



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 451 OF 2015

BETWEEN

DANIEL SIMIYU OMALI

EDEN EQUIPMENT LIMITED..... PETITIONERS

AND

THE HON ATTORNEY GENERAL.....1st RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2nd RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3rd RESPONDENT

ODDS & ENDS LIMITED.....4th RESPONDENT

JUDGMENT

Introduction

1. The 2nd Petitioner has over some years had a cherished business relationship with the 4th Respondent. Their business dealings were perfect until sometime in July 2015 when cheques issued by the 2nd Petitioner in payment of furniture goods supplied by the 4th Respondent to the 2nd Petitioner were dishonoured upon presentment and the 4th Respondent quickly moved to lodge a complaint with the officers of the national police service under the command of the 3rd Respondent.

2. The 3rd Respondent then set about to investigate the complaint and in the process had to summon and question the 1st Petitioner. Believing that there exists only a commercial dispute, the Petitioners have now moved the court alleging that their constitutional rights and fundamental freedoms as guaranteed by the Constitution were being violated.

3. The Petitioners now ask the court to declare that the 1st Petitioner's arrest was a violation of his right to personal liberty and freedom. The Petitioners also seek orders to prohibit the institution and prosecution of the 1st petitioner in any criminal case for breach of contractual obligations.

Basic background facts

4. The facts do not generate any dispute, notwithstanding some dots of non-disclosure earlier in the proceedings.

5. The 4th Respondent deals in both home and office furniture. The 2nd Petitioner variously sources furniture for resale from the 4th Respondent. In May 2015, the 2nd Petitioner placed an order for assorted furniture from the 4th Respondent. The order was honoured and the furniture delivered on diverse dates prior to 15 June 2015. The 2nd Petitioner was billed in the amount of Kshs. 3,179,600/=. The 2nd Petitioner then issued cheques in the amount of the bill. There were four post valued cheques payable on diverse dates. Two of the cheques were payable on 16 June 2015. Another two were payable on 20 July 2015. The 4th Respondent presented the cheques for payment on the due dates but the same were dishonoured with the reason that the accounts lacked sufficient funds.

6. After the Petitioners were notified of the dishonor and no replacement cheques were issued or payment by tender made, the 4th Respondent Respondent complained to the National Police service that the petitioners had received goods through a false representation that they would pay for them. The 1st Petitioner was ultimately charged with an offence in Criminal Case No 1748 of 2015.

7. The investigations and the criminal proceedings brought by the Respondents prompted the instant Petition.

The Petitioners' case

8. The Petitioners' case is that the criminal justice system as invoked by the Respondents is merely intended to harass the Petition. The Petitioners contend that the dispute with the 4th Respondent is a purely civil dispute and does not merit the invitation of the criminal justice process. The Petitioner sought to demonstrate this by the fact that when the 1st Petitioner was being interrogated, the 4th Respondent's representatives were also present and that the 1st petitioner was informed by the 1st and 2nd Respondents' officers to settle the debt or risk arrest. The threats were basically to intimidate the Petitioners.

9. The Petitioners also contended that the intended charges did not meet the threshold of the law as was clearly spelt out under Sections 313 and 316A(2) of the Penal Code (Cap 63)..

10. The Petitioners contend that the Respondents are simply abusing the prosecutorial powers granted to the Respondents under Article 157 of the Constitution as the criminal proceedings have been instituted in bad faith and simply to exert pressure upon the Petitioners to settle the civil debt.

11. In the Petitioners submissions as highlighted by Mr Nick Omari, counsel largely repeated the Petitioners' case.

12. Counsel stated that the criminal case could not stand as no offence could be pegged to post dated cheques if the same were dishonoured. Counsel referred the court to Section 316(2) of the Penal Code which is to the effect that an offence could not attach on the basis of dishonoured cheques where the cheques were postdated. Additionally, counsel pointed out that the Petitioners were long time customers of the 4th Respondent and could not have possibly obtained items or goods under false pretence.

13. It was additionally counsel's submission that there was evident bad faith on the part of the Respondents when they interrogated the 1st Petitioner in the presence of the 4th Respondent's representatives and then directed the 1st Petitioner to go raise the monies due and payable to the 4th Respondent or risk being arrested and jailed. This fact was further exemplified by the fact that the 1st Petitioner was released on bond and further directed to raise the amounts due under the debt.

14. In support of the Petitioners' case, Mr Omari referred to various case law including the case of **Peter**

Macharia Ruchachu vs. Director of Public Prosecutions & Another [2014]eKLR where Justice Ngaah reiterated the generally accepted proposition that where criminal proceedings are commenced for other ulterior purpose other than for upholding criminal justice then the trial must be stopped. Counsel also referred to the cases of **R vs. Chief Magistrate's Court Mombasa ex p Ganijee & Another [2002]eKLR** and **Samuel Kamau Macharia & another vs. Attorney General & Another [2001]eKLR** for the same proposition. Counsel urged the court to allow the Petition with costs.

The Respondents' case

1st Respondent

15. The 1st Respondent filed short grounds of objection.

16. The 1st Respondent contended that the Petitioners had not proven any violation of their constitutional rights. Further it was also contended that the Petitioners had failed to set out with the requisite precision the nature of infringement of their constitutional rights.

17. Ms L Wawira who appeared for the 1st Respondent submitted that the matter was purely commercial and private. It did not involve the public and consequently the 1st Respondent was wrongly dragged to these proceedings.

The 2nd and 3rd Respondents

18. The 2nd and 3rd Respondents opposed the Petition and filed a Replying affidavit sworn by PC Emmanuel Korir. The 2nd and 3rd Respondents contended that the Petition did not meet the competency threshold as the Petitioners had failed to plead their case with precision. Additionally, the 2nd and 3rd Respondents contended that the Respondents had merely sought to satisfy their constitutional duty to investigate crime once a complaint had been lodged. It was further contended that the facts of the case revealed criminal culpability on the part of the Petitioners and that the 2nd Respondent had independently reviewed the facts and ascertained that the Petitioners were criminally culpable. Finally, the 2nd and 3rd Respondents contended that the mere fact that the facts disclosed a civil debt did not and could not absolve the Petitioners from any criminal liability if the facts revealed elements of crime.

19. Ms Katherine Kithiki who appeared for the 2nd and 3rd Respondents, while relying on the case of **Anarita Karimi Njeru vs. R [1979]KLR 154** submitted that the Petitioners had not demonstrated that their rights under the Constitution had been violated. Likewise, it was also contended that the Petitioners had not established that the investigations were tainted with any illegality or bad faith. Rather the Respondents were only executing a statutory and constitutional role in investigating the complaint lodged by the 4th Respondent. In this respect counsel relied on the case of **Cape Holdings Limited vs. Attorney General & Another [2012]eKLR** where the court made it clear that it is the duty of the police to receive and investigate complaints of criminal offences brought to it by any member of the public.

20. Ms Kithiki then relied on the cases of **Danson Buya Mungatana vs. Attorney General & 2 Others [2012]eKLR** as well as **Cape Holdings Limited vs. The Attorney General & Another (supra)** for the proposition that civil and criminal proceedings could run concurrently.

21. Finally, counsel submitted that the court ought to be reluctant in interfering with the criminal justice process as it was upto the 2nd Respondent to make a determination whether to prefer any criminal charges against the Petitioners and likewise as to whether or not the Petitioners were guilty of any offence, the trial court had the capacity to sieve the evidence and determine the Petitioners' guilty or innocence. In this regard counsel referred to the cases of **Meixner & Another vs. Attorney General [2005]eKLR**, **Michael Monari & Another vs. The Commissioner of Police & 3 Others [2012]eKLR** and **R vs. Attorney General ex p Kipngeno Arap Ngeny [2002]eKLR** and concluded that there was a factual foundation to institute the prosecution of the 1st Petitioner.

The 4th Respondent

22. The 4th Respondent's case was also relatively clear. It is contained in the Replying Affidavit of Peterson Irungu Mureithi sworn on 26 October 2015.

23. According to the 4th Respondent, the Petitioner owed the said Respondent money for goods sold and delivered. The 2nd Petitioner undertook to pay, issued post dated cheques to the 4th Respondent but upon presentment the cheques were dishonoured. Despite request for replacements, the Petitioners had failed to honour their promises to pay and this prompted the 4th Respondent to lodge a complaint with the 2nd and 3rd Respondents.

24. The 4th Respondent insisted that the Petitioners are culpable and that the facts established the offences of issuing bad cheques as well as obtaining goods by false pretence. Counsel Mr R Mutito who appeared for the 4th Respondent relied on the cases of **Francis Mwangi & Another vs. Republic [2015]eKLR** and **Samuel Ndung'u Gitau vs. Senior Resident Magistrate's Court Kiambu** to demonstrate that the facts of this case disclosed an offence. Counsel closed his submissions by referring the court to Articles 157 (10) and 245(2) of the Constitution which dictated respectively that the 2nd and 3rd Respondents exercise their respective powers to prosecute and investigate without any direction or control from any person.

Discussion and Determinations

25. The two issues for determination are; firstly, whether the criminal process is being used for purpose quite collateral to the intention of the criminal justice system. Secondly, is whether there is a foundational basis for the criminal charges preferred against the Petitioners.

26. There is no controversy that the 2nd Respondent is enjoined through the Constitution under Article 157 as promoted and supplemented by the Office of the Director of Public Prosecutions Act No.2 of 2013 to undertake investigations, commence prosecutions and even terminate prosecutions. There is also no doubt that under Article 245(4) of the Constitution and the provisions of the National Police Service Act (Cap 84), in particular Section 24, the National Police Service is mandated to investigate criminal offences and also enforce the law. The National Police Service is under the command of the 3rd Respondent.

27. The Constitution however also dictates that the Respondents do act within its confines: See Articles 157 and 244 of the Constitution. Article 244 in particular commands the National Police Service under whose wings the 3rd Respondent falls to “ *comply with constitutional standards of human rights and fundamental freedoms*”. The 2nd Respondent is also enjoined under Article 157(11) to “ *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*”. Where therefore the constitutional muster is not met or where any act or omission is inconsistent with the Constitution then the court will always be called upon to intervene: see Article 165(3)(d)(ii) of the Constitution as well as the case of **Ndarua vs. Republic [2002] 1 EA 205**.

28. I would consequently not agree with the Respondents that the Petition does not raise any constitutional issues and or clear allegations of violations of rights and freedoms warranting the court to interrogate.

29. There is no dispute that the 4th Respondent lodged a complaint with the Police Service through the 3rd Respondents. The complaint was that the Petitioners had obtained goods from the 4th Respondent and had no intention of paying for the same. The Respondents were consequently under an obligation to investigate the complaint. Any failure to investigate offences and prosecute offenders would mean a failure in the exercise of the Respondents' constitutional and statutory obligations: see **Republic vs. Commissioner of Police and Another Ex p Michael Monari & Another [2012]eKLR**. The Petitioners

however state that the process is being used for the wrong purpose and being abused. The Petitioner contends that the matter is a civil dispute.

30. It is true that where there is an abuse of the criminal justice process the court will intervene just the same way it does in civil proceedings and stay any such process to ensure that a proper administration of justice is attained and the public confidence in the process of litigation, whether criminal or civil, is also maintained: see **Williams vs. Spautz [1993] 2LRC 659** , **Republic vs. Chief Magistrates Court at Mombasa Ex P Ganijee & another [2002] 2 KLR 703** and **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**.

31. I also agree that criminal proceedings ought not to be invoked to settle personal scores or to advance personal interest or to put pressure on any party to resolve purely commercial or civil disputes. In **David Mathenge Ndirangu vs. Director of Public Prosecutions & 3 Others [2014] eKLR** at paras 37 & 39 in which the case of **R vs. Chief Magistrate's Court at Mombasa Ex P Ganijee & Another [supra]** was cited with approval, the court was clear that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement or 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...”

32. I however hasten to add that it does not however follow that criminal and civil proceedings cannot run concurrently. An investigation may be commenced by the Police service notwithstanding the existence of a civil claim. By the better reason as well, a civil claim may be commenced notwithstanding any on-going criminal proceedings or investigations. That, in my understanding, is what Section 193 A of the Criminal Procedure Code (Cap 75) stands for when it provides 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.”

33. Of course caution must be exercised where a seemingly civil dispute appears to have a criminal trajectory and investigations or prosecution is invited. In their discretion, both the Director of Public Prosecutions and the National Police service must decide whether it would be in the best interest of the administration of justice to run the two jurisdictions concurrently. In my view, an appropriate though not necessarily the exclusive question to ask is whether the two courts (civil and criminal) are likely to decide in opposite directions given the specific facts of each case.

34. I have reviewed the facts as stated and do not think that the position is as stated by the Petitioner. It is

clear that a complaint was made by the 4th Respondent and the other Respondents had to act. There is no evidence that the 4th Respondent influenced the other Respondents in any way. The evidence that is easily discernible and acceptable is that the Petitioner owes the 4th Respondent money. The fact that the Respondents gave the Petitioners the option to settle the debt is no excuse and cannot be used as an inference of undue influence by the 4th Respondent or to show bad faith on the part of the Respondents.

35. The constitutional architecture of our supreme law promotes reconciliation as well as alternative dispute resolution even where a dispute is already before the court. Where therefore the Respondent opts to allow and the parties a chance to settle a matter that is readily admitted by the parties or either of them, the Respondents ought to be encouraged and not discouraged. Public policy would encourage the promotion of a less adversarial medium of solving disputes. In my view, that is what the 2nd Respondent was doing when it gave the Petitioners the chance to try and settle the debt owed to the 4th Respondent. It did not however mean that the criminal angle was spent. It was perfectly within the 2nd and 3rd Respondents powers to try and have the parties resolve the matter without having to go through the court process whether criminal or civil. I view and hold it that the Petitioners have not established before me any facts to illustrate that the 2nd and 3rd Respondents were bent on abusing their powers.

36. I would also agree with the Respondents that so long as the facts revealed or pointed towards criminal culpability the 2nd and 3rd Respondents were perfectly entitled to prefer any criminal charges against the Petitioners.

37. On the foundational basis of possible criminal charges against the Petitioners, there is preliminary evidence that the Petitioner issued cheques which were dishonoured upon presentment. The cheques were post valued cheques. It appears relatively clear that the 2nd Respondent may not sustain any criminal charges commenced on the basis of dishonoured cheques in view of the express provisions of Section 316A(2) of the Penal Code (Cap 63) which is clear that a misdemeanor offence cannot be founded on the basis of postdated cheques drawn when the person drawing the cheque is aware that his account has insufficient funds. In the instant case the cheques were dishonoured on the basis of insufficient funds. It matters not that the cheques were presented on the due dates. Section 316A excludes post dated cheques and I need go no further. A charge of bad cheques which were post dated and dishonoured because of insufficient funds cannot therefore stand.

38. There is , in fewer words, no foundational basis for the charge of dishonoured cheques in so far as the Petitioners are concerned.

39. There was however the alternate charge of obtaining goods by false pretenses.

40. In this respect, the Petitioners contended that the charge could not stand as the 2nd Petitioner and the 4th Respondent had a long existing business relationship and they continuously let each other in credit. The Petitioners have let the court into their historical relationship with the 4th Respondent but have failed to put in perspective the particular instant. It is admitted that the Petitioner obtained goods in credit. The Petitioner is however not explaining what happened to the goods.

41. My quick reading of Section 313 of the Penal Code in relation to the facts of this case would reveal that the 2nd and 3rd Respondents have a basis to commence and continue with the criminal proceedings touching on the offence of obtaining by false pretenses. The Petitioners obtained goods. The goods they obtained were of the sort that is capable of being stolen. As to whether they intended to defraud the 4th Respondent, it should be a matter to be determined by the trial court and not this court.

42. I should not go into the merits of the charge. The trial court ought to be allowed to determine whether the accused engaged in conduct which amounts to a criminal offence: see **Meixner & Another vs. Attorney General [2005]eKLR**.

Conclusion and disposal

43. Having considered the circumstances of this case together with the facts as laid before me, I am not convinced that the Respondents in investigating and opting to prosecute the Petitioners acted in abuse of their respective offices to warrant any intervention in the on-going criminal justice process except in so far as the Respondents also preferred charges for dishonoured cheques which were post dated. Yet too that is an issue which the Respondents may take up before proceeding with the Petitioners' prosecution before the trial court and amend the Charge Sheet.

44. In the result, the Petition is dismissed as it is wanting in merit.

45. There will however be no order as to costs in favour of any party.

Dated, signed and delivered at Nairobi this 31st day of October, 2016.

J.L.ONGUTO

JUDGE