing to secure the orders to have access to the money in the subject bank account were denied and dismissed in another civil matter. The Applicants also faulted the Magistrate for granting the orders when no basis was laid for the same. The Affidavit of No. 231654 C.I.P Adan Ahmed Hassan, it was submitted, contained mere allegations that did not meet the threshold required of the facts deponed to; that is, the standard required in criminal proceedings.
45. For orders of this nature to be granted, the conditions set out under **Section 180** of the **Evidence Act** and **Sections 118** and **121** of the **Criminal Procedure Code** must be satisfied. Section 180 of the Evidence Act requires that the need for inspection of a bank account for the purpose of investigating an offence must be proved on oath, on the basis of either fact or reasonable suspicion. Therefore, the police officer must demonstrate the basis for seeking those orders, either on established fact or on reasonable suspicion. This demands that a formal application supported

by an affidavit is made before court. Both these provisions require a demonstration of the need to take action in the form of inspection or seizure by proof of fact or reasonable suspicion. A common thread in those provisions is existence of a basis to justify intervention – in fact or reasonable suspicion.

46. The investigations in the lower Court were commenced on the basis of reasonable suspicion since there was no established fact of commission of an offence. The **Black's Law Dictionary 9th Edition** at page 1585 defines reasonable suspicion as:

“A particularized or objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity.”

And further as elaborated in **Rondo (2001) 126 A Crim R. 562**, that:

“...reasonable suspicion involves less than a belief but more than a mere possibility. There must be some factual basis for the suspicion; reasonable suspicion is not arbitrary.”

47. Therefore, even where the basis for seeking the warrants to inspect and freeze a bank account is reasonable suspicion of commission of a crime, there needs to be a basis upon which the police officer moves to court. This is because a reasonable suspicion is not arbitrary. However, in my view, the test for establishing reasonable suspicion, is not a matter of strict evidence, that is, proof beyond reasonable doubt. In this respect, I associate myself with the expressions of the Court in the case of **Emmanuel Suipanu Siyanga v Republic Criminal Appeal 124 of 2009 [2013] eKLR** that:

“...and it follows that the factual basis which would make any suspicion which is actually formed a reasonable one must also exist at the material time: a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not grounds which then made suspicion reasonable, it was not a reasonable suspicion. Whether grounds actually existed at the time is to be tested objectively. Consequently a suspicion may be reasonable even though subjectively it was based on unreasonable grounds. To prove reasonable suspicion, it must of necessity be recognised that a reasonable suspicion never involves certainty as to the truth. Where it does, it ceases to be suspicion and becomes fact... There must be a satisfactory account...”

48. The question therefore, is whether the affidavit of CIP Adan Ahmed Hassan lays a sound basis to raise a reasonable suspicion as to the commission of an offence. The police must demonstrate the existence of a legitimate complaint to warrant the issuance of orders sought. When such is not demonstrated, it would not pass the test laid by the law, and would amount to mere allegations. Such demonstration must be looked at in the context of the impact of the orders on the rights of parties affected. As stated in **Vitu Limited vs. The Chief Magistrate Nairobi & 2 Others, Misc. Criminal Application No. 475 of 2004**:

“A police officer is not legally empowered to apply for or to obtain a warrant to investigate a person's bank account just because he imagines that that person may commit or has committed an offence. There must be substantial facts and circumstances already available to the police officer to enable him to create or to have reasonable suspicion in mind that, the account holder has committed an offence... there must have been a complaint and investigations.”

49. According to the Affidavit of Inspector Aden, there were two complaints received. The first complainant, Ignatius Mutua claimed that the Association was at the risk of being defrauded by persons who were not the legitimate representatives. In his Affidavit of 14th May 2013, CI Adan Ahmed Hassan states at paragraph 10 that Ignatius Mutua reported the matter to the police on 29th April 2013 when a director of another company claimed that the company was the new owner of

the subject property belonging to the Association. At paragraph 11, he depones that another complaint was made in respect of the same property on 13th May 2013, by Jane Musya, a co-director of the 1st Interested Party who reported that she had paid Ksh. 23 million as part payment towards the purchase of the same property. The deposit was banked into the Account No. 2025285746, which according to the documents presented to Court is held at Barclays Bank, Hurlingham Branch in the name of Kenya Youth Hostels Association Property Acc.

50. With respect to the second complainant, Jane Muasya, I note the bank account which is the subject of the freezing order in question is Cooperative Bank Upperhill Branch, Nairobi, Account No. 01109162693500 in the name of Timothy Bryant /James Ngugi Mwangi. The account in which the 1st Interested Party deposited part payment of the purchase price is Account No. 2025285746. I make two observations here: Firstly, the said account is different from the subject bank account. The claim laid by the 1st Interested Party to the money in question is to be found in her Affidavit in the following words:

“Paragraph 23

THAT the applicants application is intended to stop investigations by the police which investigations are being done pursuant to our report and if this application is allowed by this honourable court it will frustrate our claim since the applicants will end up utilizing the money already paid for the property before refunding our share of what we had paid and my claim will be defeated as the intention of the applicants is to defraud us of our money

Paragraph 25

THAT it has come to our knowledge that after the property was sold the monies paid by the second buyer was not credited at the association account but to the 1st and 2nd Respondents account with the sole purpose of defrauding us of the moneys we paid by utilizing the money before refunding our Kshs. 23,000,000.

51. From the proceedings, it appears that the money that the 1st Interested Party deposited in the bank account had been spent and failure by the Association/vendor to refund the deposit resulted in the institution of **HCCC No. 517 of 2013**. The 1st Interested Party is therefore seeking to preserve the deposit paid by having the subject bank account frozen to protect the money held therein, being money paid as the purchase price of the property by a different buyer. Appreciating this fact, I find that while the 1st Interested Party has a legitimate claim, it cannot be a basis for freezing the subject bank account.

52. The 1st interested Party, while being a legitimate complainant ought not to lay its claim on a different subject matter. On this ground alone, I find that while the police can independently pursue investigations on the basis of the reported complaint, the 1st Interested Party's claim cannot stand as the sole basis because of the need to show the nexus between the crime complained of and the bank account in question. Such a claim would stand if the 1st Interested Party can demonstrate a link between the bank account where the money was deposited and the subject bank account. This is the nexus contemplated in **Section 121** of the **Criminal Procedure Code** and **Section 180** of the **Evidence Act**.

53. With respect to the first complaint, the Supporting Affidavit of Andrew Kale, a former treasurer of the Association sworn on 9th July 2013 was cited to demonstrate that the said Ignatius Mutua was not a reliable complainant and further that there was no basis for instituting the claims against the alleged Trustees of the Association. In the said Affidavit, Andrew Kale depones that he had together with Ignatius Mutua, a former manager of the Association, withdrawn the complaints against the Applicants in the **HCCC No. 157 of 2013**. The Applicants also stated that the said **HCCC No. 157 of 2013**, was dismissed, further supporting the view that there was no legal basis.

54.They argued that the principle against double jeopardy was a ground to bar the institution of criminal proceedings where the existence of a civil claim was premised on the same subject matter in a criminal trial. This proposition as claimed by the 1st Applicant in his Affidavit cannot stand because as recognized under **Section 193A** of the **Criminal Procedure Code**, civil and criminal proceedings arising from the same subject matter can proceed concurrently.

55.As I had stated in my earlier Ruling in this matter the issue as to who the legitimate Trustees of the Association is not for determination by this Court. However, the fact that there is a dispute as to who represents the Association is a legitimate issue as it affects dealings with the Association's property. The issue therefore, is whether this legitimate claim is a matter purely to be dealt with in civil proceedings. I do not find so, since the possibility of fraudulent actions has been raised. I must however, add that certain averments made by CIP Adan Ahmed Hassan may amount to allegations. Even though I find that the complaints made were legitimate enough to raise reasonable suspicion, I do find the conclusion on the part of the police officer at paragraph 12 of his Affidavit that the alleged trustees and the 1st Applicant conspired to defraud the Association and 1st Interested Party of the money is an allegation that can only be determined upon proof.

56.Lastly, during the hearing, this Court was requested to have the money in the subject bank account be deposited into Court. I am alive to the fact that enforcement of the warrants to freeze a bank account infringes on a person's right to privacy protected under **Article 31** of the Constitution. This is more so with respect to bank accounts which have been afforded special procedure. The right includes the right not to have:

“(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.”

57.Any infringement of a fundamental right or freedom ought to be in compliance with Article 24 (1) which provides that:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

58.The 1st Applicant, who claims to be the owner of the subject bank account has as one of the prayers sought to be authorized to operate the said bank account. Since the Applicant states that he holds the money as an advocate in a sale transaction, then it would not be prudent to hold the 1st and 2nd Applicants at ransom pending the finalization of investigations and any proceedings that

may be instituted. In order to preserve the interests of the parties concerned, and the subject matter in question, I order that the money that is the subject matter of this Application, be deposited in Court, upon which the 1st Applicant will be authorized to operate the subject bank account. The Applicant should also furnish accounts concerning the subject bank account for the period relevant to these proceedings. Furthermore, since the police indicate that investigations are not complete, I further order that the police do make a return of the outcome of the investigations to the Court that granted the warrants. Otherwise, the holding of the subject money cannot be held in abeyance indefinitely.

SIGNED DATED and DELIVERED in open court this **12th** day of **June 2014**.

L. A. ACHODE

JUDGE