



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 6 OF 2020

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS AND 2 OTHERS.....RESPONDENTS

EX-PARTE

HASMUKH R. SHAH AND 3 OTHERS.....APPLICANTS

AND GUARDIAN BANK LIMITED.....INTERESTED PARTY

JUDGEMENT

1. In its application dated 20th March 2020, the applicants pray for the following orders.

a) That an order of prohibition does issue restraining the respondents from instituting criminal proceedings against the ex-parte herein

2. The applicants prayed also for the costs of the application.

3. The application is supported by the affidavit dated 20th March 2020 of **HASMUKH. R. SHAH** sworn on his behalf and those of the rest of the applicants. The respondents by way of grounds of opposition dated 12th March 2020 opposed the application.

4. When the matter came up for hearing this court ordered that the same be disposed by way of written submissions which the parties have complied and the court has extensively perused the same as well as the attendant cited authorities. Before looking at the merits or other wise of the application it shall be imperative to summarise the facts as presented which are largely not contested.

5. The applicants on 26th February 2019 were offered by the interested party a cheque purchase banking facility of Kshs. 60 million which was later enhanced on 8th September 2019 by another Kshs. 15 million thus totalling Kshs. 75 million.

6. The applicant drew two post-dated cheques of Kshs. 60 million and 15 million respectively in favour of the interested party. The applicant continued servicing the same but when the time was almost due it requested the bank to convert the same to a long term loan.

7. The request by the applicant seemed not to have been acceded to and it thereafter advised the bank not to bank the post-dated cheques. By then the outstanding loan was about Kshs, 42 million.

8. It is the contention of the applicant that by it stopping the presentation of the cheques the respondent's officers who came from the criminal investigation department camped around their offices with the intention of arresting and charging them. This necessitated them to seek the protective orders of this court.

9. The substance of the applicant's application is that the action by the respondents runs contrary to the provisions of **Section 316 (a) subsection 1(a) and 2 of the Penal Code** which was intended to criminalise dishonoured cheques. In other words, by them stopping the cheques from being presented they do not find the action criminal as seen through the lances of the respondents.

10. The applicant's contents that the said cheques were stopped from being presented for payments way before the due dates as the

repayment had superseded the total amount. Presenting them for payment would have been imprudent businesswise.

11. The applicants thus prayed for the intervention of this court to issue orders of prohibition against the respondents. Their action they say amounts to cross injustice and runs contrary to the constitution especially the bill of rights.

12. As indicated above the respondents filed ground of opposition through the learned state counsel. They said that all that the respondents were doing are within the constitutional mandate and not excess in any way. That the applicants have not exhibited anything to show that the respondents acted outside their mandate. They prayed for the application to be dismissed.

13. As indicated above the parties filed their written submissions which this court does not intend to reproduce here save to add that they each pulled towards their obvious directions.

14. The applicants submitted that under the provisions of Section 316(a) of the Penal code the issuance of a post-dated cheque does not amount to an offence. The intention of arresting the applicants based on the above cheques is not only illegal but interferes with smooth contractual agreements entered by the parties.

15. The applicants cited several authorities to support their claim which I have perused. They said that this court can always issues the prohibitory orders where it is proven that the action by the respondents was oppressive and an abuse of due process.

16. The learned state counsel submitted that the application was premature and run contrary the provisions of **Articles 47 and 165)6) of the Constitution**. She submitted that the court was being asked to exercise its supervisory jurisdiction over a **“would be”** matter since the investigation was yet to commence and concluded. The question of whether to charge the applicants with any criminal offence was yet to be decided.

17. In other words, the application was premature and this court is not ripe to render any decision over the same. In any case the applicant still has other forums in the circumstances to ventilate their innocence.

18. The Court of Appeal while dealing on similar issue stated in **JORAM MWENDA QUANTAI VS. THE CHIEF MAGISTRATE, NAIROBI CIVIL APPEAL NO. 228 OF 2003 (2007) 2 E.A. 170** stated as hereunder.

“It is trite that an Order of Prohibition 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 laws of the land. It lies, not only in 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. See Kenya National Examinations Council vs Republic Ex-parte G.G. Njoroge & 9 Others 1996 LLR 483 (CAK. See also HALSBURY’S LAWS OF ENGLAND 4th Edition Vol. 1 p 37 para. 128.”

19. The facts herein are not disputed. The contract between the bank and the applicant was and is still subsisting. There is no evidence that the respondents in any have commenced any criminal proceedings. All that is alleged is that some police officers have visited them at their offices and are likely to be arrested anytime.

20. This court’s jurisdiction at this level does not entail dealing with contested matters but purely procedural. What has been presented before me is an allege desire by the respondents to arrest the applicants based on some agreement over some post-dated cheques between the interested party and the respondents. The applicants have not demonstrated that they have been arrested leave alone called to be questioned and or record statements.

21. The province of investigation lies solely on the respondents. This court may not interfere with it unless it is proved that due process was not followed. More importantly the judicial review field does not interest itself with evidence gathering and prosecution but only on the issue of due process and specifically the rules of natural justice.

22. For now, the applicants have not shown any breach of the above by the respondents. Whether the charge would be under **Section 316 (a) of the Penal code** is mere speculation and at best theoretical. Even if that was the case the matter would be taken to the right court where they would battle over the evidence and that court would make the right decision.

23. This court can be approached at any time if in the course of time it is established that the respondents or any other tribunal or body has exceeded its mandate especially under the supervisory jurisdiction thereof. For now, there is no evidence that the respondents have acted unreasonably in carrying out its investigation to warrants interference by this court.

24. The application is therefore dismissed with costs.

Dated signed and delivered at Nakuru via video link this 29th day of April 2021.

H. K. CHEMITEI.

JUDGE