



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE , KIAGE & GATEMBU JJ.A

CIVIL APPEAL NO. 284 OF 2009

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION.....APPELLANT

AND

REPUBLIC1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT KIBERA.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

ABC METALLURGIACS LTD.....4TH RESPONDENT

GIRO COMMERCIAL BANK OF KENYA LTD.....5TH RESPONDENT

(Appeal against the Ruling and the Order respectively delivered 16th October, 2009 and issued on 30th November, 2009 (Onyancha J)

in

JR. Application No.469 of 2009 (Nairobi)

JUDGMENT OF THE COURT

The brief background to this appeal is that the appellant, the Kenya **Anti-Corruption Commission** moved to the Kibera Chief Magistrates Court and presented an exparte Notice of Motion in Misc. Criminal Application No. 217 of 2009, under section 180 of the evidence Act cap 80 Laws of Kenya, section 23 of the Anti-corruption and Economic Crimes Act, No.3 of 2003, and all other enabling provisions of the law. It sought, inter alia, a warrant to be issued to **Mrs.Umazi Rinya**, a forensic investigator, or any other investigator duly appointed by the appellant to investigate, inspect and lift copies of statements, bankers books and an original cheque in respect of account number 3006082 CD/1 Giro Bank Limited Kimathi Street Branch, Nairobi, and 0102472004 Commercial Bank of Africa Limited, Upper Hill Branch, Nairobi held in the names of **ABC Metallurgiacs Limited and Kenya**

Pipeline Company Limited, respectively.

The application was grounded on the affidavit of **Mrs. Umazi Rinya**, and the grounds in the body of the application whose central theme was that the investigations were inquiring into allegations that the **Kenya Pipeline Company Limited** paid a sum of Kshs.45 million to **ABC Metallurgiacs Limited** for services not rendered. The learned Chief Magistrate upon perusing the papers presented found cause shown and issued exparte orders as prayed on the 19th day of June, 2009.

The 4th respondent herein **ABC Metallurgiacs Limited** became aggrieved by the said exparte orders and in a letter dated 7th day of July, 2009 set in motion Criminal Revision Proceedings Number 29 of 2009, seeking to reverse the exparte orders on the grounds that the warrants had been erroneously issued, on the basis of false information. The Appellant opposed the application for revision arguing first, that it was entitled to conduct investigations into allegations of corruption, and second that the warrants issued to them on the 19th June, 2009 had been obtained legally, lawfully, regularly and within the law.

During the pendency of the ruling on revision, the Appellant presented another exparte application No.251 of 2009 in the same Chief Magistrate's Court at Kibera. It was dated 29th day of July, 2009 and filed on 30th July, 2009 under the same provisions of law as the previous application, seeking issuance of a warrant to a **Mr. Wasike Soita**, a forensic investigator or any other investigator to investigate the same bank account and in particular take-

“ All cash deposits and withdrawal slips and original cheques, whether personal or bankers, Records and particulars of all funds transfers and the recipients thereof as well as instructions for payments and any other relevant bank documents relating to the afore said account, from 1st August 2009 to date.”

The main ground advanced in support of the application for the second warrant was that the appellant needed to establish the movement and transfer of funds from the 4th respondent's account to various other accounts by electronic funds transfer, bankers cheques as well as cash withdrawals, suspected to have been paid out in furtherance of corruption and/or corrupt activities. It was thus necessary firstly to verify the veracity of the allegations; second to identify the identities of the recipients; third to establish in what respect the recipients received those funds. The Chief Magistrate's Court on being satisfied that sufficient cause had been shown issued the second warrant on 30th day of July, 2009.

The 4th respondent was aggrieved by the orders of 30th July, 2009 granting the appellant the second warrant. It filed Judicial Review application No.469 of 2009 on the 10th August, 2009 pursuant to leave, seeking first an order of certiorari to remove into the Honourable Court for the purpose of being quashed and quash the order and warrant given on 30th July, 2009 in Misc. Application Number 251 of 2009 in the Chief Magistrate's Court at Kibera Nairobi to investigate account number 3006082 CD/1 Giro Commercial Bank, Kimathi Street Branch Nairobi held in the name of **ABC Metallurgiacs Limited**; and second an order of prohibition directed at the Appellant prohibiting it from further investigating the said account; and that costs of the application be provided for.

The grounds in support of the application were that the issuance of the second set of warrants was unreasonable, of no basis and an abuse of the process of the court considering that documents sought to be supplied through the second warrant had in fact been supplied pursuant to a similar warrant issued in Misc. Criminal Application number 217 of 2009; that the proceedings in Misc. application number 251 of 2009 were intended to and or were likely to circumvent and abuse a ruling pending for 1st October, 2009 in High Court Criminal Revision Number 29 of 2009 wherein the 4th respondent had challenged the earlier proceedings and warrant issued in Misc. application No.217 of 2009 over the

same subject matter; that the appellant had opposed the application for revision and in fact participated in the said proceedings; and also that the appellant had breached an oral undertaking made in Misc. Criminal Application No. 29 of 2009 to maintain the status quo; that is not to investigate the 4th respondents account.

The 4th respondent argued further that the predominant purpose for obtaining two warrants to investigate the same account was outside the criminal process as the grounds upon which, and the manner the warrants were applied for disclosed ulterior motives; that there was no material on the basis of which the 4th respondent's Fundamental Right of protection against arbitrary search or entry could be infringed upon for reasons other than the public good; that there was breach of the principle of proportionality as the appellant failed to balance the adverse effects their decision and action would have against the rights, liberty or interest of the 4th respondent and the purpose the Appellant was seeking to pursue; that there was an element of bad faith as no basis was shown to sustain the application for the second warrant.

The Appellant opposed the application for Judicial Review on the basis of replying affidavits filed by **Mr. Victor Mule** on behalf of the Attorney General and by **Mr. Francis Gichure Kariuki and Wasike Soita** both on behalf of the Appellant. In totality, they argued that the relief of prohibition was not available to the 4th respondent in the circumstances displayed therein; that the warrant issued in Misc. Criminal application No. 217 of 2009 had already been executed and as such it could not form a basis for giving an oral undertaking on status quo; that the second warrant had been validly applied for and issued as the moneys allegedly received by the 4th respondent had in fact been paid out to several payees in furtherance of the alleged corrupt activities and there was need to investigate both the identities of the beneficiaries of these payments as well as reasons for those payouts.

Parties were heard on the merits of the Judicial Review Application. Apparently, the matter was adjourned to 3rd September, 2009, for further hearing. It was however not listed in the cause list. Entries of the proceedings of 3rd September, 2009 indicated that the Appellant's learned Counsel had attended Court but apparently left when he noticed that the matter had not been on the cause list. The file was however traced and taken before the learned Judge. When it was called out, it is on the record that **Mr. Obiri** informed the Court that learned counsel for the Appellant had been present in Court earlier on but left when he realized that the matter had not been listed and the file was not apparently in Court.

It is not clear from the record as to the exact time when the file was traced and placed before the learned trial Judge. Without making a note on the record on the absence of the appellant's counsel, the learned Judge allowed **Mr. Obiri** for the 2nd and 3rd respondents and **Mr. Nyandieka**, who was for the 4th respondent, to make their final remarks and thereafter reserved the ruling for 7th October, 2009 with a rider that status quo was to be maintained whereby no warrant was to be executed pending the ruling.

Before the ruling in the Judicial Review application was delivered, **Warsame J** (as he then was) delivered a ruling in Misc. Criminal Revision application number 29 of 2009 declining to revise and set aside the orders of 19th June, 2009 in Misc. Criminal Application No.217 of 2009 granting the Appellant the first warrant. The learned Judge found that the Chief Magistrate's Court had jurisdiction to issue the orders sought by the Appellant **Kenya Anti-corruption Commission** in terms of the provisions of Section 180 of the Evidence Act, Cap 80 Laws of Kenya, and Section 118 of the Criminal Procedure Code; that it was in the interest of justice that such orders be issued to enable the Commission to perform its functions properly; that such an action was also in the interest of the public good; that the rights of an individual could not supercede the public good; that there had been no demonstration that the learned magistrate who issued the orders of 19th June, 2009 exercised his/her discretion improperly or un judiciously and lastly that the orders sought to be revised had in fact been executed fully.

Eight days later, on the 16th October, 2009 **D.A. Onyancha J** delivered the ruling in the Judicial Review Application and granted the 4th respondent the orders of prohibition and certiorari as had been prayed for. The appellant was aggrieved by the said orders and preferred the appeal subject of this Judgment. A total of 14 grounds of Appeal have been put forward for our interrogation and determination.

At the hearing of the appeal, learned counsel for the appellant **Mr. David K. Ruto** urged us to allow the appeal on the grounds that the learned Judge exceeded his mandate in JR 469/2009 by making orders affecting the orders made on 19th day of June, 2009 in Misc. application No.217 of 2009 in the absence of an invitation to the learned Judge to do so in the Judicial Review Application; by purporting to impugn orders made in Misc. Application No.217 of 2009 which had been declared legal, proper and lawful by **Warsame J** (as he then was) on 8th October, 2009 in Misc. Criminal Revision No.29 of 2009; and by barring the Appellant from using orders issued to it and fully executed in Misc. Application No.217 of 2009.

Further argument was that the Judicial Review application was erroneously heard ex parte in the absence of the Appellant on a date when the cause had not been listed in the cause list for hearing; that the trial Judge wrongly declined to hear the appellant on the 4th September, 2009 when it sought leave to be heard and lastly that the law permitted the appellant to seek a second warrant considering that the intention and documents sought in the second warrant of 30th July, 2009 were distinct from what had been sought in the earlier warrant of 19th June, 2009.

Mr. Kioko Kamula for the 1st respondent who adopted and associated himself fully with the entire submissions of the appellant urged us to allow the appellant's appeal.

Mr. Nyandieka for the 4th respondent urged us to dismiss the appellant's appeal on the grounds that no valid reasons were given by the appellant for seeking the first warrants; that the 4th respondent was entitled to challenge the legality and propriety of the first warrant; that the 4th respondent raised valid complaints in the Judicial Review proceedings regarding the conduct of the appellant in applying for the second warrant considering that the appellant had relied on the same grounds and reasons as had been advanced for the first warrant and this was therefore an abuse of the due process of the Court; that all the grounds relied upon by the 4th respondent in their application for Judicial Review were demonstrated to exist; that the learned Judge was justified in concluding the hearing of the application for judicial review on 3rd September, 2009 in the absence of the appellant as the appellant was not serious in the pursuit of its right to be heard.

Mr. Kangethe, for the 5th respondent, left the matter to Court.

This being a first appeal, our mandate is clearly set out in rule 29(1) (a) of the Court of Appeal Rules;

"In any appeal from a decision of a Superior Court acting in the exercise of its original jurisdiction, the Court shall have power-

a. To re-appraise the evidence and to draw inferences of fact.

Being so guided, we have re-evaluated, reassessed and re-analyzed the facts on the record and considered them in the light of the content of the grounds of appeal and the rival arguments fronted by either side. In our opinion, five issues have arisen for our determination namely, whether the relief of Prohibition should have been granted to the 4th respondent in the circumstances disclosed herein; whether the learned trial Judge was justified in making a pronouncement on the first warrant issued in Misc. application number 217 of 2009 in the absence of an invitation to do so by the 4th respondent in the

Judicial Review application; whether an oral undertaking had been made by the appellant in Criminal Revision No. 29 of 2009; whether the Appellant was denied an opportunity to be heard on its response to the Judicial Review Application; Whether the second warrant obtained by the Appellants on 30th July, 2009 had been obtained in contempt of the ruling pending delivery in Misc. Criminal Revision No. 29 of 2009; and lastly whether there was justification for the learned Judge to grant an order of certiorari to the 4th respondent.

In *Halisburys* laws of England, Fourth Edition, Reissue volume 1(1) page 202 Para.109, there is observation that:

“The order of Prohibition is an order issuing out of the High Court and directed to an inferior Court or Tribunal or Public Authority, which forbids that Court or Tribunal, or Authority to act in excess of its jurisdiction or contrary to law. Prohibition is employed for the control of inferior Courts, tribunals and Public Authorities. Prohibition is concerned with decisions of the future. Prohibition will issue to prohibit a determination in excess of jurisdiction, error of law on the face of the record or breach of the rules of natural justice”

This Court in the case of *Kenya National Examination Council versus Republic ex parte Geoffrey Gathenji Njoroge and 9 Others Nairobi CA No.266 of 1996 (1997) eKLR* also had an occasion to interrogate the applicability of the relief of prohibition. The following observations were made:-

“What does an order of prohibition do and when will it issue” It is an order from the High Court directed to an inferior Tribunal or body which forbids that Tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the law of the land. It lies not only for excess of jurisdiction or absence of it, but also for a departure from the rules of natural justice. It does not however, lie to correct the course, practice or procedure of an inferior Tribunal, or a wrong decision on the merits of the proceedings...”

Prayer 2, in the substantive notice of motion for Judicial Review was framed in general terms. It read:-

“That an order of Prohibition directed at the first respondent prohibiting it from further investigating account number 3006082 CD/1 Giro Commercial Bank, Kimathi Street Branch Nairobi held in the name of ABC Metallurgiacs Limited.”

The learned trial Judge made the following observation on the relief sought of Prohibition:-

“In this case, the commission had such access, through the first warrant. It will alone be to blame if it did not properly use the access under the first warrant to obtain all the information it originally set out to obtain. In the circumstances, it would be an abuse of process to grant another warrant. Prohibition sought will accordingly be granted to the ex parte applicant”

On the basis of the above reasoning, the learned Judge made the following order:-

“2. An order of prohibition directed at the Kenya Anti- Corruption Commission prohibiting it from further investigating the said bank account for the purpose and intention indicated in the first warrant dated 19th June, 2009 or any other related and or connected purposes hereby issues”

Our findings with regard to the appellant’s complaint on the issuance of the relief of Prohibition to the 4th respondent are first, that the relief of Prohibition framed in general terms in the application for Judicial

Review made no specific invitation to the learned trial Judge to make specific orders regarding the orders issued on 19th day of June, 2009. Second, the warrant issued pursuant to the orders of 19th June, 2009 had already been executed as at the time the prohibition order was issued. Third, **Warsame J**, (as he then was), had on the 8th day of October, 2009 ruled that the process employed by the appellant to apply for the first warrant were legal, proper and within the law. Fourth the learned trial Judge fell into an error when he acted suo moto in trying to curtail the warrant issued to the Appellant on 19th June, 2009 in the absence of a specific invitation to do so. Fifth there was no finding by the learned Judge that the warrant of 19th June, 2009 was issued in excess of the mandate of the Chief Magistrates Court or that it was devoid of such mandate. Sixth there was no proven breach of the rules of Natural Justice on both occasions when the first and second warrants were issued as the provisions of law under which the appellant applied for both the first and the second warrant made no provision for the affected party, in this case the 4th respondent, to be heard before a decision could be made by the Chief Magistrate as to whether to grant or withhold issuance of the warrants whenever applied for. Seventh, as demonstrated by the principles of law set out above, Prohibition looks to the future and not to the past. It could therefore not be employed by the 4th respondent to prevent the issuance and use of a warrant which had already been issued and fully executed.

In the result, we are satisfied that the appellant has a genuine complaint that the relief of Prohibition should not have been issued to the 4th respondent on the 16th day of October, 2009.

With regard to the Appellant's complaints of denial of a hearing on 3rd September, 2009, a perusal of the entries of the proceedings made on 3rd and 4th September, 2009 reveals first that the matter had not been listed in the cause list on 3rd September, 2009, second that counsel for the appellant was reported to have been around but left upon realizing that the matter had not been listed. Third that it was not clear as to whether the matter was for hearing or mention on that day. Fourth that the learned trial Judge did not make an order and give reasons as to why he decided to proceed and finalize the matter in the absence of the appellant.

In the premises it is our finding is that the appellant's right to be heard in its response to the Judicial Review application was unjustly withheld.

With regard to the appellant's breach of an alleged oral undertaking given by the appellant's counsel in Misc. Criminal Revision No.29 of 2009, all that the learned trial Judge had before him was an assertion by the 4th respondent that an oral undertaking had been made by the Appellant in the said proceedings not to make a move before the delivery of the ruling in the Criminal Revision proceeding. On the other hand, there was a denial by the Appellant that it had made such an undertaking. In the absence of an admission by the appellant that in fact an oral undertaking had been given, we find that there was no basis upon which the learned trial Judge could make a finding that such an oral undertaking had in fact been given.

We also find nothing contemptuous of the ruling then pending delivery by **Warsame J** (as he then was) in No. 29 of 2009, by the appellant's move to obtain a second warrant, as there were no orders then in place prohibiting such application.

Turning to the relief of certiorari, it was set out in prayer 1 of the substantive Notice of Motion for Judicial Review. It read:-

“That an order of certiorari to remove into this Honourable Court for the purpose of being quashed and quash the order and warrant to investigate account given on 30th July, 2009 in Misc Application number 251 of 2009 in Chief magistrates court at Kibera Nairobi in respect of account

number 300608/CD/1 Giro Commercial Bank, Kimathi Street Branch Nairobi held in the name of ABC Metallurgiacs Limited”

The learned Judge faulted the appellant’s application for a second warrant to investigate the 4th respondent’s bank account because according to him, the issue was not whether or not the Commission had the power to apply, obtain and use such a warrant, to obtain the information it required, within its mandate, but how such power and discretion had been exercised by the Appellant in the circumstances of this case.

To the learned Judge, that mandate had not been properly exercised by the appellant, first because the Appellant had failed to await the delivery of the ruling in the Criminal Revision proceedings. Second, the appellant failed to honour its oral undertaking on the status quo pending the delivery of the ruling in the Criminal Revision proceedings. Third, it undermined the dignity of the Court before which the ruling for revision was pending. Fourth, the appellant’s conduct amounted to the appellant stealing a match over the 4th respondent. Fifth, the appellant failed to disclose that the first warrant had been challenged in Criminal Revision Application No.29 of the 2009 whose ruling was awaited then. Sixth, that the conduct displayed by the appellant lacked integrity, honesty, candour, if not contemptuous and malafides.

On the basis of those faults, the learned Judge granted the relief of certiorari to the 4th respondent in these terms;

“the order of certiorari removing the order and warrant issued by the Kibera chief magistrate’s court in Kibera Chief Magistrate’s court, in Miscellaneous application number 251 of 2009 dated 30th July, 2009 into this Court for the purpose of being quashed and quashing the said order and warrant to investigate bank account number 3006082/CD/1, Giro Commercial Bank Kimathi street in the name of ABC Metallurgiacs Limited Hereby issues”

The question we have to ask ourselves is whether the learned Judge’s observations and findings reflected above are within the parameters set by applicable principles of law for the issuance of the relief of “**certiorari**”. As observed above, from the content of extracts of Hallisburrys Laws of England (Supra) “**certiorari lies to bring a decision of an inferior Court, Public Tribunal, Public Authority or any other body of persons before the High Court for review, so that the Court may determine whether they should be quashed or to quash such a decision.... Certiorari is concerned with decisions in the past....Certiorari will issue to quash a determination for excess or lack of Jurisdiction, error of law on the face of the record, breach of the rules of Natural Justice or where the determination was procured by fraud, collusion or perjury.** See also the cited authority of Kenya National Examination Council versus Exparte Republic exparte Geoffrey Gathanji Njoroge & 9 others (Supra), where it was held, inter alia, that:-

“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reason”

The appellant had in the first application sought, and was granted and executed a warrant to obtain documents namely, **Account opening documents, Bank statements and Original cheque number 258419**. In the second application, the appellant was granted a second warrant on 30th day of July, 2009, to enable it to access **Copies of statements, bankers books, Original cheques, bankers cheques in respect of account number 3006082/CD/1 Giro Bank Limited, Kimathi Street Branch Nairobi in the name of ABC Metallurgiacs Limited, all cash deposits and withdrawal slips and original cheques (whether personal or bankers) paid into, or from the said account, records and particulars of all**

fund transfers and the recipients thereof as well as instructions for payments from the said account and any other relevant bank documents relating to the afore said account from 1st August,2008 to date.

Section 180 of the Evidence Act Cap 80 laws of Kenya and section 23 of the Anti-corruption and Economic Crimes Act, 2003 which are the enabling provisions under which both the first and second warrant were applied for provide:-

“Section 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 bankers books is necessary or desirable for the purpose of an investigation into the commission of an offence, the Judge or magistrate may by warrant authorise a police officer or other person named therein to investigate the account of any specified person in any bankers books, and such warrant shall be sufficient authority for the production of any such bankers book as may be required for scrutiny by the officer or person named in the warrant, and such officer or persons may take copies of any relevant entry or matter in such bankers books”

The Anti-corruption and Economic Criminal Act Provides:-

Section 23(1) The Director or a person authorized by the Director may conduct an investigation on behalf of the commission.

(2) Except as otherwise provided by this part, the powers conferred on the commission by this part may be exercised for the purpose of an investigation by the Director or any investigator.

(3) For the purposes of an investigation, the Director and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Director or investigator has under this part.

We find nothing in these two sections which could have barred the Appellant from seeking a second warrant, considering that, the first warrant simply sought access and lifting of copies of account opening documents, bank statements and the original copy of a cheque alleged to have been representing payment to the 4th respondent for goods and or services allegedly not delivered. While in the second warrant, the appellant sought access to documents relating to transactions arising from entries in the bank account statements that they had accessed using the first warrant, which entries had demonstrated that there were other beneficiaries of that account other than the 4th respondent whom the appellant wanted to investigate to find out how these other persons had become beneficiary of funds allegedly corruptly obtained.

In the absence of a legal requirement in the cited enabling provisions of law that required the appellant to seek all the documents that they wanted from the 4th respondent in one warrant only, we find no justification in the learned trial Judge's move to fault the appellant's application for the second warrant in the manner done.

In the premises we find the appellant acted within the law and on sound basis supported by sufficient facts when they applied for the second warrant. Issues of duplicity of warrants and their purpose have not been demonstrated to exist. Since the appellant had sought to seek to establish the authenticity of the original payments to the 4th respondent, there was nothing wrong in the appellant seeking to establish the authenticity of payments made out of the said bank account to other beneficiaries.

We therefore find nothing on the record which can qualify to be termed an act either in excess of, or devoid of jurisdiction, or amounting to error of law on the face of the record. Breach of the principles of Natural Justice did not arise considering that the enabling provisions of law through which the Appellant accessed the relief permitted such orders to be obtained *ex parte*, thus leaving no room for the respondent to be heard before the warrants applied for were issued. There were also no allegations of the second warrant having been obtained on the basis of fraud, collusion or perjury. On this account, we find that there was no basis for the learned trial Judge to grant the relief of certiorari to the 4th respondent.

The upshot of the above analysis is that we find the appellant's appeal meritorious. We allow it in its entirety, set aside the orders made by the High Court on 16th day of October, 2009 and substitute with an order dismissing the application for Judicial Review number 469 of 2009. The Appellant shall have the costs both on appeal and at the High Court.

Dated and Delivered at Nairobi this 18th day of October, 2013.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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