



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 83 of 2010

PETER GEORGE ANTONY D’COSTA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

CHIEF MAGISTRATE’S COURT, NAIROBI2ND RESPONDENT

JUDGMENT

Petitioner’s Case

1. Before me is a petition dated 23rd February 2010 where the petitioner seeks to quash the indictment against him and prohibit the continued proceedings against him in ***Nairobi Chief Magistrate’s Court Criminal Case No. 1415 of 2008.***

2. The petitioner’s case is set out in his affidavit sworn on 23rd February 2010. He states that he was employed by Arrow Supplies Limited (“the Company”) as General Manager from 1st July 2007 and he left on 16th July 2008. During this period his immediate superior was one Sunil Morjaria, the director of the company who was resident in Dubai. The company was engaged in the business of selling inks, toners and computer accessories.

3. The petitioner’s woes began on or about 26th June, 2008 when Mr Sunil came to Kenya and accused him of misappropriating company funds, failing to account for goods and converting company property to his personal benefit. The petitioner alleges that he, his wife and father were threatened by the said Mr Sunil that he would be arrested. Under duress and intimidation, the petitioner and his father were taken to the offices of Sobgah H. Shah and V. Goswani Advocates. At the offices he was forced to sign an agreement dated 7th July 2008. Under the agreement the petitioner admitted that, “*During the course of the past twelve months, (he) has misappropriated funds, stocks-in-trade belonging to the Company and converted them to his own use.*” According to the agreement, the total amount misappropriated was approximately Ksh.15,000,000/00. The petitioner also handed over items of jewellery to the company for sale to be taken towards part payment of the amount due from him. Under the agreements, the petitioner also agreed to transfer three motor vehicles to the company for sale in part payment of the amount due from him and deposit his Kenya passport with the company as security.

4. The petitioner avers he continued to protest that proper audit be made by independent auditors. Two days after continuous harassment, he alleges that he was taken to the same law firm and once again executed an agreement dated 8th July 2008 making admission of misappropriation and indebtedness to the complainant.

5. After the two agreements were executed, the petitioner sought legal counsel and his advocate wrote a letter of demand to the firm of ***Sobhag H Shah and V. Goshani Advocates*** (“the firm”) dated 14th July 2008. The letter requested the firm to inform its client the Company and Mr Morjaria to desist from continuing to intimidate, threaten or harass the petitioner. The allegations were denied by a letter from the firm dated 18th July 2008.
6. What followed next was that on 4th August 2008 the petitioner was issued with a requisition to compel attendance at the CID Headquarters for purposes of assisting in an inquiry into a complaint regarding the offence of theft by servant contrary to **section 281** of the ***Penal Code***. Thereafter, the police proceeded to the petitioner’s premises and recovered several electronic items.
7. On 5th September 2008, the petitioner was charged with seven counts of theft by servant in **Nairobi Chief Magistrates Criminal Case No. 1415 of 2008**. This case is still pending but has been stayed by an order of this Court.
8. The Company thereafter lodged a civil suit grounded on the agreement dated 9th July 2008 against the petitioner and his father to wit; ***Milimani HCCC No. 250 of 2009, Arrow Supplies Ltd v Peter George Anthony D’costa and George D’costa***. The petitioner filed a defence and counter claim seeking to amend the agreements on account of duress and harassment.
9. On the basis of the facts outlined, Mr Okwach, S.C., counsel for the petitioner, submitted that the purpose of bringing the criminal proceedings was not to uphold the criminal process but for an ulterior purpose. Secondly, the proceedings were intended to bring pressure to settle the alleged debts claimed in ***HCCC No. 250 of 2009***, thirdly, that it is an abuse of the court process and lastly, it is oppressive, vexatious and intended to harass the petitioner. Counsel relied on the case of ***Samuel K Macharia and Another v Attorney General Nairobi Misc. No. 356 of 2000 (Unreported)***.
10. The petitioner also alleges breach of his various constitutional rights. He claims that he was deprived his personal liberty and property contrary to **sections 72 and 75** respectively. He further alleges breach of **section 77** on the right to protection of the law and fair hearing.
11. The Petition seeks the following orders:
- a) *A declaration that both prior to and after filing the indictment against the Petitioner his harassment, detention, arrest and prosecution was unreasonable and prejudicial to the Petitioner’s right to liberty, property and protection of the law.*
 - b) *That the prosecution is an abuse of the criminal process and against public policy.*
 - c) *An order to quash the indictment against the petitioner which is before the 2nd Respondent in Criminal Case No. 1415 of 2008*
 - d) *An order to prohibit the 2nd Respondent and/or any other Court subordinate to this Honourable court from entertaining and/or hearing Criminal Case No. 1415 of 2008 and/or any charges arising therefrom.*
 - e) *Costs of and incidental to this suit.*

Respondent’s Case

12. The respondent opposes the petition on the basis of the affidavit sworn on 14th July 2010 by Inspector Martin Luther, the investigations officer. Ms Kahoro, Counsel for the respondents submitted, that report was made by the complainant, Sunil Morjaria, alleging that petitioner had misappropriated money from the Company. According to Martin Luther, investigations revealed that the petitioner had on diverse dates collected cash but this cash was not paid to the Company and that investigations further

revealed that goods were bought by the proceeds of the stolen money. It was deponed that this was sufficient evidence to prefer a charge of theft against the petitioner.

13. Ms Kahoro submitted that the police exercised their power to conduct investigations and charge the suspect and that no case had been made out by the petitioner to warrant the court interfering with the legal process.

14. As regards the agreement, counsel submitted that it was between the Company and the petitioner and that police was not part of it and that in any case, the petitioner in the agreements admitted that he was an employee and had misappropriated funds. As regards the allegations of coercion, duress and harassment, Ms Kahoro submitted that no details have been given to demonstrate these facts and that the issues raised should be addressed in the trial court. On the whole, the respondent's case is that no violation has been shown to have been committed by the respondents.

Determination and disposition

15. The issue is whether the DPP's discretion to charge the petitioners should be stopped in its tracks on account of an abuse of the Court process.

16. The facts of this case having occurred before the promulgation of the Constitution must be decided in accordance with the former Constitution. The courts have on several occasions pronounced themselves on the extent of the Court's power to interfere with the DPP's power to prosecute any person (see ***William S. K. Ruto and Another v Attorney General and Another Nairobi HCCC No. 1192 of 2004 (Unreported) [2010] eKLR***, ***Jacob Juma v The Director of Public Prosecutions and Other Nairobi HC JR Petition No. 652 of 2009 (Unreported)***, ***Bryan Yongo v Attorney General Nairobi HCCC No. 61 and 196 of 2006 (Unreported)***, ***Elory Kranveld v Attorney General Nairobi Petition No. 153 of 2012 (Unreported)***, ***Republic v Amos Karatu Nairobi HC Criminal Case No. 12 of 1996 (Unreported)*** and ***Ndarua v Republic [2002] 1 EA 205***). In the case of ***Republic v Kenya Revenue Authority exp Aberdare Freight Nairobi HC Misc. No. 946 of 2004 (Unreported)***, Nyamu J., stated, ***"Abuse of process would involve using the process for a purpose significantly different from its ordinary and proper use. It is an abuse to bring vexatious proceedings."*** Each case though must be considered on its merits.

17. Since ***Stanley Munga Githunguri v Republic [1985] KLR 95***, it has been established that the High Court is entitled to exercise its jurisdiction to deal with abuse of power, discretion or process, the Constitution has not taken away this authority (See also ***Exparte Jared Benson Kangwana Nairobi HC Misc. No. 446 of 1995 (Unreported)*** (Khamoni J), ***Samuel K. Macharia and Another v Attorney General Nairobi HC Misc. No. 356 of 2000 (Unreported)***, ***Exparte Kipng'eno arap Ngeny Nairobi HC Misc. No. 406 of 2011 (Unreported)***). Abuse of process is one of the parameters the Court may consider in determining whether the DPP is exercising his powers within the four corners of the Constitution.

18. I have examined the authorities relied on by the respondent and find them inapplicable to the present situation. The case of ***Meixner & Another v Attorney General [2005]2 KLR*** where it was held in part that ***"It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."*** While this is correct, each case must be reviewed on its own merits and the court's will invoke its inherent jurisdiction to stop abuse of its processes.

19. In the matter before me, I have considered the allegations of threats and intimidation against the petitioner and his family. Although these were denied in correspondence between the parties, these have not been controverted in the petition. Mr. Subil Mojaria lodged the criminal complaint on the 31st July 2008 amidst alleged threats and intimidation. The petitioner's items were taken, some in pursuance of the impugned agreements and other electronic items seized pursuant to the ***Criminal Case No. 1415 of 2008***. In the circumstances where the validity of the said agreements is still a matter in question in the trial court

under **Civil Case No. 1415 of 2008** and in view of the circumstances of lodging of the criminal case, I detect dishonesty and or ill motive in the filing of the criminal matter and find that it would not serve ends of justice to allow the criminal case to go on parallel to the civil case.

20. Civil and criminal proceedings based on similar facts may proceed concurrently by dint of **Section 193A** of the **Criminal Procedure Code, (Chapter 75 of the Laws of Kenya)** which provides that; *“Notwithstanding the provisions of any other written law, the fact that any matter 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.”* The court on the other hand has inherent jurisdiction to stop abuse of its process and in this case must address itself to the question as to whether in the circumstances, the maintenance of the criminal proceedings amounts to an abuse of the criminal process. In doing so, I have to warn myself and exercise restraint as not to make a determination of the issues, particularly on the agreements that are subject before the civil court.

21. 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.

22. Taking all the facts and circumstances of this case, I have come to the conclusion that the criminal case is an avenue meant to harass or otherwise intimidate the petitioner and it would not be in the interests of justice that the matter be allowed to proceed especially in view of the civil case which will determine the ends of justice of both parties. It is likewise not in public interest that the matter be allowed to continue.

23. In the circumstances I find and hold that the **Criminal Case No. 1415 of 2008** was instituted for purposes other than to enforce the criminal law. In the result I direct and order as follows;

(a) I quash the criminal proceedings being Nairobi Chief Magistrates Court Criminal Case No. 1415 of 2008.

(b) There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 7th day of February 2013.

D.S. MAJANJA
JUDGE

Mr J. Okwach S.C., instructed by Okwach and Company Advocates for the petitioner.

Mr Kahoro, State Counsel, instructed by the Director of Public Prosecutions for the respondents.