



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHT DIVISION

PETITION NO 361 OF 2017

HASSAN A.A. H. ZUBEIDI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT (NAIROBI).....3RD RESPONDENT

JUDGMENT

1. In a Petition dated 21st July 2017 and filed in court on the same day, *Hassan Ahmed Abdul Hafedi Zubeidi*, the petitioner, challenged his arrest and prosecution in criminal case Nos 1897 of 2015 and *1078 of 2016*
2. The petitioner averred that at the time of his arrest, he was the Chairman of the Board of directors of Dubai Bank Limited, presently under receivership, and the majority shareholder in the bank. The petitioner impugned the charges in counts 2 and 3 in criminal case No. 1897 of 2015 questioning their constitutionality and rationale in so far as he is concerned as Chairman of the Board of directors of that Bank.
3. According to the petitioner, the decision to charge him is a violation and infringement of his constitutional rights and that the seizure of his properties, assets and documents, is a violation of his rights and fundamental freedoms. He also contended that the action of arresting and charging him is an abuse of the legal process and a contravention of Article 157(11) of the constitution.
4. In justifying these contentions, the petitioner averred that the bank was a limited liability company licensed to operate as banking institution and that his role as Chairman of the Board of directors was limited to policy issues as set out in the Central Bank of Kenya guidelines for institutions licensed under the Banking Act, (*CBK prudential guidelines, 2013,*) and as such, he was only a non-executive director of the bank.
5. He contended that the day to day management of the bank was solely in the hands of the management team which had the primary responsibility to operate and administer bank affairs and who had the duty to obtain, verify, process and maintain identification of customers wishing to open accounts or make transactions as well as monitor any suspicious transactions.
6. According to the petitioner, on 14th August 2015, the bank was taken over by the Central Bank and placed under receivership and its operations in all branches placed under the management of KDIC without involving the bank's management and without any inventory being taken. It is the petitioner's case that on 17th November 2015, he was charged with the with 2 counts on matters he had no control over. He therefore sought the following reliefs:-

i. A declaration be and is hereby issued that all the acts and or threatened acts by the respondents and their agents or harassment, intimidation, questioning, investigations, charging, prosecution against the petitioner in as far as the same relates to the management of the affairs of Dubai Bank limited by the respondents amounts to an infringement against the petitioner's constitutional rights as enshrined in the Bill of rights and are therefore unconstitutional.

ii. A declaration be and is hereby issued that the actions of the 1st and 2nd respondents and or their agents are unfair, unreasonable, irrational, illegal and the decision to charge and or prosecute the petitioner has been made in abuse of power and mala fides in contravention of Article 47 of the constitution and sections 4, 5 and 7 of the Fair Administrative Actions Act.

iii. A restraining order be and is hereby issued against the 1st and 2nd respondents whether by themselves, agents from charging,

prosecution, arrest, continued harassment, questioning, intimidation apprehension on any matter concerning the petitioner's alleged involvement in the management of the day to day affairs of Dubai Bank Limited.

iv. An order of a permanent injunction be and is hereby issued restraining the 1st and 2nd respondents, whether by themselves, their agents, privies and any other person acting on their instructions from prosecuting, charging arresting, harassing in any manner whatsoever intimidating. Causing an arrest threatening to arrest and or interfering with the petitioner's fundamental rights and freedoms in respect to any matters under investigations in respect of the managerial and day to day affairs of Dubai Bank Limited.

v. An order of prohibition directed against the 1st and 2nd respondent whether by themselves and or their servants, agents or any person acting on their instructions from interfering and or unjustly harassing the petitioner in respect of matters arising from the management of Dubai bank Limited.

vi. A order of prohibition directed against the 1st and 2nd respondent whether by themselves and or their servants, agents or any person acting on their instructions from n any manner whatsoever attempting to implicate the petitioner herein from all matters relating to the managerial affairs of Dubai bank.

vii. A conservatory order staying the impugned decision to charge the petitioner in Criminal Case No 1897 of 2015, Republic versus Binay Dutta & others and criminal case No 1078 of 2016, Republic versus Abdul Hafedh Zubeudu & 7 others

viii. An order of certiorari to quash and set aside the decision of the 1st respondent to prosecute the petitioner on the charges preferred against him in Criminal Case No 1897 of 2015, Republic versus Binay Dutta and others and Criminal Case No 1078 of 2016, Republic versus Abdul Hafedh Zubeidi & 7 others.

ix. A order of prohibition directed against the 1st and 2nd respondents and or their agents from lodging, preferring charges or in any other way attempting to implicate the petitioner from all matters as it relates to the management and day to day activities of Dubai Bank limited, matters relating to Kamp General engineers limited, Bashir Tahir ACC, Metro Plaza Limited, Africa energy Limited, maestro Properties Limited which are all subject to HCCC No 467 of 2015, Steve Biko, Suleiman enterprises and Kenya airways Limited.

x. An order of prohibition directed against the 1st and 2nd respondents and or their agents from using all of the documents, title deeds, log books and any other materials that KDIC has seized in the petitioner's office to prefer criminal charges against the petitioner on the basis of the said documentations pending the hearing and determination of HCCC No 467 of 2015.

xi. Costs of this petition

xii. Any other relief as this Honourable court deems fit to grant.

1st and 2nd Respondents' Response

7. The 1st and 2nd respondents filed a replying affidavit by **Chief Inspector John Jaldesa**, sworn on 12th June 2017, in response to this petition, **CI Jaldesa**, deposed that he is the investigating officer in the Criminal Case; that the petitioner had been charged in criminal case No 1897 of 2015 with two counts and the case is part heard and was due for further hearing on 30th July 2018.

8. **CI Jaldesa** further deposed that the petitioner had again been charged in criminal case No 1078 of 2016 together with 7 other accused persons with the offence of conspiracy to defraud Dubai Bank of Ksh48,180,000/- that case had been heard and the prosecution concluded and a ruling on whether or not the petitioner and others had a case to answer was being awaited.

9. The deponent stated that the petitioner's son had also been charged in criminal case No 786 of 2017 which was due for hearing on 12th July 2018. Further deposition was to the effect that the petitioner had again been charged in another criminal case, No 984 of 2018, with the offence of conspiracy to defraud, demanding property with menaces, conspiracy to commit a felony, forgery and willfully procuring registration titles with false pretence.

10. He further stated that the petitioner had again been charged in yet another criminal case No 983 of 2018, with the offence of conspiracy to defraud which is also pending. According to **CI Jaldesa**, further investigations were being conducted against the petitioner and the 1st respondent will make a decision on once investigations are complete.

11. **C. I Jaldesa** went on to stated that investigation were properly conducted and that they performed their duties as required by the Constitution and the law, including summoning the petitioner and recording statements from him and other suspects before conclusion of investigations. He deposed that they obeyed court orders given on 31st July 2017 and had only asked the petitioner to present himself for recording of statements and later he was asked to present himself to court to answer to charges, but he was not arrested.

Petitioner's Submissions

12. **Mr Koyoko**, learned counsel for the petitioner, relied on their written submissions dated 2nd October 2018. He, however, added that the facts of the petition deposed in the supporting affidavit are not controverted and urged the court to take those facts to have been admitted.

13. He contended that with the admission, it means the petitioner's rights in Articles 27, 28, 31, 40 and 50 of the constitution were violated. He argued that arbitrary searches were conducted in the petitioner's private offices leading to confiscation of personal documents which were material to his defence in criminal case Nos 1897 of 2015 and 1078 of 2016. **Mr Koyoko** disclosed that criminal case No 1078 of 2016 has since been concluded and the petitioner acquitted, leaving criminal case No. 1897 of 2015 pending though part heard which the petitioner wants the court to stop through this petition.

14. It is **Mr. Koyoko's** contention that the petitioner's position as non- executive director of the bank was not material to commission of the alleged offences. He argued that the 1st respondent is abusing his prosecutorial powers for extraneous purposes to aid KDIC in prosecution of **HCCC No 462 of 2015** and other related matters. He further argued that the petitioner had been subjected to arbitrary arrests or summonses and faulted the respondents' conduct since the filing of this petition, contending that they have not only arrested but also prosecuted the petitioner over matters pending in this petition. He, therefore, urged the court to allow the petition and more so prayers 7, 8 and 9.

1st and 2nd Respondents' submissions

15. **Mr Ashimosi**, counsel for the 1st and 2nd respondents, submitted also highlighting their written submissions dated 26th September 2018, that although this petition relates to criminal cases Nos. 1897 of 2015 and 1078 of 2016, criminal case No 1078 of 2016 has since been concluded and the petitioner acquitted thus the petition is now on criminal case No. 1897 only. He submitted with regard to criminal case No 1897 of 2015, that the case is part heard and referred to paragraph 3 of their replying affidavit to that effect. He contended that other criminal cases have since been commenced against the petitioner including **Criminal case Nos 786 of 2017, 983 of 2018 and 984 of 2018** and that, investigations are still going on and may result into more charges.

16. Learned counsel denied the petitioner's contention that the respondents had violated court orders issued 31st July 2017 and referred to paragraph 11 of their replying affidavit to support that denial. According to counsel, the orders of 31st July 2017 required the petitioner to present himself for investigations but did not stop prosecution. He therefore argued that the respondents had not violated the petitioner's fundamental rights. He contended that this court may not conclude whether or not the petitioner will be convicted in criminal case on 1897 of 2015.

Determination

17. I have considered this petition the response and submissions by counsel for the parties. I have also considered the authorities relied on. The question that arises for determination is whether the petitioner's rights and fundamental freedoms have been violated because of his arrest and prosecution.

18. This petition contests the petitioner's prosecution in criminal case No 1897 of 2015 and any other investigations or intended prosecution. The petitioner contends that the investigations and prosecution being undertaken by the 1st respondent against him have violated his rights and fundamental freedoms. He also contends that the prosecution and such other investigations are intended to aid other parties in **HCC No 467 of 2015** against Dubai Bank Ltd, thus the investigations and prosecution are intended to serve a collateral purpose and are not for the pursuit of the course of justice.

19. The 1st and 2nd respondents have denied the petitioner's claim and contend that the investigations and prosecution is to further the course of justice. They deny that those actions are linked to **HCCC No 467 of 2015**. They further contend that they have acted within their constitutional mandate and deny violating the petitioner's rights and fundamental freedoms.

20. Although this petition challenges the petitioner's prosecution in **Criminal Case No 1897 of 2015 Republic v Binay Dutta & others** and **Criminal Case No 1078 of 2016 Republic v Abdul Hafedh Zubeidi & 7 other**, it is agreed by both sides that **Criminal case No. 1078 of 2016** has since been determined in favour of the petitioner who has been acquitted. That, therefore, leaves only **criminal case No 1897 of 2015** which both parties are in agreement was at the time of hearing this petition part heard. It is not clear, however, what stage the case has reached now. There is further disclosure that the petitioner has since been charged with other cases but which are not the subject of this petition.

21. The 1st respondent exercises constitutional mandate when undertaking criminal prosecutions. Article 157(6) reposes that mandate while Article 157(10) is clear that the 1st respondent does not require consent from any person or authority in the exercise of his powers or functions and he is not under the control of any person or authority. This is not, however, a blanket discretion. There is a caveat in Article 157(11) to the effect that in exercising his powers, the 1st respondent **shall have regard public interest, interesting administration of justice and the need to prevent and avoid abuse of the legal process.** That is, the 1st respondent when commencing and continuing prosecution, must do so in the public interest and the administration of justice. He should not abuse his mandate to undermine the legal process.

22. The petitioner's contention is that the 1st respondent is not exercising his powers as required by the Constitution. In that case, this court is empowered by the Article 165(3) (d) (ii) of the Constitution to investigate and determine whether indeed the 1st respondent is acting as required of him by the Constitution and the Law. This is so because Article 2(2) of the Constitution is clear that no person may claim to exercise state authority except as authorized under the Constitution, while Article 165(3) (d)(ii) gives the court jurisdiction to determine the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of, the Constitution. In that regard, therefore, the 1st respondent must act as required of him by the Constitution and the law otherwise the court will come in and intervene where the court process is being abused.

23. In the case of **Mohammed Gulam Husseign Fazal Karmali & another v Chief Magistrate's Court Nairobi & another** [2006] eKLR, the court observed the fact that in the context of criminal proceedings, there are two fundamental policy considerations which the court must take into account in dealing with the abuse of process. Referring to the case of **Modevao v Department of Labour [190] INZLR 464** at 481,

the court identified those policy considerations thus;

“The first is that the public interest in the administration of justice require that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by state and citizen alike. The second is that, unless the court protects its ability to function in that way its failure will lead to an erosion of public confidence by reason of concern that the courts processes may lend themselves to oppression and injustice. At page 482 Richardson added....the court grants a permanent stay in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under the law. It may intervene in this way if it concludes ... that the court processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression.”

24. There are many other decisions where courts have held that where the 1st respondent is acting otherwise than in conformity with the Constitution, the court will intervene. In the case of **Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another** [2015] eKLR the court observed that;

“The Court ought not to usurp the Constitutional mandate of the Director of prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings...However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.”

25. Similarly, in **Republic v Attorney General Ex parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** the court held that;

“Although the state’s interest and indeed the constitutional and statutory powers to prosecute is recognised, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognised lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court ...It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual’s liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds.”

26. Where the 1st respondent is abusing his powers and acting contrary to Article 157(11), by pursuing other interests than the course of justice, the court will not hesitate to intervene and halt his actions. That is why the court held in **Kuria & 3 Others vs. Attorney General** [2002] 2 KLR, that;

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and/or where the proceedings are oppressive or vexatious...The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. (see also Jared Benson Kangwana v Attorney General (HC Misc Appl. No 446 of 1995 on the abuse of the process).

27. There must be no external considerations in commencing the prosecution or incidences of extraneous considerations such as malice. (see **George Joshua Okingo & another v Chief Magistrate’s Court Anti-Corruption Court Nairobi & another** [2014]eKLR, and **Vincent Kibiego Saina v Attorney General** (HC Misc Appl No 839 and 1088 of 1999.)

28. In the present petition, the petitioner was investigated and the 1st respondent made a decision to prosecute him leading to institution of **Criminal Case Nos 1897/2015 and 1087 of 2016**. However, **Criminal case No 1087 of 2016** has since been concluded and the petitioners acquitted. That left **Criminal Case No 1897 of 2015** which was at the time of hearing this petition, part heard.

29. The fact of the matter is that the petitioner was charged between 2015 and 2016, but filed the present petition in 2017. There was no explanation why he did not move the court earlier or immediately he was charged if he thought there was violation of his rights and fundamental freedoms. That is not by itself, however, a ground for dismissing a constitutional petition. Moreover, the issue was not taken up by the respondents.

30. The petitioner’s contention is that he was a non- executive director (chairman) of the bank and had nothing to do with day to day management of the bank. That, to my mind, is more of a question of evidence than a constitutional question. If the petitioner was not in the day to day management of the bank, and had nothing to do with what he is charged with, he should be able to explain himself out before the trial court. This view is supported by the fact that both sides agree that one of the criminal cases forming the basis of this petition, **Criminal case No 1087 of 2016**, has been heard and concluded in the petitioner’s favour without the intervention of this court. That is the direction, in

my view, that the remaining criminal case should follow.

31. Regarding investigations all I can say is that except where there is clear disclosure of some element of violation of the constitution, human rights and fundamental freedoms, the court would not intervene merely because a party has alleged violations. There must be clear and demonstrable facts to support such a claim. That is because the issues raised in this petition are more of factual than legal or constitutional.

32. It has also not been shown that the machinery of criminal justice is being used in aid of personal civil feuds and individual vendetta. The petitioner has alleged that the prosecution is being used to aid other parties in HCC NO. **467 of 2015**, but not much has been said about that case to show that the prosecution is indeed aimed at forcing the petitioner to settle a civil debt. I also note that the new cases the petitioner has been charged with are not part of this petition and the court may not safely deal with them here.

33. Having therefore considered the petition, the responses, submissions and the law, I am not satisfied that this is a matter the court should intervene in. consequently, the petition dated 21st July 2017 is declined and dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi this 25th Day of January 2019

E C MWITA

JUDGE