REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 36 OF 2014

IN THE MATTER OF AN APLICATION BY PATRICK GACHOKA MWANGI

IN THE MATTER OF THE PENAL CODE CAP. 63 LAWS OF KENYA

AND

IN THE MATTER OF ABUSE OF POLICE POWERS, THE

CONSTITUTION AND THE COURT PROCESS

BETWEEN

PATRICK GACHOKA MWANGI……..……APPLICANT

-VERSUS-

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

MWANGI KIRATHE NYAMU.....2ND RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 18th June, 2014, he ex parte applicant herein **Patrick Gachoka Mwangi,** (improperly described as the applicant in these proceedings since the applicant ought to be the Republic) seeks the following orders:

> **1. THAT a prohibitory order do issue directed at the Director of Public Prosecutions, the Inspector General of Police and/or any other officer acting under them prohibiting them from arresting, charging and/or instituting any criminal proceedings against Gachoka Mwangi (the applicant) in respect of Cheque No. 100322 for Kshs 80,000/= drawn on account No. [particulars withheld] Barclays Bank, Queensway Branch on 19th December 2013.**
>
> **2. THAT costs of the Chamber Summons and this Notice of Motion be borne by the 2nd respondent – Mwangi Kirathe Nyamu.**

Applicant's Case

2. According to the applicant, on 17th of January 2009 the 2nd respondent herein, **Mwangi Kirathe**

Nyamu, instructed him to pursue a suit for compensation arising out of a fatal road accident that happened on 28th December, 2008 involving his son. Pursuant thereto, the applicant advised him for such a matter, there was a need to first obtain a Limited Grant for Administration (sic) and thereafter file the main suit for compensation.

3. Upon perusing the matter, the applicant averred that he called the 2nd respondent to his office in order to discuss the issue of fees payable to the applicant and as per the instructions note the 2nd respondent had signed for the applicant's office it was agreed that by way of a gentleman agreement that applicant would pay his said client Kshs 100,000/= which was not in dispute and thereafter the applicant was to tax his bill of costs under Schedule V of the Advocates Remuneration Order to determine the actual fees payable to his office. This was explained as due to the fact that the 2nd Respondent insisted to be paid a minimum of Kshs 250,000/= while the applicant insisted he should be paid a maximum of Kshs 200,000/=.

4. It was averred that further to the foregoing, on 19th December 2013 the applicant paid the 2nd respondent Kshs 20,000/= cash and issued to him Cheque No. 100322 for Kshs 80,000/= on account No. 0948844443 at Barclays Bank Queensway branch. However the 2nd respondent called the applicant on or about 26th of December 2013 indicating that the cheque issued to him was returned to him unpaid on account of insufficient funds. According to the applicant, the said sentiments took him by surprise as by the time he drew the cheque on 19th December, 2013 he was sure there were enough funds in his account to cover a promissory note of Kshs 80,000/=.

5. Accordingly, the applicant averred that he rushed to his bankers to find out what the problem could be and on arrival was informed that by the time the 2nd respondent presented the cheque for payment which was 24th December, 2013 the account had been overdrawn below Kshs 80,000/= and therefore the cheque could not be honoured. He accordingly called the 2nd respondent to inform him that indeed the account had inadvertently been overdrawn but that the applicant was ready to replace the said cheque by cash. Although the applicant asked for 2nd respondent's bank account to be forwarded the said Kshs 80,000/= by way of Electronic Transmission the 2nd Respondent refused to send his bank account number and opted to go to the applicant's office on 13th January 2014 when he could be paid the said Kshs 80,000/=. Upon arriving at the applicant's office, however, the 2nd respondent refused to take the Kshs 80,000/= which was ready in cash and insisted he must be paid Kshs 250,000/= contrary to their earlier agreement for payment of Kshs 100,000/= first and then await taxation of our bill of costs.

6. It was averred hat the 2nd respondent immediately rushed to the Central Police Station to report the applicant for the offence of issuing a bad cheque a situation he knew was not correct as all the time the applicant was ready to replace the said cheque which had failed to be honoured on pure inadvertence and where there was no criminal intent at all or at any time.

7. It was disclosed that as earlier agreed the applicant filed his bill of costs in order to determine the actual fees payable to his office. However the 2nd Respondent having made a report to the Central Police Station the applicant was called by a police officer **PC Kuranga** to explain his side of the story and he duly went there on 27th January 2014.

8. The applicant contended that contrary to known principles of investigations and despite his indication to the said police officer that there were Bills of Costs pending in court and that he was still willing to replace the cheque which by pure inadvertence became bad the officer still proceeded to take the applicant's finger prints and bond him to appear in court on 7th February 2014 under the offence of issuing bad cheque.

9. The applicant was of the view *that t*he actions by 2nd respondent and the police officers, Central Police Station, were actuated by malice, intended to intimidate him in the course of his duties, amounted to harassment and were unconstitutional as he had not committed any criminal offence. He asserted that it was wrong for parties and the police force to use the powers bestowed on them to harass others in the

course of their duties (in this case an Advocate) and otherwise interfere with what is purely a civil matter. The applicant disclosed that among the Bills of Costs referred to the first one Nairobi Misc. Application No. 3 of 2014 was taxed and was allowed on 14th May 2014 at Kshs 41,673/= while the 2nd one Kerugoya Misc. Application No. 1 of 2014 was due for taxation on 3rd July 2014. However despite notifying the 2nd respondent of the fact the 2nd respondent has refused and/or declined to collect the same.

10. It was the applicant's case that the charges proposed against him were intended to embarrass him as an advocate, exert undue pressure on him so that he withdraw his bills of costs and go by the demands of the 2nd respondent. Indeed if 2nd respondent was genuine in his action he would have referred the matter to the Advocates Complaints Commission which is the body mandated to deal with indiscipline of advocates assuming there was anything bad in the first place.

1st Respondent's Case

11. The application was opposed by the 1st Respondent and in so doing the following grounds of opposition were filed:

1. The applicant has not demonstrated that in undertaking prosecution the respondents acted without or in excess of power conferred upon them by the law or have infringed, violated, contravened in any manner or failed to comply with the constitution or any provisions of any other written law.

2. The decision to charge the applicant was informed by the sufficiency of evidence on record and public interest and not other considerations.

3. That accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed by the trial court.

4. That applicant has not demonstrated that the DPP has not acted independently or has acted capriciously, in bad faith or has abused, the process in a manner to necessitate intervention of the High Court.

5. That applicant has not demonstrated the manner in which the alleged constitutional provisions have been infringed in relation to him.

6. The public interest underlying public prosecution tilts against private interest of the petitioner to be protected by law.

7. The application does not meet the threshold for grant of judicial review orders.

Determinations

12. I have considered the material presented before the court in the instant application.

13. In this case, it is clear that the whole dispute between the parties herein rests on the sum due and owing from the ex parte applicant to his client. However that does not necessarily warrant the order barring the 1st Respondent from instituting criminal proceedings against the ex parte applicant if the applicant did issue a cheque which was dishonoured.

14. In this case however the ex parte applicant's case, which is not factually controverted since none of the respondents have filed replying affidavits, is that the reason for putting into motion the criminal process is to force him to abandon the quests for his costs owed to him by the 2nd Respondent, his client.

15. **Majanja, J** in Petition No. 461 of 2012 – **Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions**, when dealing with situations where there exist criminal and civil proceedings

arising from the same facts pronounced himself as follows:

> **"It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State's coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent."**

16.In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69,** the High Court held:

> **"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. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the applicants in order to settle the civil dispute".**

17. The Court went further to hold that:

> **"It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made to charge the accused persons, the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks. An order of prohibition looks to the future and not to the past; it is concerned with the happenings of future events and little, if any, of past events...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear**

for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they were have already been made...However, it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy. The courts have, however stated that the power to issue an order of prohibition to stop a criminal prosecution does not endow a court to say that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts, or to say that a person should never be prosecuted in criminal proceedings when he has a civil suit against him relating to matters in the criminal proceedings...."

18.It is therefore clear that this Court has the power and indeed the duty to bring to a halt criminal proceedings where the same are being brought for ulterior motives or for achievement of some collateral purposes notwithstanding the constitutional and legal powers conferred upon the DPP and the police. In **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** the Court of Appeal held:

"It is trite that an Order of Prohibition 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 in 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...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

19.In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the same Court expressed itself as hereunder:

"The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion if acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of

the Constitution... 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 if 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."

20. Whereas the mere fact that the facts of the case constitute both criminal and civil liability does not warrant the halting of the criminal case, in **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, it was held:

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations 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 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. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

21.It was similarly held by the Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR** that**:**

"While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations"

22. The role of police in criminal process was recognised in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing 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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

23. However, it was similarly appreciated in **R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001** that:

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".

24. In this case, the person who ought to have been at the forefront in ensuring the wheels of the criminal process runs, the 2nd Respondent herein seems to have taken a back seat in the whole process.

25. In the absence of the participation of the complaint in the criminal process and in absence of an affidavit emanating from the 1st Respondent showing the basis upon which it arrived at the decision to commence criminal proceedings against the ex parte applicant, it is my view that in the instant application the prosecutor has not demonstrated that he has a reasonable and probable cause for mounting a criminal prosecution thus rendering the prosecution malicious and actionable. As was held in **Githunguri vs. Republic (1985) KLR 91:**

"A prosecution is not to be made good by what it turns up. It is good or bad when it starts."

Order

26. In the premises, I find merit in the Notice of Motion dated 18th June, 2014, and I grant the following orders:

1. An order of prohibition do issue directed at the Director of Public Prosecutions, the Inspector General of Police and/or any other officer acting under them prohibiting them from arresting, charging and/or instituting any criminal proceedings against Gachoka Mwangi (the applicant) in respect of Cheque No. 100322 for Kshs 80,000/= drawn on account No. [particulars withheld]Barclays Bank, Queensway Branch on 19th December 2013.

2. As these proceedings were instituted wrongly in the name of the ex parte applicant instead of the Republic, there will be no order as to costs.

27. It is so ordered.

Dated at Nairobi this 16th day of November, 2017

G V ODUNGA

JUDGE