



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

MISC. CRIMINAL APPLICATION NO. E018 OF 2020

GEORGE GITUMA MUGAMBI..... APPLICANT

VERSUS

DPP1ST RESPONDENT

DCIO MERU.....2ND RESPONDENT

RULING

1. In this application brought by way of Notice of Motion under Certificate of Urgency dated 5th November, 2020, by the Applicant invokes Article 165(6) and (7) of the Constitution and seeks *inter alia* that; this court be pleased to stay proceedings in CMCR No. 130/2020 in the Chief Magistrates Court at Meru, in the interim; that the charge sheet before the trial court be declared defective having been instituted by an unqualified body; that the honourable court declares that the Chief Magistrate lacks jurisdiction to determine the charges, on the basis that there exists a disciplinary process to deal with matters between and advocate and his client.

2. The grounds relied on are set out in the body of the application and substantively in the supporting affidavit sworn on 5th November, 2020, by the applicant. It is alleged that the dispute between him and his client should be referred to the Advocates Complaints Commission and not at the Chief Magistrate. He further alleges that the criminal proceedings are an abuse of his right to fair trial and his right under the law.

3. The Respondents opposed the application through the replying affidavit sworn on 4th February, 2021 by **CPL Patrick Makau** where it is contended that the matter under investigation in the criminal proceedings is one of theft of money belonging to the complainant, Kaume Adams Kubai.

4. The application was canvassed by way of written submissions which were respectively filed on 15/7/2021 and 21/7/2021. In his case, the applicant admitted that the complainant was his client in two civil matters where an award totaling Kshs 4,030,698 was made. He further admitted that the insurance company had paid out Kshs 2,500,000 which he admits to be withholding pending payment of his fees or determination thereof by what he calls the '**Advocates Disputes tribunal**'. The applicant contends and asserts that of the entire sum in dispute relate to payment of his professional fees and should not be the basis of a criminal charge of Stealing by Agent contrary to section 268(1) as read with section 283(c) of then Penal Code. He reiterates that the dispute ought to have been referred to the Advocates Disputes Tribunal as opposed to the Chief Magistrates Court which lacks jurisdiction to entertain the said charges.

5. Further submissions were made to the effect that that the police have no legal authority to charge since that is the preserve of the O.D.P.P. He viewed the charge sheet as defective and an abuse of the court process.

6. For the respondents submissions resisting the application were offered with reliance on the decision in **Republic v Director of Public Prosecution & Anor Ex-Parte Geoffrey Mayaka Bogonko & Another [2017] eKLR** to support their position that the matter in issue is not the existence of an advocate client relationship, but rather about the events that transpired thereafter and on whether the decision to charge was made reasonably.

7. On claims of failure to follow due legal process, the respondents cited section 193A of the Criminal Procedure Code and asserted that nothing stops the criminal and civil processes proceeding concurrently. It then termed the application premature since the issues herein can only be determined once evidence has been adduced in the trial court.

8. In disputing the claims of abuse of court process, the respondents relied on **R v Attorney General exparte Kipng'eno Arap Ngeny(2001)Eklr** on when this court can interfere with criminal proceedings before the trial court. It was further submitted that the charge was not defective and was drawn by the right body and cited **Republic v Commissioner of Police and Anor ex parte Micheal Monari & Another [2012] eKLR, Article157 of the Constitution and Section 3.2 of the ODPPs Decision to Charge Guidelines** in support of the position that the duty to investigate belongs to the police and that it would be a failure if they were to fail to investigate a complaint.

9. On the question of the jurisdiction of the Chief Magistrate to hear and determine the criminal matter aforementioned, the respondent relied on the decision in **Kipoki Oreu Tasur v Inspector General of Police & 5 Others (2014) Eklr** for the proposition that the superior courts ought to exercise restraint before interfering with the criminal trials before the magistracy.

Analysis and determination.

10. Before I delve into the decision, I need to answer the question what it is that the applicant seeks and if he has invoked any provision of the law to support his pursuit. I note that there has been the invocation of article 165(6) and (7) which I read and discern to invoke the supervisory jurisdiction of the court over the subordinate courts. In order to intervene, the court must be satisfied that something untoward has gone into those proceeding or that something untoward is like and evidently likely to occur that will inflict an injury on the applicant and deserve being stopped or preempted by this court.

11. I have considered the application, affidavits and the submissions, as filed by both parties in this matter. It is evident to the court that the issue for determination, must remain the complaint that the court lacks jurisdiction to try him and that the charge before the court is defective.

12. In asserting that the court lacks the jurisdiction to try him on the charge, the applicant contends that only the **Advocates Dispute Tribunal** (sic) can handle his disagreement with the client. To begin with, the Tribunal is called the Advocate Disciplinary Tribunal. It is important that one understands the mandate of the Tribunal as established under section 56 of the Advocates Act. The act provides for the powers of the tribunal which does not extend to criminal jurisdiction.

13. Before the magistrate's court is a criminal matter which must can only be tried by the court and not the tribunal. I do find that it is within the mandate and jurisdiction of a criminal court to determine all matter connected to the charge including the question of whether it is defective or not. It must not call for the supervisory power of this court to determine the correctness or propriety of the charge. In any event the trial court has the duty to determine a defect in the charge and order its amendment or have the accused discharged if it turns out to fatally defective. Those issues must remain for determination by the trial court.

14. How about the contention that it is in the nature of a contractual or civil claim? Section 193A of the Criminal Procedure Code provides for institution of concurrent criminal and civil proceedings. That provision of the CPC has been extensively discussed by the court is several decisions and one only need to cite ***Republic v Chief Magistrate Criminal Division & Another, exp Mildred Mbuya Joel [2013] eKLR***, where the court delivered itself in the following words:

‘It is not enough to simply state that the criminal proceedings ought to be halted because there are pending civil proceedings touching on the same subject matter. Neither does it suffice to be content with stating that because there is an existence of a civil dispute or suit; the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. As rightly submitted on behalf of the Respondents, section 193A of the *Criminal Procedure Code Cap 75 Laws of Kenya* provides for concurrent civil and criminal proceedings.

15. Here, the applicant has not demonstrated how his right will be infringed by the proceedings at the Chief Magistrates Court. He has further not evidenced how the same amounts to abuse of the court process. He is just hinged on the notion that he ‘may’ suffer double jeopardy if the matter is referred to the Advocates Complaints Commission. The court does not operate on possibility or probability of future occurrences but purely on evidence and facts presented before it. I do hold that nothing is disclosed to support the allegation that the charges complained about are not properly before the court.

16. I find that the admission of receipt of money by the applicant that he indeed received a whole Kshs 2,500,000 way back in 2019, has disbursed not a dime to the person in whose favour the payment was made is the kind of conduct that is not expected of an advocate as an officer of the court.

17. While am never oblivious of the right to lien over client's property including decretal sums, I am also aware that an advocate cannot justify retainer of the entire sum received before he seeks and gets an order that the entire sum goes to his fees. Good faith on counsel would have dictated that he withholds what he considers due for fees, pays out the rest then seek to have the quorum of fees determined by the court. That has not been done, the advocate appears to grandstand a fact that only puts the entire profession into disrepute.

18. In the end, I find that the criminal matter is properly and legally instituted and ought to be allowed to proceed expeditiously before the trial court. Accordingly, it is directed that this ruling be served upon the trial court, to erase any doubt that the matter is properly due for hearing and determination by that court.

19. The conclusion is that the application lacks merits and is dismissed in entirety.

DATED SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 29TH DAY OF SEPTEMBER, 2021

PATRICK J.O OTIENO

JUDGE