



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION NO 407 OF 2013**

**DANIEL MUNYAMBU .....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS .....RESPONDENT**

**TASTY BREAD BAKERY LTD .....1<sup>ST</sup> INTERESTED PARTY**

**HARUN MEITAMEI OLE LEMPAKA ..... 2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The petitioner seeks orders to stop his prosecution in **Criminal Case No 1352 of 2011** instituted before a Magistrate's Court in Nairobi. He alleges that the said prosecution is unfair and unconstitutional as the issues in dispute between him and the complainant in the criminal case are civil in nature and the criminal case is therefore a violation of his rights under Article 50(1) of the Constitution.
2. The petition, argument on which was presented before me on 19<sup>th</sup> November 2013 by Mr Kibanga for the petitioner and Ms. Kithikii for the respondent, seeks the following orders:
  - a. *This declares that the prosecution of the Petitioner in the magistrate's court criminal case No 1352 of 2011 (Nairobi) is an abuse of the process and a violation of the Petitioner's right to a fair hearing.*
  - b. *This do issue an order stopping the prosecution of the Petition in the aforesaid criminal case.*
  - c. *Such other orders as the court may deem just to issue.*
  - d. *Costs of this petition.*

**The Applicant's Case**

3. The case for the petitioner is set out in the petition dated 2<sup>nd</sup> August 2013, which is supported by an affidavit sworn by the petitioner on the same date, as well as written submissions dated 7<sup>th</sup> November 2013.
4. The petitioner's case is that he has been unfairly charged before a Magistrate's Court in **Criminal Case No 1352 of 2011** with the offence of obtaining money by false pretences. He alleges that the

charges arise out of a set of facts which are in issue and are pending hearing and determination before the High Court in **Civil Case No 399 of 2009**; that the facts that gave rise to the High Court case are the same ones that the respondent has relied upon to institute the criminal case against the petitioner; and that no criminal element exists to justify the institution of a criminal case against him.

5. In his affidavit sworn in support of the petition on 2<sup>nd</sup> August 2013, the petitioner avers that he emigrated to the United Kingdom in 2006 where he has been living and working. He states that he engaged in social and political activities and was elected a Councillor in his local authority; that he also engaged in business and in February 2008, incorporated in the United Kingdom a limited liability company known as **Clickett Traders (UK) Limited** (hereafter 'Clickett') through which he engaged in the business of buying cars in the UK and selling them to buyers in Kenya.
6. The petitioner avers further that on or about 17<sup>th</sup> November 2008, one **Harun Meitamel Lempaka**, the complainant in the criminal case, requested him to sell to the complainant's company known as Tasty Bread Bakery Ltd. a Toyota Land Cruiser for a purchase price of £14,000 sterling pounds and shipping charges of UK £1,800; that the complainant sent the said amount to the petitioner's company, Clickett and the company purchased the motor vehicle. He contends that the complainant refused to accept the motor vehicle because of its capability to use Liquefied Petroleum Gas (LPG) in addition to ordinary fuel and demanded his money back.
7. The petitioner avers that in order to avoid legal action being taken against him by the complainant, and as an indication of his intention to refund the money paid by the complainant, he swore a declaration in the complainant's favour on 23<sup>rd</sup> February 2009 pledging to repay the money paid by the complainant, less the costs incurred by Clickett, but that the offer was declined; that he engaged the complainant in telephone conversations pledging to pay the money in instalments, an offer that was also declined.
8. He avers further that sometime in 2009 the complainant filed **HCCC No 399 of 2009 Tasty Bread Bakers Ltd and another -vs- Clickett Traders (UK) Ltd** in which the plaintiff sought judgment for UK £15,800. He contends that the complainant dealt with the petitioner's company and not the petitioner as an individual; that the complainant sought to use the criminal process because of the slow pace of the civil process; and that unknown to the petitioner, criminal charges were laid against him on 7<sup>th</sup> October 2011 in Nairobi Magistrate's Court Criminal Case No 1352 of 2011 for *inter alia* obtaining UK £17600 from the complainant by false pretences.
9. The petitioner states that he learnt that there were charges against him when he travelled to Kenya on holiday in March 2012; that he took a plea on 3<sup>rd</sup> April 2012 and was released on bond; that as he was a civic leader in the United Kingdom and had no other means of livelihood in Kenya, he left for the United Kingdom where he has been to-date.
10. The petitioner avers that he was in the United Kingdom when the offences prosecution in respect of which he now faces in Kenya were committed; and that the criminal case against him is a violation of his right to a fair and public hearing before a court as the issues between himself and the complainant are of a civil nature. He contends further that the pendency of a warrant of arrest against him is a consequence of the respondent abusing the legal process to inhibit his freedom and deny him a fair hearing; that it was impossible for him to commit the offence in Kenya while he was in the UK; and he asks the Court to find that the criminal case against him is a violation of his right under Article 50(1) of the Constitution.
11. Learned Counsel, Mr. Kibanga, submitted on behalf of the petitioner that the facts of the transaction as set out in the petitioner's affidavit in support of the petition demonstrate that the transaction in question was purely of a contractual and commercial nature; and that upon an examination of the facts the Court will find that certain criminal elements including *mens rea* should be seen on the facts as they appear so that the criminal trial can be said to be fair in

accordance with Article 50.

12. Counsel submitted further that the plaint in the High Court Civil Case will demonstrate that the suit involves parties other than the petitioner and in which the petitioner is not a party; that the prosecution has been brought three years after the institution of the civil case, yet the petitioner was never joined as a party to the civil suit; and that if the complainant had a legitimate claim against the petitioner, he should have joined him as a party to the criminal case.
13. The petitioner contends therefore that the criminal proceedings against him were not instituted to meet the ends of justice but for other purposes and if allowed to continue will be an abuse of the process.
14. While relying on the decision of the Court in the case of **Peter George Antony D'costa -v- Attorney General and Another, Nairobi Petition No. 83 of 2010**, Counsel submitted that while it was conceded that the office of the DPP is independent, its discretion, as observed in the case of **Investments & Mortgages Bank Limited -vs- The Commissioner of Police & Others High Petition No. 104 of 2012**, should not be abused, and the criminal law should not be used oppressively.
15. Counsel submitted further that the petitioner's rights under Article 50(1) have been violated; that the issue in dispute between the complainant and the petitioner was a breach of contract the recourse for which is a civil claim; and that the criminal charges were brought in order to put pressure on a director personally. He contended that if the High Court seized of the civil matter was allowed to proceed with the matter, the issue of the monies will be sorted out. He therefore asked the Court to grant the prayers sought in the petition.

### **The Respondents' Case**

16. In opposing the petition, Counsel for the respondents, Ms. Kithikii, relied on the affidavit of **Chief Inspector Ali Ibrahim** dated 23<sup>rd</sup> October 2013 and submissions dated 19<sup>th</sup> November 2013. In the said affidavit, the deponent, an investigating officer attached to the Criminal Investigation Department, Banking Fraud Investigation Unit and who was seized of the investigation of this matter, avers that a complaint was made by one Harun Meitamel Lempaka, a Director of Tasty Bread Bakery Company Limited with regard to the transaction between his company and the petitioner.
17. CI Ibrahim averred that the complaint was that in October 2008, Mr Lempaka had come across an advertisement in the Standard Newspaper for the sale of a motor vehicle, a Land Cruiser (Toyota Land Cruiser 4.7 V8 Lexus Gold, petrol) by Clickett Traders (UK) Ltd, a company registered with its headquarters in England and a local branch in Kenya. The vehicle was said to be in the United Kingdom and the contact person was the petitioner; that the petitioner represented himself as a Director of the said Clickett Traders (UK) Ltd; that he introduced the complainant to his local agent, a Mrs Olivia; that acting upon the representations of the petitioner and the said Mrs. Olivia, the complainant purchased the said vehicle on condition that it would be delivered within 30 days of payment of the full purchase price; that the complainant transferred on 14<sup>th</sup> November 2008 and 18<sup>th</sup> November 2008 respectively £14,000 being the cost of the vehicle and £1,800 in respect of shipment charges to the foreign account of Clickett Traders (UK) Ltd; that Mrs. Olivia then gave the complainant two cheques in the total sum of £15,800 drawn in his favour as security guarantees in respect of the said transaction by the UK based company.
18. The deponent avers further that by the extended delivery date of 15<sup>th</sup> January 2009, the vehicle had not been delivered; and consequently, on 25<sup>th</sup> February 2009, the complainant deposited the two cheques he had been given as security guarantees by the said Mrs. Olivia. The two cheques, no. 100106 (for £1,800) and no. 100101 (for £14,000) were, according to information the complainant received from his bank on 30<sup>th</sup> April 2009, stopped and reversed by the drawer, and

- the complainant has never received the motor vehicle nor the monies he had paid in respect thereof.
19. CI Ibrahim avers that there was evidence to show the payment of money by the complainant to the petitioner; that five years later, neither the motor vehicle nor the money had been given to the complainant; and the alleged local branch of Clickett Traders UK Limited had never been registered; that the evidence available showed elements of criminality and the petitioner and Mrs Olivia were accordingly charged in Criminal Case No. 1352 of 2011.
  20. CI Ibrahim avers further that the petitioner, who had been in and out of the country in the period during which the events in question took place, was finally arrested and arraigned in Court on 20<sup>th</sup> March 2012; that he was released on bond on condition that he does not leave the jurisdiction of the Court without leave, deposits all his travel documents in Court, and reports to the investigating officer every fortnight. He avers that despite the orders of the Court, it came to the Court's attention on 31<sup>st</sup> July 2012 that the petitioner together with others had switched his passport No A1090010 deposited in Court with passport No A680415, both under his name; that one of his sureties sought to withdraw as surety on the basis that the petitioner had fled the country and confirmed that the passport produced before the Court was not the one previously deposited.
  21. CI Ibrahim states that a warrant of arrest is pending against the petitioner, as is the criminal case against him; that the Director of Public Prosecutions is in the process of conducting extradition proceedings in respect of the petitioner; and there are on-going investigations with regard to the circumstances leading to the disappearance of the original passport from the Court registry.
  22. Ms. Kithikii submitted that the investigations in the matter started on 3<sup>rd</sup> July 2009 pursuant to a complaint by the complainant, and upon completion, criminal charges were laid against the petitioner. She contended that the petitioner has not demonstrated how his rights have been violated and what damage he has suffered as required under the principle established in the case of **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and Section 107 and 109 of the Evidence Act.
  23. Counsel submitted further that under Article 243 and 245, the Constitution establishes the National Police Service and empowers the Inspector General of the Police Service to direct his officers on investigation and enforcement measures; while under Article 157, the office of the Director of Public Prosecutions is empowered to institute criminal proceedings. She asserted that both these officers are guided by the Constitution and they observed fairness and acted in accordance with the Constitution with regard to the petitioner. She submitted further that section 193A of the Criminal Procedure Code provides that civil and criminal proceedings can subsist together.
  24. Ms. Kithikii relied on the decision of the Court in the case of **Paul Nganga Nyaga & 2 Others – vs-AG & 2 Others High Petition No. 518 of 2012** for the proposition that the Court can only interfere where a constitutional body acts in contravention of the Constitution, which had not happened in this case. She also relied on the decision in **Francis Mbugua -vs- Commissioner of Police High Court Petition No. 79 of 2012** in which the Court was of the view that the petitioner was attempting to present his defence to the charges facing him in the criminal case before the Constitutional Court.
  25. She submitted further that the criminal prosecution took place after apprehension of the petitioner and asked the Court to take into account the fact that the petitioner is in breach of his bail terms and is being investigated with regard to the disappearance of his passport which had been deposited in Court; and that there is evidence that the petitioner is outside the country while the bail terms were that he should not leave the jurisdiction and deposits his passport in Court. She contended that the conduct of the petitioner was wanting and referred the Court to the maxim that he who comes to equity must come with clean hands.
  26. Ms. Kithikii distinguished the petitioner's authorities on the facts of each of the cases and submitted that they are very different from the facts of the present case. It was her contention that

the current petition is misconceived, seeks to obstruct the cause of justice and should be dismissed.

### **Rejoinder**

27. In his response to the respondent's submissions, Mr. Kibanga submitted that the petitioner was not alleging that the respondent acted in contravention of the Constitution; rather, that his decision was exercised unfairly with regard to the petitioner bearing in mind the facts of the case. He contended further that the petitioner was in total agreement with the authorities cited by the respondent on the points of law raised but alleged that unfairness to the petitioner has been demonstrated.

28. Mr. Kibanga conceded that the criminal trial against the petitioner was pending; that the petitioner is outside the jurisdiction; and that the petitioner may have breached his bail terms. He nonetheless submitted that the Court, should it find that the petitioner's rights had been violated, would be exercising its jurisdiction properly to protect his rights; and should not falter in its exercise of its discretion to protect the petitioner's rights.

### **Determination**

29. The issue for determination in this matter is whether the respondent has violated any of the petitioner's constitutional rights by preferring criminal charges against him in respect of the transaction between him and his company on the one hand, and the interested parties on the other. The petitioner impugns the decision of the respondent to charge him with the offence of obtaining money by false pretences, alleging that the issues in dispute are civil in nature and therefore falling for determination before the High Court in the pending civil suit.

30. The law, however, is that the pendency of a civil dispute is not a bar to a criminal prosecution. Section 193A of the Criminal Procedure Act is clear in this regard. It provides as follows:

***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. Consequently, if the respondent is satisfied that the evidence in its possession demonstrates that a criminal offence has been committed, it has the discretion to charge the petitioner with the criminal offence disclosed, notwithstanding the pendency of a civil dispute.

32. The respondent is vested by the Constitution and statute with the discretion to determine whether or not, on the evidence before it, to charge a party with a criminal offence. The court can only interfere where the discretion has been exercised unreasonably, for, as Majanja J observed in the D'Costa case relied on by the petitioner:

***"The process of the Court must be used properly, honestly and in good faith, and must not be abused. This means that the Court will not allow its function as a Court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where there is an abuse of the Court process, there is a breach of the petitioners' fundamental rights as the petitioner will not receive a fair trial. It is the duty of Court to stop such abuse of the justice system."***

33. According to the respondent, the evidence is that the complainant lodged a complaint on the basis that the petitioner had represented that his company, Clickett Traders (UK) Limited, had a local subsidiary manned by a Mrs. Olivia; that it would be able to deliver the motor vehicle sought by the complainant in 30 days; that as a guarantee for such delivery, gave the complainant two cheques as security guarantees in the event that the transaction failed; and that the complainant

was informed that the cheques which he had deposited in the bank upon failure by the petitioner to deliver the motor vehicle in question had been stopped and reversed by the drawer.

34. It is not for this Court to inquire into the circumstances under which the transaction failed, and whether or not the stoppage of the cheques issued to the complainant amounted to a criminal offence. Should the petitioner have such defences to the criminal charges facing him, he is required to present them to the trial Court.

35. This Court would only interfere with the exercise of discretion by the respondent if there was placed before it such material as would demonstrate unreasonableness on the part of the respondent in reaching its decision. There is nothing before me, however, that suggests that the actions of the respondent were so unreasonable as to merit interference by this Court.

### **Violation of the Petitioner's Rights Under Article 50**

36. The petitioner also alleges violation of his rights under Article 50(1) of the Constitution. This Article provides as follows:

***50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.***

37. The petitioner was charged in Court, then jumped bail and left the jurisdiction. He has not shown in what way the Court before which he was charged fell short of the requirements of Article 50(1). The fact that the issues at hand may have both a civil and criminal element did not in any way detract from the fairness or impartiality of the Court seized of the matter.

38. More importantly, however, the petitioner has not demonstrated any violation of his rights under Article 50(2) which contains specific guarantees with respect to accused persons facing a criminal trial. His allegations with regard to violation of his rights under Article 50 therefore have no merit.

### **Conclusion**

39. The petition before me demonstrates the somewhat lopsided way in which many citizens perceive the Constitution and the rights guaranteed therein: that the petitioner sees himself as possessed of certain rights, but not under an obligation to abide by the rule of law which is a cardinal pillar of the same Constitution that guarantees his rights and freedoms; and readily disobeys the criminal law that is underpinned by the very same Constitution.

40. It has been conceded by Counsel for the petitioner in his submissions before me that the petitioner **'may have breached his bond terms'**. The bond terms in question included the deposit of the petitioner's passport in Court. The respondent states, and the petitioner did not deny this, that the petitioner's passport was indeed deposited in Court, but was later 'switched' and the petitioner, who was required not to leave the jurisdiction by his bond terms, left the jurisdiction.

41. If a party so confidently breaches terms granted by a Court seized of a criminal case against him and flees its jurisdiction, it is something of an irony that he now seeks the protection of the Court from which he could, if dissatisfied with the terms granted by the lower Court, have sought revision of the terms and thus been better able to approach this Court with clean hands. On this ground alone, even if the Court had found merit in the petitioner's contentions, the Court would have been unable to grant him the prayers he seeks for as long as he was outside the jurisdiction in circumstances suggesting breach of his bond terms and criminal action in the course of such breach. The Court cannot come to the aid of one who has no respect for the rule of law without undermining the rule of law and thereby, the Constitution.

42.The petitioner has held himself out in his pleadings as a responsible person holding a civic position in the United Kingdom. It is noteworthy, however, that five years since he (or, as he alleges, his company) entered into the transaction with the complainant, he has never made an attempt to meet his contractual obligations. Further, when charged with a criminal offence in respect of the transaction, he elected to breach his bond terms, obtain his passport from the Court Registry in circumstances suggestive of criminal conduct, and flee the jurisdiction.

43. He may be well advised to reconsider his position as a fugitive from justice by presenting himself to the authorities in Kenya and seeking to present the arguments he now presents before this Court in his defence to the criminal charges facing him.

44.In any event, as I have found no merit in the allegations made by the petitioner against the respondent, this petition is dismissed with costs to the respondent.

**Dated Delivered and Signed at Nairobi this 17<sup>th</sup> day of January 2014**

**MUMBI NGUGI**

**JUDGE**

**Mr. Kibanga instructed by the firm of Munga Kibanga & Co. Advocates for the Petitioner.**

**Ms. Kithikii instructed by the Director of Public Prosecutions for the Respondents.**