



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

JR.MISC.APPLICATION NO. 1 OF 2017

IN THE MATTER OF AN APPLICATION BY CHARLES MUSEE KYAKA AND EASTON PHARMACEUTICALS LIMITED FOR JUDICIAL REVIEW ORDERS OF PROHIBITION

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

IN THE MATTER OF THE CIVIL PROCEDURE ACT, CAP 21, LAWS OF KENYA

BETWEEN

CHARLES MUSEE KYAKA.....1ST APPLICANT

EASTON PHARMACEUTICALS LIMITED.....2ND APPLICANT

VERSUS

INSPECTOR GENERAL,

NATIONAL POLICE SERVICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

PATRICK K. KATA.....INTERESTED PARTY

RULING

1. Pursuant to leave granted by this Court on the **23rd January, 2017**, the Exparte Applicant, **Charles Musee Kyaka** filed a Notice of Motion dated the **24th January, 2017** seeking an order of prohibition to issue directed against the Respondents prohibiting it and/or officers at Mwingi Police Station and/or the Respondent's agents or otherwise, whomsoever, from summoning, harassing, intimidating, threatening to arrest and/or arresting the Exparte Applicant in relation to any dispute pertaining to the sale agreement dated **15th March, 2011**.

2. The application is based on grounds that on **23rd April, 2010** CFC Stanbic Bank offered a loan facility in the sum of **Kshs. 3,187,620/=** to **Easton Pharmaceuticals Limited** where the Exparte Applicant is a director and he purchased a motor-vehicle Registration No. **KBL 069K**, Mitsubishi Canter

(Subject motor-vehicle).

3. On the **15th March, 2011** the Exparte Applicant entered into a sale agreement to sell the subject motor-vehicle to **Patrick K. Kata** at **Kshs. 2.5 Million** who was to take over the loan at the CFC Stanbic Bank. The vehicle was to be transferred on payment of the total sum.

4. In breach of the agreed terms and conditions of the agreement the Interested Party did not take up the loan thereby forcing the Exparte Applicant to pay interest on the loan in the sum of **Kshs. 1,038,224/=** to avoid the motor-vehicle being repossessed. In the meantime on the **17th January, 2017** **Mr. Mwongera**, the DCIO Mwingi Police Station, summoned him (Exparte Applicant) and demanded the release of the log book of the motor-vehicle. Despite presenting all sale documents to the DCIO he still demands for the log book the only lien he has over the motor-vehicle.

5. That the 1st Respondent's agents in abuse of their powers have decided to intervene in a contractual dispute between the Exparte Applicant and the Interested Party. That the act of summoning the Exparte Applicant offends public policy doctrine that grievances of a civil or contractual nature should be addressed through civil action as opposed to criminal proceedings.

6. That the Exparte Applicant is entitled to the protection and benefit of Law under **Article 27** of the **Constitution** where the Court should protect him from harassment, intimidation, mental anguish and suffering through the abuse of the criminal justice system.

7. The Exparte Applicant swore an affidavit verifying facts alluded to.

8. In response, **No. 219790 SSP Simon Mwongela** the DCIO, Mwingi filed a replying affidavit where he averred that the Exparte Applicant failed to provide them with original documents of loan application or log book documents that he was waiting for in order to investigate claims lodged by the Interested Party. That he is obligated to ensure the protection of the rights of the Interested Party as enshrined in the **Constitution of Kenya, 2010**.

9. The Interested Party filed a replying affidavit where he deponed that the purchase price of the subject motor-vehicle was **Kshs. 2.5 Million** which he paid. Thereafter the Exparte Applicant wrote to him requiring payment of **Kshs. 1,170,780/=** that he had been charged by the bank. He wrote back disputing the issue of payment of interest and asked for the logbook. That he later learnt that the **Kshs. 90,768/=** was interest included in the amount he used to pay to settle the **Kshs. 2.5 Million**.

10. That when he instructed his advocates to demand for the log book the Exparte Applicant demanded for payment of the interest. That the conduct of the Exparte Applicant prompted him to report the matter to the police as there existed a fraud element in the transaction.

11. A further affidavit was filed by the Exparte Applicant without leave of Court.

12. The application was canvassed by way of written submissions that I have considered.

13. The prerogative order sought of prohibition is discretionary. In granting such an order the Court must consider the conduct of the party applying. I must also consider if it is really necessary to grant it and if it will serve any purpose.

14. In the case of **Kenya National Examination Council vs. Republic Exparte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR** the Court stated that:

“What does an order of prohibition do and when will it issue? It 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 for 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 Halsbury’s Law of England, 4th Edition. Vol. 1 at Page 37 paragraph 128.”

15. In the case of **Meixner & Another vs. Attorney General (2005) 2 KLR 189**, the Court of Appeal stated that:

“Judicial Review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

16. The contention of the Exparte Applicant is that the Respondents through the DCIO, Mwingi is harassing him following a dispute arising from the sale agreement they entered into. He admits having received the **2.5 Million** the purchase price for the subject motor-vehicle that he sold but argues that the Interested Party failed to interpret the terms of the agreement which according to him meant he was to pay the interest on the loan facility. This would be a matter to be determined by a Civil Court. It is however argued by the 1st Respondent that though the dispute between him and the Exparte Applicant may be commercial in substance the police are not barred from investigating the matter as an offence may have been committed.

17. The argument of the 1st Respondent is that the transaction and the dispute between the two (2) parties is purely commercial in nature but the introduction of new terms of the agreement has a criminal element which calls upon them (police) to investigate whether the Exparte Applicant received the **2.5 Million** and/or obtained money by false pretences contrary to **Section 313** of the **Penal Code**. Further, that it would be a failure of criminal justice system to fail to investigate the complaint lodged by the Interested Party.

18. In **Republic vs. Chief Magistrate’s Court at Mombasa Exparte Ganijee & Another (2002) 2 KLR 703** it was held that:

“It is not the purpose of a criminal investigation or criminal charge or prosecution to help individuals in the advancement of frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to a person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement... In this case it (High Court) is asked to step in to grant an order of Prohibition. Prohibition looks into the future and can only stop what has not been done...”

19. The Interested Party herein having paid the **2.5 Million Shillings** stipulated in the sale agreement attempted to get the log book of the motor-vehicle from the Exparte Applicant in vain. Failure to obtain it left him frustrated. On the face of it there arose a dispute for the purported breach of contract. The 1st Respondent’s officer on receipt of the complaint and even having read the sale agreement entered into by the parties decided to help the Interested Party by summoning the Exparte Applicant and further directing him to avail the original document. As an officer in charge of the Divisional Criminal Investigation Office, he should have been aware that he was vigorously supporting the Interested Party’s civil cause in a civil dispute. He was acting unlawfully as he departed from the rules of natural justice and indeed it was in excess of his official power. It was erroneous on his part to make the Interested Party believe that

he could be assisted by the criminal law to settle his civil cause.

20. In the premises I find merit in the application. Therefore, an order of prohibition be and is hereby issued prohibiting the 1st Respondent and the DCIO Mwingi in particular from intimidating the Exparte Applicant in relation to the dispute arising from a sale agreement dated the 15th day of **March, 2011**.

21. Costs of the application are awarded to the Exparte Applicant against the 1st Respondent.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 20th day of February, 2018.

L. N. MUTENDE

JUDGE