



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 39 OF 2015

IN THE MATTER OF: ARTICLE 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLE 23 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THREATENED CONTRAVENTION OF ARTICLES 3, 29 AND 39 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

RHODAH MUTETE MUTUKU.....PETITIONER

VERSUS

1. THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE

2. DIRECTOR OF PUBLIC PROSECUTIONS

3. HON. ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

The Petition

1. By the petition dated 22nd June, 2015 the Petitioner prays for the following orders:

a) A Declaratory Order that the National Police Service cannot and should not arrest or cause the arrest and charging of the Petitioner before any court of Law in a bid to enforce the recovery of the civil debt between **DALETE CONTRACTOR LIMITED** and **GOLDTRUCK SERVICE LIMITED**.

b) A conservatory order prohibiting the Kenya Police Service, Mombasa County, **only** from taking the Petitioner, in particular, **NO. 49090 CPL PAINITO INGOSI** or any other Kenya Police Service officer into custody and detaining her on the basis of the purported criminal complaint under investigation pending arraignment before a court of law.

c) Bail pending arrest on such terms as the Court may deem just and expedient to assure the Petitioner of her freedom and security of her person and her freedom of movement and to prevent the Kenya Police Service, Mombasa County, in particular, **NO. 49090 CPL PAINITO INGOSI** or any other Kenya Police Service officer from arbitrarily arresting and detaining her in custody during the

course of their investigations and/or pending arraignment before a Court of Law.

d) Any other or further just and expedient relief as the Court may deem fit to grant.

2. The Petition is not supported by an affidavit, but there is an affidavit sworn on 23rd June, 2015 by the Petitioner in support of the Notice of Motion herein dated 22nd June, 2015 and a Further Affidavit filed on 29th September, 2015.

3. The Petitioner is a female adult citizen of Kenya. The 1st Respondent is the Inspector General of Police, the 2nd Respondent is the Director of Public Prosecutions and the 3rd Respondent is the Attorney General.

4. The Petitioner's case is that the Applicant is a director of DALETE CONTRACTORS LIMITED. On 5th November, 2013 DALETE CONTRACTORS LIMITED entered into an agreement for transportation services with another company known as GOLDTRUCK SERVICE LIMITED full terms and conditions of which are stipulated in the said contract. Following the Petitioner's company's cash flow constraints, the company fell back in settling its commitment to GOLDTRUCK SERVICE LIMITED for services rendered. The Petitioner's company proposed a payment plan to settle the outstanding invoices with GOLDTRUCK SERVICE LIMITED. On 10.03.2015, GOLDTRUCK SERVICE LIMITED however instituted a Civil case being MOMBASA HIGH COURT CIVIL SUIT NUMBER 38 OF 2015; HASSAN IBRAHIM T/A GOLD TRUCK SERVICE LIMITED VERSUS RHODAH MUTETE MUTUKU T/A DALETE CONTRACTOR LIMITED for the recovery of the outstanding invoices. This suit was commenced by HASSAN IBRAHIM who is a director at GOLDTRUCK SERVICE LIMITED. This suit is pending trial. The Petitioner has now become aware of ongoing police investigation focusing on her as a person in relation to her company's bank account number 114021644271 held at KENGELENI EQUITY BANK in the name of DALETE CONTRACTORS LIMITED. The Petitioner has since found out from her bank that these police investigations are on the strength of a complaint made by one FEISAL ABDIKADIR who is also a director at GOLDTRUCK SERVICE LIMITED *but* in his private capacity as an individual alleging that the Petitioner issued him with bad cheques from the abovementioned Bank Account but without disclosing to the Police the purpose of those payments. The Petitioner alleges that it does not owe the Complainant any money. The Petitioner issued DALETE'S cheques to the Complainant in payment of the debt due to GOLDTRUCK. The said cheques were issued to him in his name by the DALETE at his own request and were to be banked on due dates *only upon prior confirmation* of availability of funds in the Company's Account by the Petitioner. However, the Complainant banked the Cheques without prior confirmation when there were insufficient funds in DALETE'S aforesaid Account. Consequently they were not paid on presentation by Equity Bank. The Petitioner's case is that there was no intent to issue cheques without sufficient funds in DALETE'S Account nor was there intent to defraud. The Petitioner is aware that she is being investigated by the Respondent and she has received several strange calls from strange people who have also made inquiries about her residence in Nyali. The Petitioner believes these strange people are agents of the Respondents intent or arresting her. The Petitioner believes that the criminal investigations against her are meant to exert pressure on her to settle the civil claim between her company and GOLDTRUCK SERVICE LIMITED. The Petitioner believes that the institution of the criminal investigations against her constitutes an abuse of the powers of the police. The police have no role in the process of the recovery of civil debts. The allegation of issuance of bad cheques is meant to blur the court's vision since in the Civil Case no fraud was pleaded.

The Response

5. The 1st Respondent oppose the petition vide Replying Affidavit sworn by No. 49090 Cpl. PAINITO INGOSI on 19th August, 2015. The deponent states that he is an Investigations Officer with the police. He depones that the Petitioner entered into a contract with Feisal Abdikadir the Managing Director of Goldtruck Services Limited to transport for Petitioner some construction materials using his company's trucks for a period of 11 months. On 15th November, 2013 the Petitioner contracted Goldtruck Services Limited to transport lime, shell and clinger using their trucks at an agreed consideration of Kshs. 13,000/= per day and Kshs. 11,000 per night and the payments were to be done at the end of every month after receiving the invoices. The existence of the said contract is not disputed by the Petitioner. Goldtruck Services Limited transported the said lime, shell and clinger as per her instructions for a period of about 11 months. The outstanding amount after offering the service was totaling to Kshs. 13,994,750/=. The Petitioner paid Feisal Abdikadir the Managing Director of Goldtruck Services Limited through Equity Bank Kengeleni branch cheques in the name of Petitioner's company DALETE CONTRACTORS LIMITED Account Number 1140261644271. In the month of September, 2014 Feisal Abdikadir presented the cheques to the bank but nine cheques totaling to Kshs. 7,900,000/= were dishonoured by the Bank. Feisal Abdikadir tried reaching the Petitioner on phone but she was giving empty promises concerning the issues of bounced cheques. This prompted Feisal Abdikadir to report the matter to the Central Police Station vide OB No. 40/4/6/2015. The deponent states that he was assigned by the Regional CID Coordinator to investigate the matter and take the necessary action. He recorded statements of the complainant and his partner and obtained a court order to enable him investigate the said Account No. 1140261644271 held at Equity Bank Kengeleni branch with a view to establishing whether there was sufficient funds in the said account. On 15th June, 2015 the bank manager Equity bank supplied him with certified copy of bank statements of DALETE CONTRACTORS LIMITED's account and certified copies of the 9 bad cheques. The deponent tried in vain to get explanation from the Petitioner on these bad cheques. The deponent then completed his investigations and purports to have established that the Petitioner committed a criminal offence of issuing bad cheques contrary to Section 316A (1) (a) as read with Section 316A (4) of the Penal Code. The Respondents aver that the petition herein is intended to usurp the efforts of the police from discharging their duties as per the constitution and the National Police and Service Act. The Respondents concede that Hassan Ibrahim has instituted a civil suit on behalf of Goldtruck Services Limited against the Petitioner herein for the recovery of the outstanding claims and that a civil suit is not a bar to institute criminal proceedings against a party in a civil suit as per Section 193A of the Criminal Procedure Code.

6. On their part the Attorney General filed Grounds of Opposition dated 26th March, 2018, stating that the Petition is incompetent, frivolous, vexatious and an abuse of the court process and ought to be struck out; that the Petition is premature and aims to defeat the course of justice; that the Petition seeks to curtail, restrict and/or control the 2nd Respondent's constitutional mandate which is enshrined under Article 157(10) of the Constitution of Kenya and that the filing of a civil suit is not a bar to criminal proceedings per section 193A of the Criminal Procedure Code.

Submissions, Analysis and Determination

7. Parties filed submissions which I have considered. The issue for determination is whether Petitioner's fundamental rights have been breached.

8. The Petition before Court is fundamentally one for an **Anticipatory Bail**. In terms of **Article 23 of the Constitution**, the court is authorized to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the bill of rights. Among the rights that are guaranteed to every citizen including the Petitioner is the right to be free from arbitrary arrest. In terms of **Article 165 (3) (b)**, the court is authorized to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened. Thus, Article 23 is the bedrock Article under which a Petition for anticipatory bail to the petitioner may be considered. The jurisprudence that flows through our Courts is that anticipatory bail can be granted **"...when there are circumstances of serious breaches of a citizen's rights by an organ of the state which is supposed to protect the same."** This is the threshold that the Petitioner is required to satisfy in this case. The Petitioner's case is that the Kenya Police are being used to recover a contested civil debt owed by Dalete to Goldtruck. To achieve this objective, **NO. 49090 CPL Painito Ingosi** was used to persistently harass the Petitioner in order to vex her into settling the debt between the two companies.

9. It is common ground that Hassan Ibrahim instituted a civil suit on behalf of Goldtruck against the Petitioner for the recovery of the outstanding monetary claims between the two companies and at the same time, Mr. Feisal reported a complaint to the police that the Petitioner issued him with bad cheques in relation to the same transaction that is subject of the civil proceedings. The Petitioner avers that the complaint to the police by **Mr. Feisal** was a **contrived** attempt to use the Kenya Police Service to recover a contested civil debt owed by Dalete to Goldtruck. The Petitioner's case is that she received persistent calls from the police officer who has conduct of the criminal investigations referred to above. In addition, she was also informed of the policemen lurking around her residence with the aim of arresting her. It is her case that this is an **unwarranted manhunt** instituted by the investigating officer against her. It is her case that this manhunt in the guise of police investigations is not in good faith. It is actuated by malice, amounts to abuse of powers of the police and it contravenes administration of justice. The Petitioner avers that this is because according to the Investigating Officer, his investigations established that the Petitioner committed a criminal offence of issuing bad cheques contrary to Section 316A (1) (a) as read with section 316A (4) of the Penal Code.

10. On their part the Respondents submitted that the investigation so far has established that there is sufficient evidence to warrant the Petitioner to be arrested, arraigned and charged for the offence of issuing bad cheques contrary to Section 316 A (1) (a) as read with Section 316 A (4) of the Penal Code. Section 316A of the Penal code (Chapter 63 of the laws of Kenya) provides as follows:

"316A(1) Any person who draws or issues a cheque on an account is guilty of a misdemeanor if the person –

(a) knows that the account has insufficient funds;

(b) knows hat the account has been closed; or

(c) has previously instructed the bank or other institution at which the account is held not to honour the cheque.

(2) Subsection (1) (a) does not apply with respect to a post-dated cheque.

(3) Any person who, by deceit or any other fraudulent means, assists a person to obtain anything on the basis of a cheque drawn or issued in the circumstances described in subsection (1) is guilty of a misdemeanor.

(4) A person who is guilty of a misdemeanor under this section is liable to a fine not exceeding fifty thousand shillings, or to imprisonment for term not exceeding one year, or to both.

11. This offence is to be read with Section 23 of the Penal Code dealing with liability of officer of corporations for offences committed by the corporation. It provides as follows:

"Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission."

The Respondents' case is that whereas the complainant has filed a civil suit number in CMCC No. 38 of 2015 Hassan Ibrahim T/A Goldtruck Services Limited vs. Rhoda Mutete Mutuku T/A Dalete Contractors Limited this action does not bar the 2nd Respondent from instituting criminal proceedings against a culpable party pursuant to Section 193A of the Criminal Procedure Code. Section 193A of the Criminal Code provides that:

"Notwithstanding the provision 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 proceeding shall not be a ground for any stay, prohibition or delay of the criminal proceedings."

12. The Respondents submitted that the Petitioner has not stated in particular which fundamental freedoms in the Bills of Rights under the constitution are being violated. As a general rule, the Director of Public Prosecutions has the mandate to do his work without interference. Courts will only intervene where there appears to be abuse of office.

13. This Court is persuaded by the submissions of Respondents. The 2nd Respondent has not contravened the laid down standards provided under the constitution and the Office of the Director of Public Prosecutions Act to warrant this court to review its decision. The principle that runs across the proceedings in the nature instituted by the Petitioner herein is that the court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the constitution and that the mere fact investigation have been done and the Director of Public Prosecutions may institute a criminal case against Petitioner is not a ground for halting those proceedings by way of Petition. The Petitioner has not demonstrated how the intended criminal proceedings that 2nd Respondent intends to carry out constitute an abuse of process.

14. In Nairobi HCCC No. 1729 of 2001 **Thomas Mboya Oluoch & Another vrs. Lucy Muthoni Stephen**: Ojwang J (as he then was) stated:

“...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense.. I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes.”

15. From the proceedings herein, this Court believes that there are reasonable grounds to believe that the Petitioner herein issued 9 cheques drawn on Equity Bank, Kengeleni Branch, No. A/c No. 11240261644271 on behalf of the Dalete Contractors Limited knowing well that account No. A/c No. 11240261644271 had no sufficient funds. Under Section 316 A(1) (a) and 316 A(1) (c) of the Penal Code, Cap 63 Laws of Kenya it is a crime to issue a bad cheque. The said Section provides that:-

“316 Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person—

a) knows that the account has insufficient funds;

b) knows that the account has been closed; or

c) has previously instructed the bank or other institution at which the account is held not to honour the cheque.”

16. The question that arises from the foregoing is whether the Petitioner deserve being granted anticipatory bail? In **W’Njuguna versus Republic, Nairobi Misc. Cr. Case No. 710 of 2002, [2004] 1 KLR 520**, the Court held that anticipatory bail can be granted:-

“...when there are circumstances of serious breaches of a citizen’s rights by an organ of the state which is supposed to protect the same.”

17. In this petition the Court is called upon to determine:

(a) Whether or not the actions of the Respondents amount to infringement of the Petitioners fundamental rights.

(b) Whether or not the circumstances of this case are eligible for the grant of anticipatory bail.

18. On the first issue it is the finding of this Court that the Respondents acted within the law and have not infringed on the Petitioner’s rights and freedoms. The Petitioner has alleged violation of her rights without specifying how the conduct of the Respondents has resulted in or pose a risk of violation. The Petitioner has not pointed out any right and/or fundamental freedom that has been violated. The Petitioner is however apprehensive that investigations are being undertaken and she fears that she will be arrested. Has the investigation infringed on the petitioner’s rights? Investigations are a fundamental step in the justice chain to ensure that people are not charged unnecessarily and therefore cannot be said to be a threat to the Petitioner’s right unless the investigations have been conducted unprocedurally and/or for an ulterior motive which is not the case herein. A complaint was made to the police vide OB NO. 40/4/6/2015. Following the complaint investigations were launched by the Police as is the duty of the Police under law. In fact the police are required to investigate every complaint as was held in the case of **Republic vs. Commissioner of Police and Another ex-parte Michael Monari & Another (2012) EKL**R where the court stated that:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be falling in their constitutional mandate to detect and prevent crime..... The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court.”

19. While conducting their investigations the Police sought the attendance of the Petitioner so as to record her statement. However the Petitioner declined to avail herself. To date she has not been arrested. The Police have taken all steps to ensure that the investigations are conducted procedurally. It cannot be said that the investigations have been carried out unprocedurally and/or unfairly. The Petitioner should not therefore be allowed to cast aspersions on the conduct of the investigation. Upon conclusion of investigations and forwarding of the investigation file to the 2nd Respondent, a decision is by law to be made on whether or not to charge the Suspect. That decision will not be made capriciously. It will be based on the National Prosecution Policy.

Paragraph 3 at page 6 of the NATIONAL PROSECUTION POLICY states as follows:-

“In exercising the prosecution mandate the DPP is constitutionally bound to have due regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This provision applies equally to the DPP and officers acting on his or her behalf. This requirement is generally accepted as an international best practice whose origins are in common law.”

20. This Court believes that there are enough safeguards to ensure that the Petitioner’s fundamental rights and freedoms are protected. The Petitioner’s argument that civil proceedings have been instituted by directors of Goldtruck Service Limited to recover a civil debt and that criminal proceedings should not be commenced against her has no legal ground.

Section 193A of the Criminal Procedure Code provides that:-

“193A 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 proceeding.”

21. It is plain from the reading of Section 193 A of Criminal Procedure Code that if any matter in issue in criminal proceedings is also directly or substantially in issue in any pending civil proceedings that should not be a ground for any stay, prohibition or delay of the criminal proceedings. The directors of Gold Truck Services Limited have a right to pursue their creditors. The fact that a civil case for recovery of a debt has been instituted should not therefore be a reason to stay, prohibit or delay criminal proceedings if a decision to prosecute is reached. Mere apprehension by the petitioner that she will be arrested due to the fact that investigations are being carried out does not meet the threshold for grant of anticipatory bail (***See the case of. ERIC MAILU vs. REPUBLIC & 2 others [2013] eKLR***). Should the investigations culminate in the arrest of the petitioner, arrest and arraignment are known processes of the legal system and per se do not amount to infringement on the fundamental rights and freedoms of the Petitioner (***See the case of ERIC MAILU v REPUBLIC & 2 Others [2013] eKLR***). In any case the Petitioner will be entitled to bail as provided by the Constitution.

22. From the foregoing this Court finds that the petition before the Court lacks merit and is herewith dismissed with costs to the Respondents.

That is the Judgment of the Court.

Dated, Signed and delivered in Mombasa this 26th day of March, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Isaboke for DPP

Mr. Nguyo for AG

Mr. Kaunda Court Assistant