



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 437 OF 2015

MAPE BUILDING & GENERAL ENGINEERING.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE BANKING FRAUD INVESTIGATION UNIT.....2ND RESPONDENT

KENYA COMMERCIAL BANK.....3RD RESPONDENT

AND

JOHN KAGO NDUNGU.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner is the holder of a current bank account number 1167848993 with the 3rd Respondent bank. The Petitioner challenges the Respondents' decision to freeze any banking activities on the Petitioner's bank account. The freezing of the account was effected upon the 2nd Respondent's application on 6th October 2015.

2. By way of relief, the Petitioner seeks the following orders:

- a. *A declaration that the freezing of the Petitioner's account No. 1167848993 held with the 3rd Respondents without hearing the Petitioner amounts to a violation of Article 50(1) and (2) of the Constitution.*
- b. *A declaration that the freezing of Petitioner's account No. 1167848993 held with the 3rd Respondent without following due process amounts to a violation of Article 40(3) of the Constitution.*
- c. *A declaration that the freezing of the Petitioner's account No. 1167848993 held with the 3rd Respondent without following due procedure and conformity to legal standards amounts to violation of the Petitioners right to fair administration as enshrined in Article 47(1) and (2) of the Constitution.*
- d. *A judicial review order of certiorari removing from the lower [court] and quashing the orders of the trial magistrate in Nairobi Misc. application No. 2034 of 2015 issued on the 6th of*

October 2015.

- e. **Compensation for violation of fundamental rights and freedoms;**
- f. **Costs of this Petition.**

3. The Petition was opposed by all the Respondents.

Background facts

4. The facts are largely not in dispute.

5. The Petitioner is a realtor. The Petitioner deals in and develops or refurbishes and repairs real property. In April 2015 the Petitioner was contracted by the Interested Party to undertake certain civil works on the Interested Party's house situate within the up-market Rosslyn Estate, Nairobi. The works mainly consisted of renovations and repairs. Various Bills of quantities were drawn by the Petitioner and accepted by the Interested Party. The contract sum ultimately aggregated over kshs. 8,500,000/=. Subsequently, the Petitioner commenced the building works and was paid the total sum of kshs. 15,460,000/= on diverse dates between April and June 2015 by the Interested Party.

6. All the payments were made in cash.

7. All was well until September 2015 when the 2nd Respondent together with the Directorate of Criminal Investigations launched investigations into fraudulent transactions within the National Youth Service, a department in the Ministry of Devolution and Youth Affairs. An amount of kshs. 791,385,000/= had been fraudulently obtained from the National Youth Service (N.Y.S). The investigations conducted by the Respondents implicated the Interested Party. Money allegedly received by the Interested Party was detected to have been paid to various persons. Such monies also traversed through various banks. The third parties paid monies by the Interested Party included Petitioner. The banks through which the monies were banked included the 3rd Respondent.

8. The 2nd Respondent quickly moved and obtained court orders freezing the Petitioner's bank account No. 1167848993 with the 3rd Respondent. The orders were obtained before the Chief Magistrates court in Misc. Criminal Application No. 2034 of 2015 on 6 October 2015. The orders involved ten other banks besides the 3rd Respondent. The orders secured sixteen other accounts besides the Petitioner's account No. 1167848993, domiciled in the 3rd Respondent bank.

9. It is the court order issued on 6 October 2015 that is the genesis of this Petition.

Relevant Chronology

10. The Petitioner moved the court on 15 October 2015 and sought conservatory orders, seeking to have the freezing orders vacated pending determination of the Petition. The Petitioner had then not included the Interested Party to the proceedings. The court, on its own motion and pursuant to Rule 7(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 directed the joinder of the Interested Party to these proceedings on 15 October 2015. The Interested Party was duly enjoined on 19 October 2015.

11. Though served with the court process, the Interested Party made no representations or appearance in these proceedings. The Respondents however filed Replying Affidavits. One by Corporal Sautet Jeremiah Matipei on 24 November 2015 on behalf of the 2nd Respondent. The other Replying Affidavit was by Debrah Ajwang filed on 18 November 2015 on behalf of the 3rd Respondent.

Petitioner's case

12. The Petitioner contends that its right to fair hearing, to property and to fair administrative action was infringed when the Respondents secured the court order of 6 October 2015 which froze and continues to

freeze the Petitioner's account without any prior notification to the Petitioner.

13. It is the Petitioner's case that the court in Misc. Criminal Application No. 2034 of 2015, at the Respondents' prompting made an adverse decision without giving the Petitioner a hearing and this led to deprivation of property. Such action, contends the Petitioner, was contrary to Articles 50 and 40 of the Constitution as well as Article 47. The Petitioner further contends that it has suffered negative publicity which has irreparably damaged its business.

1st Respondent's case

14. The 1st Respondent contends that the Petition fails the competency test set out in the case of **Anarita Karimi Njeru –v- Republic [1976-80] KLR 1272** as the Petition does not indicate with precision the Constitutional violations complained of. Further, the Petition has not particularized the manner in which the alleged violations were committed.

15. The 1st Respondent also states that, in the Respondents freezing the Petitioners bank account there was no unconstitutionality as the freezing order emanated from the court through the process of investigations into criminal activity or conduct which is a constitutional mandate of the 2nd Respondent under Article 157 (4) and 245 (2) of the Constitution.

16. The 1st Respondent also states that the freezing orders were issued pursuant to a statutory provision by a court of competent jurisdiction and the court cannot be faulted as it exercised a statutory mandate.

17. It is also the 1st Respondent's case that public interest dictates that the orders are not interfered with and further that the Petition is dismissed as the investigations relate to the embezzlement of public funds, corruption and money laundering.

2nd Respondent's case

18. Factually, the 2nd Respondent contends that it commenced investigations following a report or complaint by the National Youth Service (N.Y.S) of an attempted theft of Kshs. 800,000,000/=. Investigations however revealed that over Kshs. 791,000,000/= had actually been fraudulently obtained from the National Youth Service (N.Y.S). Further investigations led the 2nd Respondent to the various bank accounts where the money had been deposited or paid.

19. The 2nd Respondent contends that as the money was being laundered through different bank accounts, the 2nd Respondent obtained regular court orders and secured the accounts as well as part of the amount. The Petitioner's bank account, the 2nd Respondent contends, was one of the accounts through which part of the fraudulently obtained funds was deposited.

3rd Respondent's case

20. The 3rd Respondent is an innominate party. Strictly speaking, the 3rd Respondent is neither useful nor useless to these proceedings.

21. The Petitioner's bank account as well as the Interested Party's bank account was domiciled in the 3rd Respondent.

22. The 3rd Respondent states that in freezing the bank account it was simply obeying a court order. The 3rd Respondent states that it only froze the bank account having ascertained that the court order was genuine.

Arguments in court

23.3 The hearing of the Petition was conducted through the medium of the affidavit evidence and written submissions on record as well as through oral highlighting of the submissions. Mr. Thiongo appeared for the Petitioner whilst Mr. Ashimoshi appeared for the 2nd Respondent. Mr. Mohammed and Ms. Sumba urged the 1st and 3rd Respondents' cases respectively.

Petitioner's submissions

24. It was the Petitioner's submissions through Mr. Thiongo that contrary to the provisions of Article 50(a) (b), (d), (f) (4) and (5) the Petitioner had been denied the right to fair hearing as the freezing orders were issued and continued without any service of the attendant application upon the Petitioner. Counsel relied upon the two cases of **Timothy Isaac Bryant & 2 Others –v- Inspector of General of Police & Others [2014]eKLR** and **Samuel Watutua & Another –v- Republic Criminal Appeal No. 2 of 2013**. Both cases advanced the proposition that orders affecting third parties and issued ex parte should not be made final until after the party affected has been notified and given the chance to be heard.

25. Counsel contended further that Sections 118 and 121 of the Criminal Procedure Code are intended to assist in temporary lawful seizures only.

26. The Petitioner further submitted that the Respondents had denied it the right to fair administrative action contrary to Article 47 of the Constitution. Again, the Petitioner pointed out that denial of hearing before and even after the issuance of the freezing orders on 6 October 2015 was outright proof of malice and denial of right to fair administrative action. This was further heightened by the fact that even the freezing order itself was never served upon the Petitioner. In the Petitioner's submissions, the Respondent ought to have served the court order with an appropriate return date for all the affected parties to be heard. The Respondents, continued the Petitioner, had failed to follow the laid down procedure and instead adopted an unfair and unlawful procedure.

27. The Petitioner then submitted that it had been arbitrarily deprived of its property contrary to Article 40 of the Constitution. The arbitrariness was evident in the Respondents' failure to give the Petitioner any notice prior to the freezing of the account.

28. For the alleged infringement of rights, the Petitioner sought damages in the sum of Kshs. 3,000,000/= as compensation. For completeness, the Petitioner urged that private interest be balanced carefully too with the public interest.

1st Respondent's submissions

29. The 1st Respondent submitted through Mr. Mohammed that the Petition was not competent as it was lacking in material particulars. A precise description of the violated Articles as well as the nature of the violation was also lacking. Counsel referred the court to the cases of **Anarita Karimi Njeru –v- Republic [1980] KLR 1272** and **Meme –v- Republic [2004]eKLR**.

30. Counsel further submitted that the Petitioner had failed to discharge the burden of proof and show that its rights had been violated. According to counsel, the Petitioner was not an accused person for purposes of Article 50 and thus the rights guaranteed under Article 50 were unavailable to the Petitioner. Counsel stated that the Petitioner had failed to show that any Article of the Constitution had been violated.

31. Reverting to the facts of the case, Mr. Mohammed stated that the Respondents were merely executing a constitutional mandate to investigate alleged criminal activities. In particular counsel pointed out that the investigations focused on alleged "money laundering of fraudulently obtained monies" by the Interested Party. Counsel added that public interest dictated that the process be left to run to its logical conclusion.

32. Counsel further submitted that the impugned freezing order had been issued by a court of competent jurisdiction and if the Petitioner felt aggrieved then the appropriate forum was the same court which had

powers to review the orders. Relying on the case of **Pauline Cherono Koros & Another -v- The Chief Magistrates' Court High Court Petition No. 254 of 2013 [2013]eKLR**, Mr. Mohamed submitted that notwithstanding the court's supervisory powers over the subordinate courts the same could not be arbitrarily invoked and applied with a view to micro-managing the subordinate courts.

2nd Respondent's submissions

33. Mr. Ashimoshi appearing for the 2nd Respondent submitted that the 2nd Respondent was acting within its mandate and not under any particular person's control. Counsel stated that the process was full of good faith and the decision to ultimately prosecute the Interested Party was informed by the evidence assembled which evidence had led the investigators to the frozen account belonging to the Petitioner.

34. In particular, the counsel for the 2nd Respondent pointed at the affidavit evidence of the Petitioner which acknowledged cash payments by the Interested Party.

35. Mr. Ashimoshi asserted that the Petitioner had not been deprived of the property at all and further that the freezing order was temporary with a view to ensuring that the amounts allegedly obtained by the Interested Party fraudulently was secured. Counsel contended that the order had not been lifted due to the complex nature of the investigations.

36. Counsel concluded by stating that the law allowed the Petitioner to apply for the setting aside of the ex parte court order. But if the orders were regular and in force, there could be no question of unconstitutionality.

3rd Respondent's Submissions

37. Ms. Sumba's submissions were as limited as any innominate party's submissions would be. The 3rd Respondent, the court heard, acting in good faith and with full fidelity to the law obeyed court orders once it was satisfied that the orders were regular and legal.

Issues

38. The main issues in this Petition may be stated as follows.

- a. *Whether the Petition meets the competency threshold set out in the case of **Anarita Karimi Njeru -v- Republic [1976-80] KLR 1272**.*
- b. *If so, whether the fact of freezing the Petitioner's bank account amounts to a violation of the Petitioner's rights and freedoms guaranteed under the Constitution.*
- c. *If answer to (b) above is in the positive, what are the appropriate reliefs?*

Discussion and determinations

39. It is now well settled that parties coming to court and alleging violation of Constitutional rights must with reasonable precision spell out the relevant Articles of the Constitution and further particularize with reasonable precision the alleged violations as well as how the violations were committed. The locus classicus for this legal proposition is the judgment of Trevellyan and Hancox JJ in the case of **Anarita Wairimu Njeru -v- Republic [1976-80] KLR 1272**. The Respondents referred to this decision. The cases are however numerous and include **Koinange-v- Attorney General [2007] 2 EA 256**, **Attorney General -v- Butambala [1992] LRC 496**, **Matiba -v- Attorney General [1990] KLR 666**. In **Mumo Matemu -v- Trusted Society of Human Rights Alliance and 5 Others CACA No. 290 of 2012 [2012]eKLR** the Court of Appeal revisited the proposition in *Anarita's case* and stated as follows:

“However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of

defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

40. The competency threshold does not however constitute an absolute precision in drafting. The rationale is that a party should be aware of the case it is facing and the allegations raised. Thus in the case of **Kevin Turunga Ithagi –v- Hon. Justice Fred Ochieng & Others [2015]eKLR**, this court stated that the principles espoused and championed in **Anarita Karimi Njeru –v- Republic (Supra)** must be applied with adequate caution to ensure deserving parties are not denied justice, or access to justice, without adequate hearing and consideration of their cases on merit.

41. In my view, the threshold of competency is met if a court can painlessly identify from the Petition the Articles allegedly violated and also the alleged manner of violation.

42. I have perused the pleadings herein. It is apparent that the Petitioner is alleging that its right to fair hearing was not observed. The Petitioner has detailed Articles 47 and 50 of the Constitution as the Articles violated. These two Articles guarantee the right to fair administrative action and fair hearing respectively.

43. The Petitioner has also detailed the alleged manner of violation when it complains that the impugned freezing orders were obtained without notification and that the same have been continued without any hearing being accorded to the Petitioner. The Petitioner looped the alleged violations to Article 40 of the Constitution and asserted that the Petitioner’s rights to property had been violated. The Petitioner detailed, in the Petition, its inability to access its bank account where its monies are deposited.

44. I hold the view that the Petition, contrary to the assertions of the Respondents, meets the basic and reasonable minimum requirements of a petition. The provisions of the Constitution allegedly violated were cited with adequate specificity. The manner in which they were allegedly violated was also detailed albeit in a windy manner. The remedies sought for the violation were also clearly articulated. The court understood with little difficulty the Petitioner’s grievances. The Respondents certainly knew or ought to have known and appreciated the claim they were up against.

45. The Respondents have submitted that the Petitioner has failed to prove the allegations of violation of the guaranteed rights and freedoms.

46. There is no doubt that the burden of proof always rests upon the Petitioner who alleges any violation. It is for the Petitioner to present a factual basis as well as the evidence in support to enable the court to make a determination whether there has been a violation. As this court stated in **Githunguri Dairy Farmers Co-operative Society Ltd –v- The Attorney General and 2 Others HCCP No. 257 of 2015 [2016] eKLR**.

“[46] The complainant has to satisfy an evidential burden to show or establish that the specific right existed and that it had been restricted or violated and then the burden fell on the State to prove on a balance of probabilities that such violation or alleged violation was saved by the Constitution: see Catholic Commission for Justice & Peace in Zimbabwe -v- Attorney General [1993]2LRC (Const) 279 at 290 where Gubbay CJ stated as follows:

“I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it...[it] is essentially a matter of fact and some evidence

would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met”

See also Riley -v- Attorney General of Jamaica [1982]3 All E R 469 where the Privy Council clearly stated that it was on the person attacking the death penalty as unconstitutional to prove on a balance of probabilities that it is a cruel, inhuman and degrading punishment.”

47. In a bid to prove on a balance of probabilities that its rights were violated, the Petitioner stated that the Respondents, through the 2nd Respondent obtained a court order without any notification being given to the Petitioner and proceeded to freeze indefinitely the Petitioner’s bank account. This led to a denial of access to its property in the form of money. The Petitioner further states that there was no basis for such action and order being issued or continued.

48. It is not in controversy that the 2nd Respondent obtained an ex-parte order on 6 October 2015 before the Chief Magistrates court to freeze various banks accounts including the Petitioner’s account domiciled in the 3rd Respondent bank. The Respondents’ contention is however that the freezing of the account was through a genuine and valid court order obtained by the 2nd Respondent in the exercise of and execution of a constitutional and statutory mandate. The mandate, the Respondents stated, was that of investigating criminal activities and criminal conduct.

49. At the core of the Petition, it is evident from both the pleadings and submissions , is the manner in which the 2nd Respondent obtained the warrants or orders to freeze the Petitioner’s bank account. The Petitioner contends that the application ought to have been made *inter partes* or the orders subsequently revisited at a hearing *inter partes* to ascertain whether their continued existence was necessary. The orders of 6 October 2015, it is not disputed were obtained *ex parte*.

50. In support of its case the Petitioner referred to both Articles 47 and Article 50(2) of the Constitution. These two Articles respectively deal with the right to fair administrative action and to fair hearing.

Violation of Article 50- fair hearing rights

51. Article 50 (1) of the Constitution guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.

52. Notwithstanding the fact that the Petitioner had free and unlimited access to the court which originated the impugned order, no attempt was made by the Petitioner to contest the ex parte orders before any other court or tribunal except this constitutional court. The regime of Article 50(1) would thus not be applicable as I did not hear the Petitioner to plead or submit that it has been denied the chance to appear before an impartial tribunal or court.

53. I did however understand the Petitioner to complain that the Petitioner was never given a fair trial or hearing under Article 50(2) of the Constitution prior to the orders being issued. Article 50(2) of the Constitution is a directory of some of the rights to fair trial that an accused person is entitled to. In this respect, the Petitioner stated that it was incumbent upon the Respondents to serve the Petitioner with both the application and or the order.

54. There is no doubt that a person accused of any crime and arraigned in court to face criminal charges is entitled to the various fair trial rights including the rights catalogued under Article 50(2) of the Constitution. Arrested persons yet to be charged with specific criminal offences have their rights also indexed under Article 49 of the Constitution.

55. In the case of **Julius Kamau Mbugua-v- Republic Criminal Appeal No. 50 of 2008**, the appellant lodged a petition under the retired Constitution claiming that his right to an expeditious trial had been

infringed. The Court of Appeal held that the right to a trial within a reasonable time guaranteed under Section 77(1) of the retired Constitution (which is akin to Article 50(2) (e) of the Constitution 2010) relates to the whole of the judicial process from the time when one is charged until the time the trial is finalized. The court went on to observe that the protection afforded under Article 50(2) are trial related and do not cover the time preceding the arraignment in court and laying of charges. Simply put, they do not cover suspects but only accused persons.

56. It is clear that fair trial rights ought to accrue when the object of the process is to determine the accused person's innocence or guilt: see **Pauline Adhiambo Raget -v- The Director of Public Prosecutions & 2 Others HCCP No. 446 of 2015 [2016]eKLR**.

57. The Petitioner is not an accused person. No charges have been preferred against the Petitioner. The Petitioner may be treated as a suspect in any conspiracy or criminal court but is yet to have any trial commenced against it or any of its directors. In my view, the rights under Article 50(2) of the Constitution would consequently not apply to the circumstances of this case. There can consequently be no violation of or threatened violation of any of the rights enumerated under Article 50(2) of the Constitution.

Violation of Article 47- Fair administrative action

58. Article 47(1) of the Constitution provides that:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

59. Article 47 effectively constitutionalized the common law principles that form the basis for judicial review. The Article also forms, the basis and foundation of the High Court's powers and jurisdiction under Article 165 (6) of the Constitution. This court has a supervisory jurisdiction over the subordinate courts and over any person or body or authority, exercising a judicial or quasi-judicial function. Such jurisdiction is in addition to any appellate jurisdiction.

60. In these respects, the Petitioner stands in better stead when it contends that its right to a fair hearing was not observed. Fair hearing under Article 47 would entail the right to a prior and adequate notice before any adverse action is taken or decision is made. Besides, there is also the corollary right to be afforded an opportunity to be heard.

61. The Petitioner had the duty and burden to show that it had a right which has apparently been infringed and then the burden moved to the Respondents to show on a balance of probabilities that the violation or alleged violation was justified and reasonable: see **Catholic Commission for Justice & Peace in Zimbabwe –v- Attorney General [1993] 2 LRC (Court) 279** .

62. It was not disputed that the freezing orders were obtained without any notification to the Petitioner. It was further not in dispute that the Petitioner's property in the form of money is currently detained and the Petitioner has no access to the same. On the face of the facts there is evident violation of Articles 47 as well as Article 40 of the Constitution. Both Articles however do not guarantee absolute rights. The rights may be limited and justified, in a reasonably democratic society. The burden is on the Respondent to provide that reasonable justification.

63. The Respondents contended that the order was regularly obtained in the course of the 2nd Respondent exercising its constitutional and statutory mandate. The Respondents further contended that public interest justified the orders and that in the execution of a regular court order, the Respondents nothing could be unconstitutional.

64. The right to obtain court orders in the course of investigations into criminal activity may be said to obtain under a statutory framework. The relevant statutory provisions are Sections 118 and 121 of the Criminal Procedure Code (Cap 75) as well as Section 180 of the Evidence Act (Cap 80) Laws of Kenya.

65. The sections, in so far as they are relevant read as follows:

Section 118 of the Criminal Procedure Code

“118. 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.” (emphasis)

Section 121 of the Criminal Procedure Code

121(1). 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.
(emphasis)

Section 180 of the Evidence Act

180(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. (emphasis)

66. Section 24 (e) and 51(j) of the National Police Service Act (Cap 84) Laws of Kenya as well as Article 245(4) of the Constitution grant the 2nd Respondent as constituted under the Kenya Police Service, the powers to investigate crime. There is a constitutional and statutory compulsion to investigate crime.

67. The 2nd Respondent has deponed through the Replying Affidavit of Corporal Santet Jeremiah Matipei that following a report of theft from the National Youth Service (N.Y.S) of a colossal sum aggregating over kshs. 800,000,000, the 2nd Respondent commenced its investigations and soon discovered that the amount of kshs. 791,385,000/= had indeed been fraudulently obtained from the National Youth Service (N.Y.S) and sent to various bank accounts. On the basis of such findings the 2nd Respondent moved the court and obtained orders to investigate various accounts and freeze or preserve such funds as would be in the specified bank accounts until completion of the investigations.

68. My understanding and finding is that the 2nd Respondent was under a constitutional obligation to investigate the alleged criminal activities and conduct on the part of the Interested Party.

69. It ought to be acknowledged that investigation into criminal activities have no detailed limitations or boundaries. It may take the investigator to possible accomplices. It may also take the investigator to prospective witnesses. The depth of the investigation cannot be dictated or even predicted by the investigator let alone the court. Indeed, the Constitution at Article 245 (4) outlaws any purported directions to the police service as far as investigations into any crime is concerned.

70. However, in the course of such investigations the individual rights and freedoms of the persons in whose path the investigations cross must be protected and observed as dictated by Article 244 of the Constitution. Fidelity to both the law and the Constitution is basically mandatory.

71. The Respondents insist that they have observed the law.

72. I do not doubt them.

73. The 2nd Respondent moved the court. Statute law under Section 118 of the Criminal Procedure Code and Section 180 of the Evidence Act allowed them to do so. The application could be made ex parte for very obvious reasons. To hold otherwise would not be in the public interest. It would indeed destroy the very fabric of forensic investigations. No suspect or offender, knowing that there existed evidence which if not destroyed or vanquished would lead to his guilt or liability, can be expected to sit back once notified of possible investigations. The suspect would rid the evidence out of sight and reach. Consequently, the investigator must where there is a foundational basis be allowed and be in a position to seize and secure the evidence.

74. To avoid arbitrary infringement of a citizen's privacy or property through entries or searches or services, the Criminal Procedure Code provides a simple yet effective mode of obtaining authority through the court. The court has to be satisfied through an affidavit on oath that the warrant or order is necessary for the conduct of the investigations. The order or warrant is never to be granted as a matter of course.

75. It can thus be clearly understood why warrants or seizure orders are obtained ex parte when any matter is still at the investigation stage. The justification seems to fall within the provisions of Article 24 (1) of the Constitution.

76. In the circumstances of this case, the warrants and freezing orders were evidently necessary for the purposes of the investigation. Money moves. It moves fast. With the advent of e-banking, the movement is even faster. For the efficacy of the warrants and the investigations the 2nd Respondent was, in my view, justified in making the application for both the warrants and freezing order ex parte.

77. The Petitioner also laid challenge to the fact that the freezing order appears indefinite. My view is that Section 121(1) of the Criminal Procedure Code is relatively clear. The section provides for the item seized to be so seized and detained for as long the investigations or prosecution is still on-going. The Respondents have explained the rather complex nature of the investigations. The investigations, at the time of the hearing of this Petition were still on-going. They involved inquiries into allegations of money laundering. I am also satisfied that the seizure and freezing actions will not lead to any waste of the money in the bank accounts now frozen.

78. I find no basis to hold that there has been a violation of the Petitioner's rights. I find too that the allegedly infringed rights, as to fair administrative action as well as the right to property are not non-derogable rights and that the Respondents have adequately explained the reasonable justifications pursuant to Article 24 of the Constitution. The continued existence of the freezing order is also necessary for an effective investigation or prosecution to be undertaken.

79. As I conclude, it would be important to point out that where investigations and prosecutions of suspected criminals are involved, the wider public interest that criminals are brought to book through a fair process that does not bring the criminal justice process into disrepute must always be weighed against any individual's interest and right. Where violation of the latter is proved then the balance may actually tilt in favour of the individual. In the instant case the public interest weighs heavily against the private rights, especially to property.

Conclusion

80. In conclusion and final disposal, I answer the reserved issues as follows:

- a. Whether the Petition meets the competency threshold?

Yes.

b. Whether the fact of freezing the Petitioner's bank account amounts to a violation of Petitioners rights and freedom under the Constitution?

No.

c. Whether the Petitioner is entitled to any relief?

No.

Costs

81. The costs ordinarily follow the event. I have the discretion on the issue of costs. There is no disentitling factor, however, and I see no reason why the successful Respondents should not have costs.

82. In the circumstances, the Petition is dismissed with costs.

Dated, signed and delivered at Nairobi this 8th day February, 2016

J.L.ONGUTO

JUDGE