



**Cheng v Director of Public Prosecutions & another (Miscellaneous Criminal Application E439 of 2023) [2024] KEHC 9884 (KLR) (Crim) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9884 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E439 OF 2023**

**K KIMONDO, J**

**JULY 30, 2024**

**BETWEEN**

**TANG JIANG CHENG ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**DU CHANG JIANG ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant prays for stay of further proceedings in Makadara Chief Magistrates Criminal Case Number E4118 of 2023 *Republic v Tang Jiang Cheng* (hereafter the criminal case) in which he is charged with fourteen counts of, among other charges, stealing by directors of a company contrary to section 282 of the [Penal Code](#).
2. The main particulars are that on diverse dates between 8<sup>th</sup> December 2014 and 29<sup>th</sup> July 2021 in Nairobi, he stole Kshs 100,000,000 from Eabest Limited (hereafter the company) which came into his possession by virtue of being a director of the company.
3. The Notice of Motion seeking the conservatory orders is dated 18<sup>th</sup> November 2023. It is predicated upon two depositions sworn on even date and further affidavit sworn on 31<sup>st</sup> May 2024 in reply to the 2<sup>nd</sup> respondent's deposition filed on 23<sup>rd</sup> May 2024. The motion is further brought pursuant to the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#).
4. In a synopsis, the applicant avers that he is a victim of a fraudulent criminal trial meant to extort from him Kshs 45,000,000 or such other sums. He avers that there exists a decree in civil proceedings being *Du Chang Chieng v Tang Jiang Chieng & another*, High Court Commercial & Admiralty



- Division Civil Suit 164 of 2018 (hereafter the commercial or civil case). He contends that the criminal proceedings are meant to achieve a collateral purpose by the 2<sup>nd</sup> respondent to enforce the decree.
5. To buttress the argument, he states that instead of enforcing the decree in the normal manner, the 2<sup>nd</sup> respondent made a false complaint at Kasarani Police Station alleging that the applicant stole Kshs 100,000,000 from the company which led to the impugned criminal case. In particular, and after his arrest on 16<sup>th</sup> June 2023, the police demanded that he pays the above sum or a sum of Kshs 45,000,000 to regain his freedom.
  6. He was only released on 18<sup>th</sup> June 2023 on a police bond of Kshs 500,000. One of the matters raised is that his constitutional rights were violated by being held beyond 24 hours by the police. The 2<sup>nd</sup> respondent disputes that version. It is a matter however best reserved for the hearing of the main Originating Notice of Motion.
  7. Learned counsel for the applicant, Mr. Kamau Kuria, SC, relied on submissions dated 31<sup>st</sup> May 2024, a bundle of authorities and a digest of cases all filed on 3<sup>rd</sup> June 2024.
  8. The notice of motion is strenuously opposed by the Director of Public Prosecutions (hereafter the DPP) by submissions dated 8<sup>th</sup> February 2024 and by the 2<sup>nd</sup> respondent through his replying affidavit aforementioned as well as a set of written submissions.
  9. The applicant contends that the affidavit by the 2<sup>nd</sup> respondent was served out of time and should be struck out. He also argued that since the DPP never filed a replying affidavit, the averments of facts by the applicant are conceded. I will deal with those matters later.
  10. On 14<sup>th</sup> June 2024, I heard further arguments from all the learned counsel for the three disputants.
  11. I should point out at the earliest that the written submissions by the 2<sup>nd</sup> respondent largely deal with the merits of Originating Notice of Motion which remains unheard. At this juncture, the court is dealing with the prayer for a conservatory order contained in the separate notice of motion pending the hearing of the main originating notice of motion.
  12. I will turn now to the late filing of the replying affidavit by the 2<sup>nd</sup> respondent. On 9<sup>th</sup> May 2024, I granted leave to the respondents to lodge replying affidavits within 7 days. The DPP did not do so. I should however add that the DPP lodged submissions earlier dated 8<sup>th</sup> February 2024 well before the directions on filing of such submissions were granted. The 2<sup>nd</sup> respondent swore his affidavit on 22<sup>nd</sup> May 2024. It was thus filed and served out of time.
  13. The applicant prayed that the replying affidavit be struck out. I decline to do so for two main reasons: These proceedings are questioning the institution or propriety of the criminal case; and, secondly, Article 259 (2) (d) decrees that justice shall be administered without undue regard to procedural technicalities. I am also well guided on that matter by the overriding objective of the court enunciated in *Harit Sheth v Shamas Charania*, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.
  14. Regarding the issue of the DPP filing or serving his submissions before the directions were issued by the court on 9<sup>th</sup> May 2024, I find that no prejudice was occasioned to the applicant. But by failing to file a formal replying affidavit, he lost a good opportunity to contest some facts put forward by the applicant. Nevertheless, I have found that the affidavit by the 2<sup>nd</sup> respondent is properly on record and has replied to a number of the applicant's claims.
  15. I will now return to the merits of the matter. I have two important caveats. Firstly, the main Originating Notice of Motion is pending for hearing. The instant notice of motion only seeks conservatory orders.



It would thus be improper to make conclusive findings on disputed facts. Secondly, in view of the nature of orders that I propose to make, it would also be prejudicial to delve into the merits of the criminal charges now facing the applicant.

16. The gist of the Originating Notice of Motion as well as the instant Notice of Motion is that the proceedings in the criminal case are an abuse of power or brought in bad faith to achieve a collateral purpose. Paraphrased, it is a scheme to enforce a civil decree or debt. More importantly, the applicant contends that the proceedings violate the Constitution; are arbitrary; offensive to public policy or contravene his rights under Article 27 on equal treatment.
17. Reliance was placed on, among other decisions, Githunguri v Republic [1985] KLR 1, Jared Benson Kangwana v AG, High Court Misc. Civil. Application No. 446 of 1985, John Mwenda Guantai v The Chief Magistrate, Court of Appeal, Nairobi, Civil Appeal No. 228 of 2003 [2007] eKLR; and, Standard Resource Limited v AG & 2 others, High Court Nairobi, Pet. 342 of 2016 [2016] eKLR.
18. The general proposition in the line of those cases is that the High Court has an inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court if the proceedings are oppressive or amount to an abuse of power or the process of court. The right to an order of prohibition was perhaps best illustrated in the Githunguri Case [supra] where the following rhetorical question was posed at page 18-

What kind of a mad man who had an opportunity to apply for prohibition would opt for a trial, the risk for conviction and imprisonment? Review would not be available for him.....
19. It is not contested that there is a commercial or civil case that I mentioned earlier. In the case, the 2<sup>nd</sup> respondent pleaded that the applicant had fraudulently altered the records of the company to remove him as director; and, that he had misappropriated assets of the company. The 2<sup>nd</sup> respondent thus sought, amongst other orders, that the register be rectified.
20. On 22<sup>nd</sup> June 2022 the High Court (M. Odero J) ordered that the register of the company be rectified and that accounts be taken. The decree was as follows-
  - a. The name of Hou Yan be deleted, removed and /or cancelled therefrom as a director and holder of 400 shares or any shares whatsoever in the company.
  - b. That the register does reflect the correct shareholding/directorship structure as-

Du Chang Juang - 400 shares  
Tang Jing Cheng - 400 shares  
Tang Panlin - 200 shares
  - c. That the 4<sup>th</sup> respondent/3<sup>rd</sup> defendant be and is hereby ordered to furnish the applicant with complete business transactions and all financial and bank statement of accounts from the year 2014 to date and the same to be subsequently analyzed and reconciled as the 4<sup>th</sup> respondent's accountant appointed by the parties upon the court's directions on terms of reference and reporting timeframe as the court might deemed fit.
  - d. Costs to the applicant.
21. The gist of the applicant's case is that the 2<sup>nd</sup> respondent should execute that decree instead of preferring the criminal charge as a pretext to enforce payment. From the materials before me at this stage, I cannot say for certain that the charges for theft of Kshs 100,000,000 from the company were meant to enforce



- the above order. But I say that very carefully and without making a final finding. Like I stated, that will be the true province of the judge hearing the main Originating Notice of Motion.
22. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the charges in the lower court of theft or fraud are known in law. The 2<sup>nd</sup> respondent in particular denied that the complaint to the police was made in bad faith or that Kasarani Police Station was used to exert pressure on the applicant to pay the alleged sums. In particular, the 2<sup>nd</sup> respondent submitted that he merely lodged the complaint of theft but the decision to charge was made by the DPP. Again, those are matters of evidence best left to the main Originating Notice of Motion.
23. The misuse of criminal prosecution for ulterior purposes was well explained in *Meme v Republic*, [2004] 1 KLR 637 at 678 where it was stated-
- An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.
24. When I unpack the prayers in the Notice of Motion, they are imploring the court to undertake a merit review of the evidence at this early stage; or, to find that there is no foundation for the criminal charges; or, that the prosecution is meant to achieve a collateral purpose. I am ill-placed to do so based on the materials before the court now. It may well turn out to be clearer at the time of hearing the main Originating Notice of Motion.
25. The point to be made however is that the applicant has not at this stage presented solid evidence to show the prosecutorial power is being abused by the DPP to achieve the collateral purpose or that the lower court will not accord him a fair trial. On the face of it, the offences the applicant is charged with are based on the provisions of the *Penal Code*. I state that very carefully in view of the pending matter.
26. So much so that many of the matters now raised by the applicant may well form powerful defences if the trial finally takes off. Again, I say that very carefully because of the pending Originating Notice of Motion. But I am well guided on that point by the Supreme Court in *Praxidis Namoni Saisi and others v DPP & others*, Petition 39 & 40 of 2019 [2023] KESC 6 (KLR) (Civ).
27. I also remain alive that interlocutory stay of criminal proceedings should only be granted sparingly and in the clearest of cases. I am again well guided by the Supreme Court in *Joseph Lendrix Waswa v Republic*, Supreme Court Petition No. 23 of 2019 [2020] eKLR.
28. An important matter to note is that prior to taking the plea, the applicant lodged a preliminary objection to the charges in the lower court on a number of grounds. One objection was that the offences were alleged to have been committed against the company yet the complainant was the 2<sup>nd</sup> respondent here. The objection was dismissed in a considered ruling dated 10<sup>th</sup> November 2023.
29. The present Miscellaneous Criminal Application by way of Originating Notice of Motion is neither a revision nor an interlocutory appeal to any decision by the lower court. It is in a manner of speaking a fresh suit at the High Court for a constitutional relief or to bar the criminal case. Accordingly, the order by the High Court (Mutende J) on 20<sup>th</sup> November 2023 calling for the records of the lower court was made out of an abundance of caution.
30. For all those reasons, I am not persuaded that the applicant has laid sufficient foundation for grant of a conservatory order to stay further proceedings in the lower court. The upshot is that the entire notice of motion dated 18<sup>th</sup> November 2023 is hereby dismissed.



31. In the interests of justice, the main Originating Notice of Motion shall be heard on priority. The original lower court records shall now be returned to Makadara Chief Magistrates Court together with a certified copy of this ruling.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY 2024.**

**KANYI KIMONDO**

**JUDGE**

Ruling read virtually on Microsoft Teams in the presence of: -

Mr. Kamau Kuria, SC for the applicant instructed by Kamau Kuria & Company Advocates.

Ms. Awino for the 1<sup>st</sup> respondent instructed by the office of the Director of Public prosecutions.

Mr. E. Ombuna, Court Assistant.

