



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.546 OF 2015

BETWEEN

ASHISH KAMPANI.....PETITIONER

AND

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

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE....2ND RESPONDENT

THE CHIEF MAGISTRATE’S COURT, KIBERA.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Ashish Kampani, is the accused person in **Kibera C.M’s Criminal Case No.4365 of 2015** where he is facing one count of the offence of obtaining money by false pretence contrary to **Section 313** of the **Penal Code**. It was alleged in that regard that on diverse dates between 18th May and 4th June 2015, jointly with others not before the Court, with intent to defraud, he obtained Kshs.5.3 Million from Titus Wandau Kimondo by falsely pretending that he was in a position to sell him “a new Backhoe loader ACE AX-150”, a fact he knew to be false.
2. After taking plea and denying the said charge, on 9th October 2015, he was released on a cash bail of Kshs.700,000/- and he thereafter instituted the present Petition claiming that his prosecution is oppressive, vexatious and an abuse of Court process as it is being used as a means of exerting pressure for him to settle a purely civil dispute between him and Titus Wandau Kimondo, the complainant in the criminal case.
3. He therefore prays for the following orders;

“a) A declaration that the criminal proceedings at the Chief Magistrate’s Court at Kibera Criminal Case No.4362 of 2015 accusing the Petitioner of obtaining under false pretences contrary to Section 313 of the Penal Code is illegal and unconstitutional.

b) A prohibition do issue against the Respondents prohibiting the Respondents from continuing with the criminal proceedings at the Chief Magistrate’s Court at Kibera

against the Petitioner charging him with the offence of obtaining under false pretences contrary to Section 313 of the penal Code.

c) Costs of this Petition.

d) Any other relief this Honourable Court may deem fit to grant.”

Petitioner’s Case

4. The Petitioner’s case is contained in his Petition aforesaid, Supporting Affidavit sworn on 9th December 2015 together with its annexures as well as Submissions filed on his behalf on 29th January 2015.
5. The facts forming the background to his case are that he is a Director of Poweron (East Africa) Ltd, a company that deals with moving equipment and material handling equipment. That sometime in October 2014, one Peter Kimani approached him as an agent on behalf of an undisclosed principal seeking to purchase a back hoe loader. As none was available, the Petitioner ordered one from India and which arrived at the Port of Mombasa in December 2015. It was his deposition in that regard that the loader was not specifically delivered for Mr. Kimani’s client but when the latter returned in January 2015, he agreed to negotiate with his principal for purchase of the loader.
6. Later, upon inspection of the loader, Mr. Kimani and his principal, identified as Mr. Kimondo aforesaid, agreed to purchase it and on 18th May 2015, a deposit of Kshs.500,000/- was paid by Mr. Kimondo and on 4th June 2015, a cheque of Kshs.4.8 Million was paid on his behalf by CFC Stanbic Bank.
7. Thereafter, the loader was registered in the name of Mr. Kimondo and after CFC Stanbic Bank had installed a tracking device on it, the purchaser took possession of it. After a week, he alleged that it was faulty and an engineer was sent to inspect it. The engineer allegedly found no fault with it but without notice Mr. Kimondo returned it and dumped it at the premises of the Petitioner’s company. Thereafter the criminal charges were instituted against the Petitioner hence the Petition.
8. His further case in the above context is that the dispute, if at all, is purely civil and that the institution of criminal charges against him was made in bad faith as Mr. Kimondo neither bought the loader from himself nor from his company.
9. Lastly, that the charges, malicious as they are, amount to a violation of his constitutional rights and the orders elsewhere reproduced above should be granted.

Respondents’ Case

10. The 3rd and 4th Respondents filed no response(s) to the Petition but the 1st and 2nd Respondents filed a Replying Affidavit sworn on 7th January 2016 (together with annexures) by Jairus Namiti, a police officer attached to the Directorate of Criminal Investigation.
11. Submissions were also filed on behalf of the said Respondents on 3rd February 2016 and it is their case that the Petition is completely misguided as the Petitioner is urging his innocence before the wrong Court. That on the facts as elsewhere set out above, upon Mr. Kimondo had lodged a complaint on 22nd June 2015 at the Directorate of Criminal Investigations and after investigations were conducted they revealed that “the Petitioner received the price money by falsely pretending that he was in a position to sell him a new back hoe loader while knowing it to be false as he sold him a second hand and/or used machine – see para 11 of the Replying Affidavit.

12. Thereafter, the 1st Respondent in exercise of powers conferred upon him by **Article 157** of the **Constitution** took the decision that there was sufficient evidence to charge the Petitioner and he did so.
13. In addition to the above, it is the case for the 1st and 2nd Respondents that the fact that the dispute between the Petitioner and Mr. Kimondo may be civil in nature, is no bar to the institution of criminal proceedings in view of the provisions of **Section 193A** of the **Criminal Procedure Code** which allows parallel proceedings in appropriate cases.
14. Lastly, that it has not been demonstrated that the 2nd Respondent has abused his powers in preferring the charging of the Petitioner and it is in the public interest that all crimes should be pursued to their logical conclusion without interference with the independence of the office of the 1st Respondent.
15. For the above reasons, the 1st and 2nd Respondents pray that the Petition be dismissed.

Determination

16. I have read the Petition, the response to it and the submissions by parties. In the Petition, it is alleged that **Articles 27 (protection from discrimination and right to equality before the law), Article 39 (freedom of movement) and Article 157 (11)** (obligation placed on the 1st Respondent when exercising his mandate, including having regard to the administration of justice and to avoid abuse of the Court process) have been violated. However, I am satisfied that the substantive question to address is whether in the circumstances elsewhere set out above, the 1st Respondent, having received Mr. Kimondo's complaint made to officers reporting to the 2nd Respondent, had lawful reasons to have the Petitioner arraigned in Court and whether by so doing he acted unconstitutionally.
17. In framing the above issue for determination, I note that not a single complaint has been made that the 3rd and 4th Respondents acted unlawfully in any respect. Further, allegations of a violation of **Articles 27 and 39** will be addressed as I address the above issue.
18. In that regard, I note that in her written submissions, Counsel for the Petitioner stated that under **Section 4 of the Office of DPP Act, No.2 of 2013**, the DPP, in furtherance of the expectation of **Article 157(11)** is also to be guided by the following fundamental principles:
- a. The diversity of the people of Kenya
 - b. Impartiality and gender equity.
 - c. The rules of natural justice.
 - d. Promotion of Public confidence in the integrity of the office.
 - e. The need to discharge the functions of the office on behalf of the people of Kenya.
 - f. The need to serve the cause of justice, prevent abuse of the legal process and public interest.

 - g. Protection of the sovereignty of the people.
 - h. Secure the observance of democratic values and principles.
 - i. Promote constitutionalism.
19. In applying the above principles, Counsel relied on the decisions in **Guantai vs CM's Court [2007] 2E.A 170, Meixner & Anor vs AG [2005] KLR, Kuria & 3 Others vs AG [2002] KLR 69 and R vs CM's Court exparte Ganijee & Anor [2002] KLR 703** which were all generally to the effect that in exercising prosecutorial powers, the prosecutor (formerly the AG and now the DPP) must exercise that discretion lawfully and not to contravene fundamental rights and freedoms of suspects. Further, that criminal charges should not be pursued for ulterior motives including in pursuing or frustrating civil cases.

20. It was her other submission that in the totality of the circumstances leading to the charging of the Petitioner, the 1st and 2nd Respondents abused the Court process by mounting a trial in an otherwise clear civil dispute, harassed and intimidated the Petitioner to refund the purchase price for the loader to Mr. Kimondo. That such conduct is illegal and unconstitutional and the orders elsewhere reproduced ought to be granted.
21. On their part, the 1st and 2nd Respondents submitted that the Petitioner, aside from making bare allegations, has failed to show how the DPP abused his powers or the Court process. In any event, that all the evidential issues raised can only be interrogated by the trial Court and not this Court. Reliance in that regard was placed on the decision of **Thuita Mwangi & 2 Others vs EACC & 3 Others, H.C. Petition No.369 of 2013**.
22. It was their other submission that it is in the public interest that the 1st and 2nd Respondents are allowed to perform their obligations under the Constitution and Statute and following the decision in **R vs Kenya National Human Rights Commission ex parte Uhuru Kenyatta, Misc. Application No.86 of 2009**, such public interest must sometimes override individual interests.
23. On the submission that the Petitioner was only acting on behalf of a company and is therefore not criminally liable, the 1st and 2nd Respondents submitted in response that under **Section 23 of the Penal Code**, it is not enough to take such a position and hide behind the veil of the company without showing that there is absolutely no connection between him and the company. In this case because he had admitted that he is a director of Poweron (E.A.) Ltd., its actions are intertwined with those of the Petitioner.
24. As to the claim that the dispute is a purely civil one, the 1st and 2nd Respondent's relied on the decision in **William S.K Ruto & Anor vs AG HCCC 1192/2005 and Section 193A of the Criminal Procedure Code** to argue that such a defence is not available to the Petitioner.
25. Lastly, it was submitted on behalf of the above Respondents that following the decision in **Paul Ng'ang'a vs DPP & Anor Constitutional Reference No.483 of 2012**, where a party has been unable to particularise how his fundamental freedoms and rights have been violated or are threatened with violation, no favourable orders can issue to such a party. It was their submission that the Petitioner had failed that test and his Petition therefore ought to be dismissed.
26. In the above context, I should begin by stating that whereas the 1st and 2nd Respondents have the mandate to investigate and prosecute crimes, that mandate must take into account the fundamental principles in *inter alia* **Article 157(11) of the Constitution** and **Section 4 of the Office of DPP Act** which have been reproduced above. For avoidance of doubt **Article 157(11)** provides as follows;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

(10) ...

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

27. It is also true that under **Article 165(3)(d) (ii)** if the DPP or indeed the police act in contravention of the above principles, this Court has the constitutional duty to render itself on the subject. That position has been well expressed in **Thuita Mwangi (supra)** where the Learned Judge stated thus:

“The Court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the Court process. As the Kuloba J, observed in Vincent Kibiego Saina vs Attorney General, where the prosecution is seen as amounting to an abuse of the process of the Court, the Court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of the Court, the Court will unhesitatingly step in to stop it.”

28. In applying the above principles to the present case, only two issues of relevance were raised by the Applicant regarding alleged abuse of process by the 1st and 2nd Respondents vis:

- i. Whether the dispute between the parties is a purely civil one and therefore not one for resolution through the criminal process and;
- ii. Whether therefore there is a violation of the Constitution by all the Respondents as alleged.

29. In addressing issue No.(1) it is the position of this Court, that the fact that a dispute has both civil and criminal elements is *per se* not a ground for terminating on-going criminal proceedings.

30. This is because the law anticipated such a situation hence the provisions of **Section 193A** of the **Criminal Procedure Code** 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.”

31. In **Paul Ng’ang’a vs DPP (supra)**, the Learned Judge appreciated that fact and stated as follows:

“14. Section 193A of the Criminal Procedure Code highlighted above gives light to the possibility of criminal and civil proceedings subsisting concurrently over the same or similar issues. An examination of the issues at hand manifests an intricate correlation of the issues in the different Courts to the extent that the outcome of one matter will inadvertently impact on the other.”

“15. The Subordinate Court is inquiring into allegations of a criminal nature and it is my considered view that the process should not be halted on account of the civil appeal of which I am not seized. This is not to state that if the High Court which is seized of the civil appeal finds that the proceedings in CM Cr.1298 of 2011 in the Subordinate Court may embarrass the proceedings in the High Court Civil Appeal No.335 of 2012, it cannot arrive at a different decision from mine.”

32. Further, in **William S.K Ruto & Anor vs AG (supra)** the Court was in fact confronted with a

situation where there were existing civil proceedings relating to the subject matter of the criminal charges that the Applicants were facing but nonetheless the Court stated that since no good reason had been preferred why the criminal proceedings should be terminated, the mere existence of the civil proceedings could not be a bar to the continuation of the criminal proceedings.

33. It is my conclusion and finding therefore that a civil dispute may be handled simultaneously with criminal proceedings on the same subject matter. But having so said, there is still the question whether in the circumstances of this case, and in answering issue No.2, the Respondents in any way acted unconstitutionally. In that regard, it is not the place of this Court to analyse the evidence whether the charge of obtaining money by false pretence can be proved as against the Petitioner. That is why in **Meixner vs AG (supra)**, the Court of Appeal stated thus:

“It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge.”

34. Turning back to the alleged violation of the Constitution, I would have expected the Applicant to show malice, ulterior motive (not merely an argument that the dispute is a civil one) and manipulation of the Court process but in the Petition, Supporting Affidavit and submissions, not one instance nor an iota of evidence was placed before me in that regard. Like the Learned Judge in **Kuria & 3 Others vs AG (supra)** without such evidence, it is very difficult to find fault in the conduct of the Respondents. In that case the Learned Judge stated thus:

“There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution. In the instant case, the applicants have stated that there is an abuse of the process of the Court by the A.G. Several allegations have been levelled against the state that there is selective prosecution, that there is harassment of the Applicants and pressure from the state to settle the civil dispute ... I have not seen any evidence of these allegations made against the state.”

He then stated:

“There is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under Section 77 of the Constitution... There is need to show how the process of the court is being used or misused. There is a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution ...”

He went on to state:

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whoever means ... Given these bi-polar considerations, it is imperative for the court to balance these consideration vis-à-vis the available evidence ... However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of the court processor that there is a danger to the right of the accused person to have a fair trial.”

35. I completely agree and would only add that it may be true that the Applicant is innocent of the charges that he is facing but the proper forum to prove that innocence, if at all, is the trial Court and not this Court once I have found no proof of violation of constitutional rights. I say so

because without proof of any breach of **Article 157(11)**, I see no basis for interrogating alleged breaches of **Articles 27 and 39** of the **Constitution**. The same finding applies to the question whether the action undertaken by Poweron (EA) Ltd can lead to his prosecution as an individual.

Conclusion

36. Having held as above and turning back to the prayers in the Petition, once I have held that I see no unconstitutional conduct on the part of the Respondents, prayer (a) is not available to the Petitioner. Prayer (b) is consequential upon grant of prayer (a) and it is obvious that it cannot also be granted.

37. Regarding costs, no party should suffer costs as the criminal trial is on-going.

Disposition

38. For the above reasons, the Petition herein is dismissed. Let each party bear its own costs.

39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Ndege for 1st and 2nd Respondents

No appearance for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE