



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

PETITION NO.10 OF 2020

IN THE MATTER OF CONTRAVENTION ARTICLES 22, 23, 27,31,35,47 AND 50 OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES and 50 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ARTICLES 10,156,232,245 & 258 OF THE CONSTITUTION

OF KENYA

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT

AND

IN THE MATTER OF THE COMPANIES ACT, 2015

BETWEEN

UNITED MILLERS LIMITED.....1ST PETITIONER

SUNIL NARSHI SHAH.....2ND PETITIONER

KAMAL NARSHI PUNJA SHAH.....3RD PETITIONER

MANGESH KUMAR VERMA.....4TH PETITIONER

HENRY MUNYOKI KAVITA.....5TH PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS...2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

B.N. KOTECHA & SONS LIMITED.....4TH RESPONDENT

JUDGMENT

Background

1. **UNITED MILLERS LIMITED (1st Petitioner)** filed **KISUMU HCCC NO. 38 OF 2015** against **B.N. KOTECHA & SONS LIMITED (4th Respondent)** who was the **1<sup>st</sup> Defendant in the suit** and 2 others seeking the following orders alleged to have arisen from 4th Respondent and 2 others' breach of contract to supply sugar after payment of Kshs. 76,250,000/- for the said sugar:

1) Kshs. 124,106,600/- plus costs and interest

2) Special damages for breach of contract in the sum of Kshs. 79,471,000/-

3) General damages for loss of business

4) Costs of the suit

2. On 22.11.15, the court allowed the striking out of the 2nd and 3rd Defendant's name from the suit and entered judgment in favour of the 1st Petitioner against the 4th Respondent for principal sum of Kshs. 124,000,000/-.

3. On 28.03.17, the suit came up for hearing and the parties' advocates recorded a consent for an all-inclusive sum of Kshs. 50,000,000/- payable in 3 monthly instalments from 25.04.17 until payment in full.

4. The 4th Respondent paid a sum of Kshs. 6,800,000/- in instalments then issued 15. cheques dated 31.12.16 for the sum of Kshs. 41,673,550/- in settlement of the outstanding sum but the cheques were returned unpaid with instructions that the **4<sup>th</sup> Respondent had stopped payment.**

5. Thereafter, the 1st Applicant filed **KISUMU HIGH COURT INSOLVENCY CAUSE NO. 1 OF 2018** against the 4th Respondent. The 4th Respondent filed an application in the insolvency cause seeking to be allowed to pay the debt in instalments. On 11.04.18, **the parties' advocates recorded a consent for an all-inclusive sum of Kshs. 5,000,000/-commencing 30.04.18 until payment in full.**

6. Subsequently, the 4th Respondent filed an application dated 29.05.18 seeking to set aside the consent judgment on the ground that the firm of L.G. Menezes did not have instructions to enter into a consent on its behalf and that the LPO's in support of the Applicant's claim against the 4th Respondent and two others were forgeries. The application was heard and dismissed by a ruling dated 21.09.19.

7. Afterwards, the 2nd Respondent summoned the 1st, 2nd and 3rd Respondents to their offices in Nairobi to record statements concerning the 4th Respondent's complaint. They were arrested on 03.06.2020 and were to be arraigned on 25.06.2020 to answer to charges of conspiracy to defeat the course of justice contrary to section 117(a) of the Penal Code. The arraignment was delayed by the filing of this Petition.

#### **Petitioners' case**

8. The Petitioners' case is that the dispute herein is a commercial dispute and that 2nd Respondent has no role to play in such disputes. It is further their case that the criminal proceedings are challenging orders of the High Court and as such the 2nd Respondent is attempting to usurp the powers of the Court of Appeal.

9. The Petitioners additionally argue that their constitutional rights have been violated and seek the following orders:

**1) A declaration that the arrest, detention, intended arraignment of the Petitioners are a contravention of the Constitution of Kenya, 2010**

**2) A declaration that the Petitioners' right to information guaranteed by article 35, right to equal protection of the law guaranteed by Article 27(1), the right to have their dignity respected and protected, the right to privacy as guaranteed under Article 31, right to access to justice guaranteed under Article 48, the right to administrative action that is reasonable and procedurally fair guaranteed under Article 47 and the right to a fair trial guaranteed under Article 50 of the Constitution have been violated and contravened by the Respondents.**

**3) An order of certiorari does issue to the effect that the intended arraignment of the Petitioners before the Chief Magistrate's Milimani Courts is an illegality and contrary to Articles 27(1), 28 and 47 of the Constitution**

**4) An order of prohibition does issue to the effect that the intended arraignment of the Petitioners before the Chief Magistrate's Milimani Courts is an illegality and contrary to Articles 27(1), 28 and 47 of the Constitution**

**5) An order for compensation of the Petitioners in terms of general damages for the distress and mental anguish caused by the infringement of their constitutional rights**

**6) An order awarding costs to the Petitioners**

10. The Petition is supported by an undated affidavit sworn by **SUNIL NARSHI SHAH (2nd Petitioner)** a director of the 1st Petitioner in which he reiterates the pleadings in the Petition. Annexed to the affidavit are various documents detailing the genesis of the dispute between the parties herein as pleaded in the petition. The petition is also supported the 2nd Petitioner's further affidavit sworn on 20.07.2020 in which he avers that the charges preferred by the 2nd Respondent are malicious. His averments have been reiterated by the 2nd, 3rd and 5th Respondents in their supplementary affidavits sworn on 29.07.2020.

#### **1st, 2nd and 3rd Respondents' case**

11. 1st, 2nd and 3rd Respondents' case is contained in a replying affidavit sworn on 08.07.2020 by **CIP MISHECK KAGERA** who is an investigator with the Directorate of Criminal Investigations (2nd Respondent). He avers that under the powers conferred on the National Police Service, the 2nd Respondent commenced investigations following a complaint by the 4th Respondent by a letter dated 26.10.18. He further avers that in the course of investigations, some of the documents relied upon by the 1st Petitioner in support of its case against the 4th Respondent were established to have been falsified as a result of which a decision was made to charge the Petitioner.

#### **4th Respondents' case**

12. 4th Respondents' case is contained in a replying affidavit sworn on 08.07.2020 by **HARSHIL KISHORE KOTECHA**, a director and shareholder of the 4<sup>th</sup> Respondent. He concedes that the 1st Petitioner and the 4th Respondent in early 2015 entered into a contract for sale and purchase of 60,000 bags of sugar. A dispute arose in which the 1st Appellant sued the 4th Respondent with resultant orders as pleaded by the Petitioners in the Petition. That subsequently, the 4th Respondent appointed KPMG-Kenya to investigate the documents relied upon by the 1st Respondent in support of its claim against the 4th Respondent and with some traders denying the authenticity of some documents. The report by KPMG-Kenya prompted the deponent to lodge a complaint with the 2nd Respondent who after investigating the complaint recommended that the 2nd to 5th Petitioners be charged.

13. It is the 4th Respondent's case that its complaint raises a criminal element which is not tied to the civil cases between the parties herein.

#### **ANALYSIS AND DETERMINATION**

14. After careful consideration of the pleadings and submissions by the Petitioners and the Respondents and the authorities that they cited, The gravamen for determination in this petition is whether the Petitioners' fundamental rights under the Constitution have been violated.

15. It is trite that a Petitioner who desires the court to give judgment in its favour in a constitutional petition must meet the threshold of the principle of sufficient precision settled in the case of **Anarita Karimi Njeru v R (No 1) 1979 KLR 154**.

16. It is however to be remembered that the principles of drafting Constitutional Petitions stated in Anarita Karimi's case are not cast in iron and stone. They have however been recognized as the principal goal posts in drafting informed and well-considered Petitions. Those principles were reiterated in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** where the Court of Appeal stated thus:

**"We cannot but emphasise the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims."**

17. The principles in Anarita Karimi's case were also cited by Lenaola J (as he then was), in the case of **Stephen Nyarangi Onsuma & Another v George Magoha & 7 Others [2014] e KLR** as follows-

**"... This court has in the past expressed its concern about the manner in which parties coming before the court and alleging a violation to constitutional rights have presented these cases. As a basic minimum a Petition is required to cite the provisions of the Constitution which have allegedly been violated, and the manner in which they have been violated and the remedy which he seeks, for that violation. In demonstrating the manner in which they have been violated, a Petitioner should present before the court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation."**

18. Additionally in the case of **John Harun Mwangi v Independent Electoral and Boundaries Commission & Another [2013] eKLR**, the court stated;

**"It must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution."**

19. In **C.J.K. vs. K.D. [2011] e KLR** the court stated

**"For an action to amount to violation of the inherent dignity it would be demonstrated inter alia, that such action has been taken by another, intentionally, maliciously or spitefully calculated to injure the other person's sense of self-respect or worthiness in a manner that will lower his or her standing in society for that is what dignity entails."**

20. The Petitioners aver that their right to information has been violated. In **Charles Omanga & 8 Others Vs. Attorney General & Another [2014] e KLR** the court said-

**"How is a right to information threatened unless a person has been requested and has been denied the information. A person moving the Court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated."**

21. The fact that Petitioners are to be arraigned before court does not constitute a denial of the right to access to justice and fair hearing for as was stated by the Supreme in the case of **Francis Karioko Muruatetu & another v Republic SC Petition No. 15 of 2015; [2017] eKLR:**

“[57] ..... the State through the courts, ensures that all persons are able to ventilate their disputes and access to justice includes the right to a fair trial....”

22. The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges (**James Ondicho Gesami V Attorney General & 2 Others [2012] eKLR**) and the decision whether or not to institute criminal proceedings is made based on the evidence collected. Once the investigations establish reasonable suspicion that a person committed a crime he ought to be charged in a court of law. The rest is left to the courts of law. (See **Mohamed Ali Swaleh v Director of Public Prosecution & another Ex- parte Titus Musau Ndome [2017] eKLR**).

23. Once the police and the DPP establish a reasonable suspicion, they are at liberty to prefer charges. (See **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**). The issue of whether or not the evidence in possession of the Respondents is sufficient to sustain a criminal trial is within the ambit of the trial court and this court has no jurisdiction to determine it at this stage.

24. It has not been demonstrated that the decision to charge the Petitioners was made in an arbitrary manner and there would therefore be no reasonable cause for this court to direct the 3rd Respondent on how to conduct its business for to do so would amount to the court usurping a role which has been exclusively reserved by both statute as well as the Constitution for the office of the 3<sup>rd</sup> Respondent. (See **Pauline Adhiambo Raget v Director of Public Prosecutions & 5 others [2016] eKLR**).

25. The purpose of criminal proceedings is to hear and determine whether an accused has engaged in conduct which amounts to an offence and on that account deserving punishment. From what is stated hereinabove, it has been demonstrated that there is reasonable suspicion that an offence/offences may have been committed. I have no doubt that the Petitioners will be afforded an opportunity to defend themselves, to cross-examine witnesses and adduce evidence in support of their case and that in my view is the proper course to take in this case.

26. As to whether the existence of civil/commercial case should be a bar to criminal proceedings, Section 193A of the Criminal Procedure Code provides that:

**Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.**

27. It is not the work of court to interfere with other State organs unless it can be shown that they violate the constitution. (See **Hassan Ali Joho v Inspector General of Police & 3 others [2017] eKLR**). The Petitioners have not been demonstrated that the prosecution is intended to produce certain results in the civil case or for the achievement of a collateral purpose other than its legally recognized aim and this court would therefore be reluctant to stay the criminal proceedings.

28. I must point out that the burden is upon the Petitioners to prove on a balance of probabilities any of the alleged violations. (See **Githunguri Dairy Farmers Cooperative Society Ltd v Attorney General [2016] eKLR**). This burden is discharged by the Petitioners availing such relevant and admissible evidence. I totally agree with the Respondents contention that the Petitioners have presented an omnibus petition citing Articles 27(1), Article 31, 35, 48, Article 47 and Article 50 of the Constitution as having been violated and contravened by the Respondents but have neither pleaded nor demonstrated how the Respondents have violated those rights.

29. From the material presented before by the parties, this court finds **THAT:**

- 1) Petitioners have failed to demonstrate how their constitutional rights have been violated and/ or threatened.**
- 2) The Petition is thus dismissed with costs to the Respondents.**
- 3) The restraining orders issued on 24.06.2020 are discharged**

DATED AT KISUMU THIS 23rd DAY OF October, 2020

T. W. CHERERE

JUDGE

Court Assistants - Amondi/Okodoi

For Petitioners - Mr. Ogejo for Ogejo, Omboto & Kijala LLP Advocates

1st,2nd & 3rd Respondents - Ms. Gathu for ODP

For 4th Respondent - Mr. Ogada for Prof. Tom Ojienda & Associates